MASELLI, MILLS & FORNAL, P.C.
By: Paul J. Maselli, Esquire
Attorney No. 036101986
pmaselli@masellilaw.com
400 Alexander Park, Suite 101
Princeton, New Jersey 08540
(609) 452-8411
Attorneys for Appellant First Bank

FIRST BANK Plaintiff/Appellant, v. GREENBAUM, ROWE, SMITH & DAVIS, LLP and CHARLES J. WILKES Defendants/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appeal Docket No. 2946-24T4 On Appeal From: Superior Court of New Jersey Law Division, Mercer County Trial Docket No. MER-L- 000128-21 Sat Below: Hon. R. Brian McLaughlin, J.S.C.

AMENDED BRIEF OF APPELLANT, FIRST BANK

Dated: October 16, 2025

Of Counsel:
PAUL J. MASELLI, ESQUIRE

On the Brief:
PAUL J. MASELLI, ESQUIRE
LIZA SHERMAN, ESQUIRE

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PRELIMINARY STATEMENT

Plaintiff/appellant First Bank, an institutional lender. (the "Bank") retained defendants/respondents Greenbaum, Rowe, Smith & Davis, LLP and Charles J. Wilkes Esquire (the "Attorneys") for legal representation in a loan transaction. The Bank had committed to make a $6 million loan (the "Loan") to CTE 1, LLC, a New Jersey limited liability company operating as a Lexus franchise car dealership known as "Lexus of Englewood," (the "Dealer").

The Bank required collateral to secure the Loan and agreed to accept a first priority security interest in an inventory of vehicles owned by the Dealer and valued at $4.5 million (the "Vehicle Inventory"), and a second mortgage (the "VW Mortgage") on real property owned by an entity related to the Dealer. The second mortgage was to be junior only to a closed-end first mortgage.

The Loan was made and the Dealer defaulted. The Dealer filed for bankruptcy relief. When the Bank attempted to enforce the security interest and the VW Mortgage it discovered that (a) the security interest in the Vehicle Inventory was second in priority to a first priority security interest in favor of another lender and (b) the VW Mortgage was junior to an open-ended first mortgage. The

equity in the two assets was insufficient to fully collateralize the Loan.

The Attorneys failed to advise the Bank, before it made the Loan, that the Dealer could not deliver the promised collateral. The Attorneys did not advise the Bank that a search of filed UCC financing statements disclosed a first priority security interest in favor of a different lender on the Vehicle Inventory. The attorneys did not advise the Bank that a real estate title search disclosed that the first mortgage on the real property to be pledged as collateral was subject to an open-ended mortgage which would jeopardize the Bank's security.

The Bank pursued collection of the Loan from guarantors and from the bankruptcy estate of the Dealer. The Bank has not recovered the full $6 million it loaned to the Dealer. If the Bank had been advised by the Attorneys that the Bank of the defects in title to the purported collateral, the Bank would not have made the Loan.

The Bank sued the Attorneys for legal malpractice. The Bank produced an expert report that set forth the standard of care and opined on proximate cause.

The court below granted the Attorneys' motion to bar the Bank's expert report. In ruling on the motion, the court below found as fact that the Dealer defrauded the Bank with false representations as to the state of the title of the Vehicle Inventory and the real property. The court below ruled, as a matter of law, that an attorney is not liable for legal malpractice in representing a lender in a loan transaction where a borrower provides the lender false information regarding the state of the title of the proposed collateral.

After the court below entered its order barring the Bank's expert report, the Bank moved for reconsideration and the Attorneys moved for dismissal. The court below denied the motion for reconsideration and granted the motion to dismiss.

The Bank's position in this appeal is that the court below erred as a matter of law. The expert report meets the requirements for admission into evidence. Additionally, lawyers representing lenders have a duty to independently verify the state of the title of personal property and real estate to be pledged in a loan transaction and to not rely on representations made by the borrower.

PROCEDURAL HISTORY

The Bank filed a complaint on January 19, 2021. Pa007a-019a.

The Attorneys filed an Answer on February 26 2021.[1] Pa20a-41a

In discovery, the Bank produced an expert report (the "Jennings Report") containing the opinion of attorney Martin J. Jennings, Jr., Esquire ("Jennings"). Pa183a-208a. The Jennings Report states, in pertinent part:

> The lender's lawyer is responsible for (a) reviewing existing legal documents to determine whether the borrower can deliver to the lender the collateral required for securing the loan; and (b) preparing documents to be executed at a closing that are legally enforceable and encompass all the terms of the loan.
>
> The lender is not tasked with the responsibility of reviewing existing legal documents to determine whether the borrower can deliver the collateral required for securing the loan. That is the job of the lender's lawyer.
>
> The division of labor is a point of emphasis. Loan officers are not trained as lawyers and they are not trained to read legal documents defining the ownership of title to assets and the existence and legal effect of liens on those assets, and they are not licensed to provide legal advice on these issues.
>
> Instead, attorneys are uniquely qualified to undertake certain functions. Recognizing this, the Supreme Court of New Jersey has defined certain duties related to conveyance of property interests to be performed by a licensed attorney. The

[1] The Attorneys sued various third-parties and the claims against the third-parties were dismissed voluntarily by the Attorneys.

duties include, among other duties, drafting a contract of sale, ordering title searches, analyzing title searches, (explaining the significance of title searches, explaining the quality of title), advising clients regarding the risks that surround both contract and title, including the extent of those risks, the probability of damage, the obligation to close or not to close, explaining the closing itself, and drafting all documents leading up to the transaction. [Footnote 11: *See In re Opinion No. 26 of Committee on Unauthorized Practice of Law*, 139 N.J. 323 (1993).]

When representing a lender, an attorney's job is to make sure the loan documents grant to the lender all the rights the lender negotiated for and the borrower agreed to. The lawyer must also make sure that enforceable legal documents are in place that allow the lender to enforce its rights, in the event of default, against the collateral pledged to secure the debt.

It is standard industry practice [Footnote 12: "[A]n examination of the searches remains within an attorney's duties." *Les Realty Corp. v. Hogan,* 314 N.J. Super. 203 (1998)] that the lawyer examine the title to the assets pledged as collateral to make sure that the person or entity pledging the assets is the owner of the assets, and to examine public records to make sure that the assets are not encumbered by any prior and existing liens that were not disclosed by the borrower and that would prevent the lender from getting the full value of the assets, as promised by the negotiated terms. To fulfill this responsibility, a lawyer reviews the title and lien documents disclosed by real property title searches, title documents provided by the owner of the personal property pledged [fn 13] and personal property security interest searches known as UCC Financing Statement searches.[fn 14] This duty to a client includes making a painstaking examination of the records and to report all facts relating to the title of real property. [fn 15]

***

[Footnote 13: Real estate title is evidenced by a deed, and a deed is recorded in public records. Documents that evidence personal

> property are not typically recorded in the public record. The lender's attorney must advise the lender of what documents are required of the person pledging personal property to prove that the person actually owns the personal property and has the right to pledge it as collateral. In this case, Wilkes should have advised the Bank to obtain the titles to each vehicle in the Vehicle Inventory and Wilkes should have reviewed the titles to verify that the vehicles were owned by CTE 1.]
>
> [Footnote 14: *In re Opinion No. 26 of Committee on Unauthorized Practice of Law*, 139 N.J. 323, 654 A.2d 1344, holding contract of sale, obligations of contract, ordering of title search, analysis of search, significance of title search, quality of title, risks that surround both contract and title, extent of those risks, probability of damage, obligation to close or not to close, closing itself, settlement and documents there exchanged must be explained by attorney, and documents themselves, to be properly drafted, must be drafted by attorney. *See* also, *UCC: Conducting and Reviewing UCC Searches*, Practical Law Practice Note 5-506-5300, "Before funding and taking security over the assets of a borrower and its subsidiaries (loan parties), lenders typically need assurance that the loan parties' assets are only encumbered by liens that are permitted under the loan agreement. For example, a first lien lender wants confirmation that there are no liens prior to its lien and a second lien lender wants confirmation that no liens exist between itself and the first lien lender. One of the ways lenders find out about existing liens is by conducting lien searches."]
>
> [Footnote 15: *St. Pius X House of Retreats v. Camden Diocese*, 88 N.J. 571, 443 A.2d 1052 (1982), dealing with the sale of residential property and holding it is the attorney's obligation to advise observable defects, deficiencies and imperfections of title.]

Pa192a-193a.

On July 21, 2024, the Attorneys filed a motion to bar the admission into evidence of the Jennings Report. Pa42a-44a. The

Bank opposed the motion. Pa218a-236a. The Attorneys filed a reply. Pa257a-470a. The court below granted the motion and entered an order on December 2, 2024 (the "Order Barring Expert"). Pa471a-472a.

When the motion was filed on July 21, 2024 with a return date of August 16, 2024, Pa42a-44a, the discovery end date was September 30, 2024. Pa547a-549a. The motion was continuously adjourned, at first by the parties and then by the court below, until it was heard on December 2, 2024. 1T.

Upon the court's granting of the motion, the Bank's attorney made an oral motion to extend discovery. 1T50:20-25. The court below denied the motion on the record, 1T51:20-21, and entered an order on December 2, 2024 (the "Order Denying Discovery Extension"). Pa471a-472a.

Earlier in the proceedings, at a case management conference on April 22, 2024, Pa544a, when the discovery period had expired on March 18, 2024, Pa541a-543a, the court below, at the oral motion of counsel for the Attorneys, granted an extension of discovery to July 26, 2024. Pa545a-546a.

On December 30, 2024, the Attorneys filed a motion to dismiss the complaint on the grounds that the Bank had no expert and the discovery period had expired. Pa473a-475a. On January 21, 2025, the Bank filed opposition and a cross-motion[2] seeking reconsideration of the Order Barring Expert and the Order Denying Discovery Extension. Pa518a-519a. The court below adjudicated the motions, after oral argument, by entering an order on May 7, 2025 denying the reconsideration motion (the "Order Denying Reconsideration") and granting the dismissal motion (the "the Order of Dismissal"). Pa522a-523a.

The Bank filed its notice of appeal on May 22, 2025. Pa001a-006a.

STATEMENT OF FACTS

The complaint (Pa007a-019a) alleges that the Bank agreed to make the Loan to the Dealer under the terms of a term sheet (the "Term Sheet"). The Bank's loan officer prepared a presentation for approval (the "PFA"). The PFA was submitted to the Bank's board of directors who approved the Loan.

[2] The motion for reconsideration included a brief with exhibits attached. One exhibit, portions of the deposition of the Attorneys' expert, is in the appendix at Pa551a-556a.

The PFA contained all the loan details and requirements of the Dealer to be met before the Loan was made. The PFA required the Dealer to provide the Bank with collateral in the form of a first priority security interest in the Vehicle Inventory, and a second mortgage on the property owned by an entity related to the dealer (the "VW Property") subject only to a closed-end first mortgage of $8.5 million in favor of Toyota Motor Credit Corporation ("TMCC").

The complaint alleges that the Attorneys conducted a real estate title search of the VW Property, and a public records search of filed financing statements disclosing perfected security interests in the Vehicle Inventory.

The complaint alleges that although the Attorneys conducted these searches, the Attorneys failed to advise the Bank that the Dealer could not meet the collateral requirements set forth in the PFA. Specifically, the Attorneys failed to advise the Bank that the Vehicle Inventory was encumbered by a first priority security interest in favor of TMCC and the VW Property was encumbered by an open-ended first mortgage (not a closed-end first mortgage as required by the PFA).

The complaint alleges the Bank made the Loan and, when it went into default, the Bank learned for the first time that the New Vehicle Inventory was fully encumbered by TMCC and the VW Property was encumbered by an open-ended mortgage with an amount due and owing well in excess of the value of the VW Property.

The complaint alleges that the Bank has been unable to recover the full amount of the Loan from parties who guaranteed repayment of the Loan and from the collateral.

The complaint alleges that the Bank hired the Attorneys to provide representation in the loan transaction. The complaint alleges that the Attorneys' failure to advise the Bank that the Dealer could not meet the collateral requirements of the PFA was a failure to meet the standard of care required of attorneys representing lenders in loan transactions. The complaint alleges that the failure of the Attorneys to meet the standard of care is a breach of duty. The complaint alleges that the breach of duty is the proximate cause of the Bank's damages. The complaint alleges that the Bank's damages are the uncollected loan balance, interest, attorney fees and costs.

LEGAL ARGUMENT

Standard of Review

A trial court's findings of fact and conclusions of law are subject to appellate review if they are "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence." *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974). Further, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995) Thus, where a trial court's decision is palpably incorrect as to both the facts and the law, the Appellate Court should reverse those decisions.

I. THE TRIAL COURT ERRED, AS A MATTER OF LAW IN GRANTING THE ORDER BARRING EXPERT, THE ORDER DENYING DISCOVERY EXTENSION AND THE ORDER DENYING RECONSIDERATION. (Raised Below: 1T:42-50; 52:3-5; and 527A-539A)

Where the trial court has misapplied the law and the legal consequences flowing from that error, the appellate court must review the proceeding *de novo* and owes no particular deference to

the legal conclusions of the trial court. In this case, the trial court made several critical mistakes in its legal conclusions, which are discussed seriatim below.

In the Attorneys' motion to bar the Jennings Report, they made several arguments as to why the Jennings Report was inadmissible.[3] This brief, in POINT I.A. details the law regarding admissibility of expert testimony and demonstrates why the Jennings Report meets the standard for admission.

In its decision to enter the Order Barring Expert, the court below did not focus on the standard for admission of expert testimony.

Instead, the court found, as a matter of law, based on facts not of record, that the Bank was defrauded by a non-party as to the state of the collateral for the Loan. It ruled that that fraud barred

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[3] One argument raised by the Attorneys in their motion to bar the Jennings Report was that the report was a "net opinion." An expert opinion that is otherwise admissible may be barred where the expert's opinion does not identify the grounds for the opinion it expresses. *State v. Townsend*, 186 N.J. 473, 494 (2006). As conceded by the Attorneys at the December 2, 2024 hearing, "Your Honor, and this is not a strict net opinion case…" 1T14:19-20. The Jennings Report clearly relies upon case law, treatises and Supreme Court opinions, as well as the experience of the expert. It is clearly not a net opinion.

any claim against the Attorneys for the failure to advise the Bank that the Dealer could not meet the collateral requirements of the PFA. The court ruled that the Attorneys could only have liability if the Bank and the Attorneys had a written retainer agreement that specifically tasked the Attorneys with the duty to investigate for fraud. The court found, as a matter of law, that the Bank had no claim and therefore, the Jennings Report was inadmissible. 1T42-50.

The court below, instead of focusing on whether the Jennings Report met the requirements of *N.J.R.E.* 702, decided, essentially, that no expert testimony could be proffered by the Bank because the Bank had no claim.

The court's ruling, as a matter of law, was palpably incorrect.

The court relied on one case in particular, *Grubbs v. Knoll*, 376 N.J. Super. 420, 439 (App. Div. 2005), 1T44-45, a case which is wholly inapplicable to the admissibility of expert testimony, to the standard of care required of attorneys representing lenders in loan transactions, or to any other facts or issues in this case.

The court's ruling that a lawyer cannot be held liable for damages arising from the attorney's failure to discover another's

fraud, unless the attorney and client have a specific clause in a retainer agreement tasking the attorney to investigate fraud, 1T42:21-44:2, is simply wrong and wholly inapplicable to the issue that was before the court.

This brief shall address these two critical errors of law by the court below in POINTS I.B and I.C. In POINT I.D. the brief argues the court's refusal to extend discovery to allow the Bank the opportunity to obtain an expert report that was admissible was incorrect as a matter of law.

A. THE JENNIGNS REPORT SATISFIES THE STANDARD FOR ADMISSION OF EXPERT TESTIMONY. (Raised Below: 1T48:11-18)

The criteria for admission of an expert opinion testimony permitted by *N.J.R.E.* 702 is well-established:

> [An] an expert is permitted to offer an opinion regarding 'scientific, technical or other specialized knowledge' if the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue[.] To satisfy the Rule, the opinion must address a matter "beyond the ken of the average juror," the expert's field "must be at a state of the art such that an expert's testimony could be sufficiently reliable," and "the witness must have sufficient expertise to offer the intended testimony."

Kemp v. State, 174 N.J. 412, 424 (2002). This is a relatively low barrier to entry and it is one easily met by Jennings and by the Jennings Report.

There was no dispute as to the fact that Jennings had specialized knowledge. The Jennings Report comprises *specialized knowledge* (legal knowledge), beyond the ken of the average juror that would assist the trier of fact to understand what the standard of care is with respect to an attorney retained to provide a lender legal representation in a commercial loan transactions. An opinion as to the standard of care for attorneys in malpractice actions is not only typical in malpractice actions but a requirement. Indeed, Jennings Report contained no revolutionary or incendiary statements of law or conclusions.

The opinions rendered in Jennings Report were so ordinary, in fact, that the Attorneys' own expert, Mark Rattner concurred in all material respects about the duties of an attorney in a loan transaction.

At Rattner's deposition he was asked whether he agreed with Jennings' assessment that:

> the lender's lawyer is responsible for (a) reviewing existing legal documents to

> determine whether the borrower can deliver to the lender the collateral required for securing the loan; and (b) preparing documents to be executed at a closing that are legally enforceable and encompass all of the terms of the loan.

Rattner replied, "I agree with clause B for sure. Clause A is a little big ambiguous as to what that really means. There's a review of legal documents to determine whether the borrower can deliver to the lender the collateral required." Pa553a. In this, Rattner and Jenkins concur.

Rattner also concurred with Jennings that an attorney in a loan transaction will review filed Uniform Commercial Code financing statements to determine the existence of other loans on collateral:

> Q. What if they [the Bank] are just going to take a lien without regard to where they are in terms of the seniority of the lien, will the attorney still perform the UCC search to determine where there are, in fact, other liens on the collateral?
>
> A. "Yes, we certainly would.

Pa554a.

Rattner also confirmed Jennings' conclusion that the level of experience or training held by the lender is irrelevant to the lawyer's duties. He was asked, "But if a lawyer handling a transaction for a bank is aware that the lender had a lot of

experience, does that somehow alter that lawyer's responsibility to inform the lender of the meaning of those legal documents?" Rattner again answered unequivocally: "No." Pa554a.

Again, Rattner and Jennings concur.

Referencing the Jennings Report, Rattner was asked:

> Q. "Attorneys are uniquely qualified to undertake certain functions. Recognizing this, the Supreme Court of New Jersey has define certain duties related to conveyance of property interest to be performed by a licensed attorney. The duties include, among other duties, drafting a contract of sale, ordering title searches, analyzing title searches, (explaining the significance of title searches, explaining the quality of title), advising clients regarding the risks that surround both contract and title, including the extent of those risks, the probability of damage, the obligation to close or not to close, explaining the closing itself, and drafting all documents leading up to the transaction." Do you agree with that statement?
>
> A. I think it's a big picture, it's a fair description of what attorneys would typically do in a financing transaction on behalf of a bank.

Pa554a-555a. On these points as well, Rattner and Jennings agree.

Rattner was further asked: "If the bank is seeking a first lien position on a particular set of assets, it's the attorney's job to take the necessary steps, whether it's drafting an agreement and filing the necessary documents to effect that, or advise the client that it

cannot be accomplished. Is that a fair statement?" Rattner replied: "Yes, that's a fair statement." Pa555a.

Finally, Rattner was asked, "Would you say the attorney as part of their duty of care needs to raise the existence of that open mortgage with the bank line?" Rattner replied: "If the bank is extending the loan based on an understanding that there will only be a set amount in front of it, then that would be something that would be certainly worthwhile discussing." Pa556a. Rattner and Jennings agree on these points as well.

All of these statements comprise the foundation of the Jennings Report and the Attorneys' expert agrees. He agrees without qualification or conditions. Rattner and Jennings agree as to the scope of duties of a transactional attorney, including the fact that an attorney has an obligation to investigate the status of collateral in a loan transaction, to interpret and to communicate his findings.

It is clear that the expert testimony embodied in the Jennings Report satisfies the threshold requirements for admissibility.

The court below did not engage in this analysis, but rather got sidetracked by a red herring argument that focused on purported

fraud by the Dealer instead of breach of professional duties by the Attorneys. This is argued in POINT I.B.

B. THE DECISION IN *GRUBBS* DOES NOT BEAR ON THE ADMISSABILTY OF THE JENNINGS REPORT. (Raised Below: 1T44:19-45:3 and Pa532a-536a)

The term "backstop" was uttered not fewer than *twelve* times by the court and the Attorneys in oral argument leading to the entry of the Order Barring Expert. 1T26-44. The same term was spoken another four times in oral argument leading to the entry of the Order Denying Reconsideration. 2T7-12.

The term "backstop" was cherry-picked from a case that is both factually and legally distinguishable for the case at bar.

In *Grubbs v. Knoll*, 376 N.J. Super. 420, 439 (App.Div. 2005), the appellate court wrote, "[W]e are not persuaded that an attorney should be viewed as a 'backstop' and held jointly and severally responsible for all damages in circumstances [of fraud]."

In a vacuum, this line appears compelling. However, in context, it is apparent that the term is inapplicable here.

The Attorneys proffered that case as support for their assertion that the Jennings Report and his testimony at trial should

be barred because there was fraud in the underlying transaction. In articulating their position, the Attorneys cherry-picked a phrase from the case—that "an attorney should not be viewed as a 'backstop'" for fraud— and contorted its actual meaning to imply that legal malpractice defendants should not be held liable where the transaction the attorneys were retained to shepherd was tainted by fraud.

The Attorneys relied on *Grubbs* to bootstrap an argument that because the borrower in the underlying transaction, the Dealer, allegedly defrauded the Bank, the Attorneys were absolved of their professional obligations to investigate whether the Dealer's representations regarding the property proffered as collateral for the loan were true and accurate based on publicly recorded documents. However, not only are the duties of attorneys in investigating a transaction in the presence of alleged fraud not implicated by the holding of *Grubbs*, that issue is not even discussed in *Grubbs*.

In *Grubbs*, the facts revolve around a real estate transaction. The case started with the seller suing the buyer for turnover of the buyer's deposit. The buyers counterclaimed alleging fraud against

the sellers, sued the realtors for violations of the Consumer Fraud Act (CFA) and sued their attorneys for legal malpractice.

The buyers received a jury verdict against all defendants – against the seller for fraud, against the realtors for CFA violations and against their attorneys for legal malpractice. Note, the attorney was found liable for legal malpractice for failing to discover that the seller defrauded his client. The jury allocated the damages among the three liable parties, with an allocation of ten percent against the attorneys for legal malpractice.

The court granted the buyers' application for attorney fees and ruled that each of the liable parties – the seller, the realtors and the lawyer – were liable for one-third of the attorney fees. *Id.* at 428-429.

The buyer appealed this ruling asserting that the attorney should be liable for the full attorney fee award. The lawyer appealed, asserting that he should not be liable for the attorney fees expended by the buyer to sue the other parties. The appellate court agreed with the attorney and reduced the amount of the attorney fee award for which the attorney was liable from one-third to ten percent. *Id.* at 434.

The appellate court ruled that a transaction attorney's liability for harm caused to his client by the fraud of another is attenuated based on whether the fraud was foreseeable. In making that ruling, the appellate court rejected the buyers' argument that the attorney is the "backstop" to prevent harm to the client for the seller's fraud because the fraud was not foreseeable. *Id*. at 439.[4]

The critical point is that the jury returned a verdict of liability for legal malpractice against the buyers' attorney at the same time it delivered a verdict of liability on the sellers based on the fraud of the sellers.

So we see from the *Grubbs* case that a transaction lawyer may be liable for damages arising from legal malpractice even where another party to the transaction defrauded the client.

Accordingly, *Grubbs,* while largely inapposite at this juncture, supports the rule of law that an attorney *is* responsible for his failures to meet the established standard of care owed to his

[4] The Bank notes that the alleged fraud of the Dealer in this matter should not attenuate the liability of the Attorneys because the misrepresentations were foreseeable, discoverable through public records, and because determining the veracity of the information about the collateral proffered by the Dealer was the significant and sole responsibility of the Attorneys.

client even where a fraud has been committed. Because the standard of care is a fundamental issue in the instant case, and because *Grubbs* does not compel otherwise, the Jennings Report should be allowed and his testimony permitted at trial.

C. THE COURT BELOW ERRED IN RULING THAT THE ATTORNEYS ARE ABSOLVED BECAUSE THE RETAINER AGREEMENT DID NOT SPECIFICALLY TASK THE ATTORNEYS WITH INVESTIGATING FOR FRAUD.
(Raised Below: 1T43:21-44:2 and Pa530a-532a)

In oral argument, the court below, in rendering its decision, stated:

> What is –- what has been agreed to in the papers and from this oral argument is that there is –- there's an agreement that there is no expressed duty of Wilkes and Greenbaum, Rowe to sort of ferret out the fraud. There's nothing in a retainer agreement that imposes that duty, and again, it's undisputed that it's not based on any expressed obligation…

1T43-44.

By their nature, retainer agreements are inclusive of all duties comprising the standard of care unless they are specifically drafted to restrict or eliminate those duties. *N.J.RPC* 1.2 states, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed

consent." Stated differently, unless a representation is specifically and explicitly restricted in its scope, and that such restriction is explicitly agreed to, it is all-encompassing. It includes all of the tasks and obligations typically attendant to performing the job of an attorney and what comprises those tasks is the standard of care—and the standard of care is what requires an expert opinion. Thus, the fact that the retainer agreement did *not* specifically carve out an exception for investigating fraud is compelling evidence that it was implicit in the terms of representation. There is no evidence in the record of the court below that the Attorneys effectively limited their scope of representation of the Bank.

Indeed, it was the very task the Attorneys were hired to perform. This duty to investigate is implicit in and attendant to counsel's retention. In *Berman v. Gurwicz*, 189 N.J. Super. 89, 102 (Ch. Div. 1981), certain plaintiffs were represented by counsel in a real estate transaction, and others were not. The court refused to find fraud as to those plaintiffs represented by counsel because there was a lack of reliance on the misrepresentations of the lessor. The court observed: "It was the obligation of these attorneys to make these examinations and to advise their clients of the lease.

The client relied upon them to do so; ***they were employed for that purpose***." *Berman*, 189 N.J. Super. at 102 (emphasis added). It was "the obligation of these attorneys to advise their clients of all 'observable defects, deficiencies and imperfections of the title.'" *Berman,* 189 N.J. Super at 102.

D. THE COURT ERRED IN DENYING THE BANK'S MOTION FOR AN EXTENSION OF DISCOVERY. (Raised Below: 1T50:20-52:5 and Pa537a-539a)

Given the procedural history of the case below, the court below should have granted the Bank's oral motion for an extension of discovery which was made at the time the court rendered its decision and entered the Order Barring Expert. The motion to bar the expert was initially scheduled for hearing on August 16, 2024 when the discovery end date was September 30, 2024. Had the court, on its own initiative, not continuously adjourned the motion into December, 2024, and had the motion been heard and decided before the discovery end date, the Bank would have had ample time to file a motion to extend discovery to obtain an expert report. Previously in the case, the court below granted the Attorneys'

request for a discovery extension made after the expiration of a prior discovery deadline.

To grant a motion to extend discovery submitted after the discovery end date, the court must find exceptional circumstances. *R*. 4:24-1(c). The appellate court ruled that exceptional circumstances exist for the granting of a motion where a trial court enters an order barring a party's expert on the eve of trial, and where the party has been otherwise diligent in pursuing discovery. *Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, LLC,* 439 N.J. Super. 446, 460 (App. Div. 2015).

Exceptional circumstances exist here. But for the delay in the hearing of the motion, the Bank would have been able to file a motion to extend discovery prior to the discovery end date. Moreover, as the court below had previously granted the Attorneys an extension of the discovery end date on a request made by the Attorneys in a case management conference that took place after the then discovery end date, in fairness, and in accordance with appellate court directives, the court below should have granted the Bank's motion for a discovery extension.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below, vacate the Order Barring Expert and remand the matter to the trial court for further proceedings.

MASELLI, MILLS & FORNAL, P.C.
Attorneys for Plaintiff/Appellant

By: _____
PAUL J. MASELLI

Dated: October 15, 2025

I certify that the foregoing brief complies with the applicable word count and formatting limitations as set forth in the Rules of Court. I certify that this statement is true. I am aware that if any statement made herein is willfully false, I am subject to punishment.

_____
PAUL J. MASELLI

Dated: October 15, 2025

FIRST BANK,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Appellant,	:	DOCKET NO. A-002946-24
v.	:	TRIAL DOCKET: MER-L-128-21
GREENBAUM, ROWE, SMITH & DAVIS LLP and CHARLES J. WILKES,	:	SAT BELOW: HON. R. BRIAN MCLAUGHLIN, J.S.C.
Defendants-Respondents.	:	SUBMISSION DATE: NOVEMBER 17, 2025

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BRIEF OF DEFENDANTS/RESPONDENTS GREENBAUM, ROWE, SMITH & DAVIS LLP AND CHARLES J. WILKES

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WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Defendants-Respondents
Greenbaum, Rowe, Smith & Davis LLP and
Charles J. Wilkes

Of Counsel and on the Brief
Brian J. Molloy, Esq. (Attorney ID No. 017831978)(bmolloy@wilentz.com)
Samantha J. Stillo, Esq. (Attorney ID No. 112722014)(sstillo@wilentz.com)

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PRELIMINARY STATEMENT

Defendants/Respondents, Greenbaum, Rowe, Smith & Davis, LLP ("Greenbaum") and Charles J. Wilkes, Esq. ("Wilkes") (together "Defendants") submit this brief in opposition to the appeal by Plaintiff, First Bank ("First Bank" or "Plaintiff").

The central issue in this transactional legal malpractice case is whether Defendants owed a duty, either express or implied, to Plaintiff to prevent the fraud by Plaintiff's borrower in a loan transaction. Plaintiff's theory of liability is that Defendants, who were hired on short notice to document the loan transaction, had a duty to prevent the borrower's fraud. This point was made expressly clear in Plaintiff's opposition brief in the Trial Court where Plaintiff said that it "hired you (Greenbaum) to find out if DeMaio (the borrower) lied to us." Da021-22.

Plaintiff's liability expert embraced this theory and asserted, without reference to any standard whatsoever, that there was an implied duty by Defendants to detect a fraud because Defendants were hired to document the loan transaction.

The Trial Court correctly held that there was no express undertaking of such a duty in the retainer agreement between Greenbaum and First Bank pursuant to which this transaction was handled, and there was no implied duty

because Defendants were never asked nor agreed to undertake that duty. Moreover, in connection with the major fraud committed by the borrower (the alleged availability of "unencumbered" cars not subject to any floor plan financing to serve as collateral for the Loan) that issue was assigned to an independent third party to verify the nature and extent of such collateral, and Defendants were expressly excluded from that work.

The Trial Court properly rejected such an implied duty because Plaintiff's theory of liability would create a broad, sweeping and undefined obligation of closing counsel that would transform closing counsel into insurers against a lender's losses. Such a result would destroy established principles that appropriately cabin attorney liability in such cases, and would impose duties far beyond the scope of a closing attorney's obligations.

The Trial Court properly noted, and Plaintiff does not dispute, that the question of duty is a question of law which was properly resolved on Defendants' Motion to Strike the proposed testimony by Plaintiff's liability expert, Martin Jennings, Esq. ("Jennings").

In addition to the fact that Jennings advanced a flawed theory of attorney liability for a closing attorney, his expert report failed to identify the applicable standard of care, he ignored record evidence, he did not review critical documents, and he assumed facts unsupported by the record, and cited cases

with fabricated holdings. In short, his opinions were not tethered to reality or the law and, thus constituted an impermissible net opinion.

Lastly, in an effort to salvage Plaintiff's moribund case, Plaintiff's counsel, after the Trial Court had ruled that Defendants had no duty to detect a fraud by the borrower and that the Jennings report did not comply with basic requirements of a competent expert opinion, Plaintiff sought to reopen discovery to obtain a replacement expert. This request came after 10 prior discovery extensions, and 1,300 days to produce an expert report. The Trial Court properly rejected that request because there were no "exceptional circumstances" as required under Rule 4:24-1(c).

The Trial Court correctly identified the legal issue, applied the applicable law, and its decision should be affirmed on appeal.

PROCEDURAL HISTORY

Plaintiff filed its single-count legal malpractice Complaint on January 19, 2021, in which Plaintiff alleged that there was insufficient collateral available to the Bank after the borrower promptly defaulted on the loan. Pa007. Plaintiff claimed that Defendants should have protected it against the fraud by Carmine DeMaio, the principal of borrower. Id.

The initial discovery end date was May 5, 2022. Da002. However, on March 29, 2022, all parties stipulated to a 60-day extension of discovery, and

the Court extended the DED to July 4, 2022. Da005. Thereafter, Plaintiff filed four motions to extend discovery (May 3, 2022, September 13, 2022, January 17, 2023, and March 3, 2023), which were subsequently granted by the Court, and not only extended the discovery end date for Plaintiff, but also extended the time in which Plaintiff had to file an expert report. Da005-007; Da009-19. There were approximately 1,329 days of discovery, and ten discovery extensions granted by the Court, with the final DED being September 30, 2024. Da002.

On December 5, 2022, counsel for Defendants took the deposition of DeMaio, and the deposition was brief because DeMaio asserted his Fifth Amendment privilege as to every question. Pa389-396.

On May 31, 2023, Plaintiff served the liability expert report from Jennings. Pa182-208.

On May 29, 2024, Defendants deposed Jennings. Pa397-470. Following the deposition, Plaintiff never sought to amend or supplement this report.

On July 31, 2024, Defendants filed a motion to bar the expert testimony of Jennings. Da007. Plaintiff's opposition brief succinctly stated its theory of liability – it "hired you (Greenbaum) to find out if DeMao lied to us." Da021-22.

The Court held oral argument on December 2, 2024. See 1T. The Trial Court held "with respect to (Evidence Rule) 702, this is – and I agree with

Defendants' argument that this goes beyond a typical net opinion argument, that the expert opinions has to be more than the expert's personal opinion. And the Court finds that, essentially, we're dealing with personal opinions here when his particular application." 1T 48:11-18. The Trial Court further found:

> THE COURT: What is –- what has been agreed to in the papers and from this oral argument is that there is –- there's an agreement that **there is no expressed duty of Wilkes and Greenbaum, Rowe to sort of ferret out the fraud.**
>
> There's nothing in a retainer agreement that imposes that duty, and again, it's undisputed that it's not based on any expressed obligation. And really, the Court – the Court agrees with defendant's characterization that this all rises or falls based upon an implied duty to discover fraud.
>
> And likewise agrees that when you're dealing with the standard of care rising out of the legal obligation, it is an issue for the Court to pass on. **And it is – and again, certainly in terms of (indiscernible) within the rules, there's – parties can argue for good faith extension of the law.**
>
> This is more than that. This is – what is contained in the Jennings report and really confirmed by the deposition of Mr. Jennings, is seeking to come back and – the Court agrees that this, with the defendant's characterization that this really is an implied duty or a backstop if you can go there to the lawyer if you're unable to go after the seller.
>
> [1T 43:21-44:18 (emphasis added)].

Additionally, the Court found that Plaintiff could not impose a duty on Greenbaum to determine whether the vehicles were unencumbered, as CRS was specifically hired to perform that task, and held "nothing in Mr. Jennings' report that would provide a basis to cobble together this [his] particular legal theory. This is –there's an agreement that, you know, the – what caused the loss to the bank is the failure to the collateral. And while Mr. Jennings seeks to impose that

duty through what he argues as a standard of care for Wilkes and Greenbaum, Rowe, **there's really no dispute here that the bank was relying on CRS to deal with those issues**." 1T 47:1-11 (emphasis added).

During the hearing, Plaintiff had a full opportunity to be heard, and at the conclusion of the hearing, the Court granted Defendants' motion. 1T 50:15-17. After the Court rendered its opinion, Plaintiff requested the Court to extend discovery so that it could locate another expert and/or supplement its expert report, which the Court denied. 1T 50:20-25.

On December 20, 2024, Defendants filed a motion to dismiss the Complaint based on the Court's Order striking the Jennings' expert report. Pa526. On January 21, 2025, Plaintiff filed Opposition and a Cross-Motion to Reconsider the Court's prior Order. Id.

On May 7, 2025, the Trial Court denied Plaintiff's cross-motion for reconsideration, and denied its request to extend discovery. Pa522. The Trial Court also granted Defendants' Motion to Dismiss based upon Plaintiff's failure to support its claims with a qualified expert. Id. Specifically, in its Order, the Court acknowledged the legal prerequisite to have an expert to support a legal malpractice claim. Pa539. The Court stated "Plaintiff has no expert to cite the applicable standard of care which Defendants owed to Plaintiff, as Plaintiff's sole expert, Mr. Jennings, has been barred. Therefore, per Buchanan, and as

Plaintiff has conceded in its moving papers, without an expert to opine on Defendants' duty of care, Plaintiff is unable to maintain a legal malpractice claim. See 428 N.J. Super. at 288." Pa540.

With respect to Plaintiff's Cross-Motion to Extend Discovery, the Trial Court found, "Exceptional circumstances do not exist to warrant the extension of discovery, therefore a reconsideration of the Court's denial of Plaintiff's Motion to extend discovery is not within the interest of justice. Thus, Plaintiff's Motion to reconsider the Order denying an extension to discovery is unsupported. Therefore, the underlying issues presented for reconsideration of both motions are unmeritorious. Because Plaintiff fails to show how the Court's December 2, 2024, Order was not consonant with the interest of justice, Plaintiff's Cross-Motion for reconsideration is **DENIED**." Pa538.

Plaintiff filed the Notice of Appeal on May 22, 2025. Pa001.

STATEMENT OF FACTS

A. Carmine DeMaio Seeks a $6 Million Loan From Plaintiff

In or around April 2019, DeMaio sought to obtain a $6 million loan from Plaintiff for his Lexus dealership, CTE 1, LLC. Pa49-87. DeMaio represented that the purpose of the Loan was to fund a buyout of DeMaio's business partner, Frank Holtham. Pa51. DeMaio was the majority owner and operator of several

car dealerships in New Jersey, including at one time dealerships for Lexus, Audi, Volkswagen, and Buick. Pa53-54.

Mark Wrobel, Plaintiff's former employee and loan officer ("Wrobel") was the primary bank employee involved with this transaction. He presented the proposed loan to his superiors in a document called a "Presentation For Approval" ("PFA"), which consisted of the Plaintiff's due diligence and analysis of the requested loan, all before Defendants were retained. Pa49-87. In the PFA, Plaintiff explained its strategic reasons for approving the Loan, which included an $832MM expectation of estimated deposits from DeMaio, and also set forth specific terms and conditions required for Loan approval. Id.

1. The Collateral

The PFA itemized the collateral for the loan. Pa49-87. Plaintiff required personal guarantees from DeMaio and his other business partner, Carmine Zeccardi. Id. In addition to guarantees from DeMaio, Zeccardi and others, it bargained for (a) a second mortgage on DeMaio's personal residence; (b) a second mortgage on two parcels of commercial real property on which DeMaio's Volkswagen dealership operated (the "VW Mortgage"); and (c) a first priority lien on "unencumbered" vehicles with a value of at least $4.5 million. Pa59. DeMaio told the Plaintiff that "unencumbered" vehicles refers to vehicles he owned outside of the dealer's floorplan financing. Pa55.

On or about July 2, 2019, before retaining Greenbaum, First Bank approved the Loan, as set forth in the PFA. Pa49-87.

a. Unencumbered Cars

This is a legal malpractice case based, according to the Complaint, on the alleged "failure of collateral." Pa11. With respect to the unencumbered cars, DeMaio provided Wrobel with "inventory reports" to show the purported identity and amount of the unencumbered vehicles. Pa253. Based upon these reports (which were never sent to Defendants) and DeMaio's representations, the PFA states that Plaintiff "confirmed" for itself that this "detailed" listing of cars were owned "free and clear." Pa55. Its analysis is contained in the PFA:

> The equivalent of a vehicle title prior to its issuance is an MSO. These MSO's are held at the dealership and are taken to the DMV to issue the title once a new car is sold. Given the volume of these cars (approximately 100) it would not be feasible to hold the MSO's at the bank. This vehicle inventory outside of the floor plans turns over in roughly 30-days. ***We have received a detailed listing of cars and MSO's, which are owned free and clear***.
>
> [Pa55](emphasis added).

The PFA further states that First Bank would commission a "field" audit by a third party to assure that the cars were not encumbered:

> **A field audit will be conducted prior to closing to ensure the unencumbered inventory schedule is accurate**. Borrower will be required to provide a monthly new, current model year, vehicle inventory listing including MSO designation after closing and semi-annually we will require a field exam to verify MSO and vehicle counts, paid for by Borrower.
>
> ***
>
> In the event that less than $4,500,000 is reflected on a monthly

> inventory report, the Borrower will be required to post cash collateral, held by First Bank, in an amount that makes up the difference. (emphasis added).
>
> [Pa55].

Thus, First Bank approved the Loan based upon its own due diligence subject to a field exam by a third party, not Defendants, to confirm that there were "unencumbered" cars with a value of at least $4.5 million to serve as collateral for the Loan. Pa49-87.

First Bank did not hire Greenbaum to review the list of unencumbered cars supplied by DeMaio or collect and review the vehicle title documents to verify ownership and/or encumbrances, or otherwise confirm that the cars were unencumbered, or to perform the field examination. It hired an independent examiner that specializes in providing accounting and forensic services to lenders conducting due diligence: Cost Reduction Solutions ("CRS"). Pa105-112.

CRS completed the field examination as per First Bank's instructions. Pa113-121. It reported its results only to First Bank, stating it had found the vehicles on DeMaio's list of unencumbered vehicles on the lot and that they had a value over $4.5 million and the "inventory test count" and "inventory cost count was "deemed satisfactory." Id. First Bank was satisfied with the results of the field exam.

In its report, CRS also offered recommendations to First Bank concerning this collateral in its report. Id. Some of these recommendations included as follows:

- The Bank may wish to hold in its possession title documents of all unencumbered, owned, vehicles.
- The Bank may wish to obtain current floor plan agreements and amendments, as well as floor plan inventory listings monthly to cross reference vehicles under the floor plan agreements.
- The Bank may wish to obtain current floor plan financing (loan) balance.
- The Bank may wish to ensure floor plan payments are being made timely and in full.
- The Bank may wish to obtain dealer units per day vehicle turnover reports on both owned and floor planned vehicles.
- The Bank may wish to obtain a listing of any unencumbered vehicles that were sold back to the floor plan facility monthly as the examiner identified a "two way relationship" exists and provides the prospect an opportunity to remove items from or sell back to the floor plan.

[Pa116].

First Bank however failed to implement those recommendations based on a “business decision,” and because it “relied on DeMaio to be truthful.” Pa265 at 104:8-25; Pa266 at 105:5-15; 106:5-25-108:6.

It was never Greenbaum’s duty to verify that the cars identified by DeMaio were “unencumbered.” In fact, Greenbaum was not involved with the

field exam, including determining the scope of work for the exam, the work performed by CRS, reviewing that work, or reviewing its recommendations. Pa124 at 39:22-40:10; Pa253-254 at 56:25-57:3. First Bank did not even provide Defendants with a copy of the CRS report. Pa125 at 85:9-12; Pa104 at 164:6-9.

It is undisputed that First Bank relied upon DeMaio and/or CRS for this collateral.

Contrary to this un-contradicted evidence:

- Jennings states that Greenbaum had a duty to verify if the cars were unencumbered [Pa424 at 108:13-17];
- He never reviewed the CRS report [Pa401 at 14:19-15:5];
- He claims Greenbaum was hired to advise the Bank whether the cars were encumbered or not [Pa402 at 19:6-10];
- He claimed (falsely) that in the PFA Greenbaum was asked to determine if the cars were unencumbered [Pa425 at 109:14-17].

Incredibly, when asked for the support for his conclusion that Defendants were hired to determine if the cars were unencumbered, Jennings testified as follows:

> Q. And what do you rely upon for your conclusion that Wilkes was hired to determine if there were, in fact, unencumbered cars?
>
> A. He was engaged by the Bank to represent them in a loan transaction.

> Q. Is that the totality of your answer?
>
> A. That's the totality of the answer to that question.
>
> Q. And there is no document that supports that conclusion?
>
> A. I'm unaware of any document that supports that. It's not a conclusion, it's a statement.

[Pa402 at 19:6-19].

b. VW Mortgage

One of DeMaio's entities, CTE 2, LLC ("CTE 2"), owned the land on which he operated a Volkswagen dealership. Pa51. It was encumbered by a first mortgage for the benefit of Volkswagen. Pa59. Originally, the VW Mortgage had a principal amount due of $7.9 million, but the PFA stated that the VW Mortgage was then $8.5 million. Pa59; Pa89. The mortgage itself, which the Bank had received, states the lien covers "[p]ayment of ***such further sums as Mortgagor… may borrow*** from Mortgagee when evidenced by another note or notes" and "[p]erformance of all obligations or indebtedness now ***or hereafter owing to Mortgagee***…" (emphasis added). Pa90.

As Greenbaum was preparing the documents for closing, it obtained a copy of the VW Mortgage so it could prepare the second mortgage. Pa101 at 85:9-18. Though Wilkes told Wrobel that First Bank should obtain VW's consent to further encumber the property, Wrobel, on behalf of the Bank, chose not to accept the advice as he feared delay in closing the loan and losing DeMaio as a customer. Pa101 at 83:17-84:14; Pa102 at 103:4-15; Pa103 at 157:1-7.

Additionally, Wrobel, testified in his deposition that it was his understanding that the VW Mortgage was open-ended and not a closed-ended mortgage (an obvious fact since the $8.5 million balance was more than the $7.9 million face amount of the mortgage), and that DeMaio falsely represented the amount of the VW mortgage. Pa249 at 38:21-39:15.

Wrobel also testified that First Bank relied on DeMaio concerning the amount of the VW Mortgage and, therefore, the available equity to the Bank on its second mortgage, and would not have relied on anything from Wilkes or Greenbaum. Pa262 at 89:10-17.

Contrary to these un-contradicted facts, Jennings:

- Never reviewed the deposition testimony of Wrobel [Pa408 at 41:20-22];
- Never reviewed the VW Mortgage [Pa411 at 54:21-22]; and
- Claimed that the Bank relied upon Greenbaum as to the amount of available equity on the Bank's second mortgage whereas the Bank confirmed that it relied on DeMaio and not Greenbaum for that information [Compare Pa262 at 89:10-17 with Pa421 at 94:8-19].

2. First Bank Hires Greenbaum As Closing Counsel And Closed The Loan

After First Bank completed its due diligence and approved the Loan, it hired Greenbaum to close the transaction. Pa100 at 43:3-15.

The Bank was "anxious" to have DeMaio and his multiple car dealerships become Bank customers, and its direction to Greenbaum was to close the loan as soon as possible. Pa264 at 97:23-98:9; Pa344 at 75:11-76:21.

On August 14, 2019, the Loan closed, and First Bank agreed to lend $6 million to the Borrower. Pa127. The terms of the agreement were memorialized in an August 14, 2019 Loan Agreement (among other documentation) signed by Wrobel on behalf of First Bank and DeMaio on behalf of the Borrower. Id. Five guarantors signed guarantees: DeMaio, his wife Patricia DeMaio, Zeccardi, CTE2 Land LLC, and CTE 4 (collectively, the "Guarantors"). Id.

3. The Purpose of the Loan

The sole purpose of the Loan was to fund the buyout of DeMaio's partner, Frank Holtham. Because that was the limited purpose of the Loan, Greenbaum recommended to the Bank that the buyout of the Holtham interests and the closing the Loan be simultaneous so that the proceeds from the Loan would go directly to fund the Holtham buyout. Wrobel rejected that recommendation and, instead, allowed the Loan to close and the Holtham buyout to occur sometime later.

DeMaio again committed a fraud. There was no buyout of Holtham's interests, none of the Loan proceeds was used for any buyout of Holtham, but

instead DeMaio applied the entire amount of the Loan for other purposes, including paying personal expenses. Pa335.

4. The Borrower Defaults and First Bank Settles With All Guarantors For Pennies on the Dollar

Two months after closing, the Loan quickly unraveled.

Toyota Motor Credit Corporation ("TMCC") discovered DeMaio had defrauded it, as its audit revealed CTE 1 was "out of trust" on its floor plan financing (meaning, DeMaio had sold vehicles without advising TMCC and remitting payment), and filed a federal lawsuit against the Borrower, DeMaio and others on October 17, 2019.[1] In response, DeMaio caused CTE 1 to file for bankruptcy almost immediately thereafter, and First Bank, which had no advance warning of these events, received notice of the petition for bankruptcy on October 28, 2019. Pa159-166.

First Bank also sued CTE 4 to foreclose on the VW mortgage. First Bank settled that action for $400,000.

Finally, it pursued Zeccardi to collect on his personal guarantee, and also pursued Thomas ("Tommy") Stabile, the Bank customer who originally referred the Bank to DeMaio and who agreed to guarantee the Loan in a post-closing amendment to the loan after the CTE 1 bankruptcy was filed. Pa168. First Bank settled with

[1] The case is captioned Toyota Motor Credit Corporation v. CTE 1, LLC, et al., 2:19-cv-19092 (D.N.J. 2019).

both for a total payment of $3 million despite the fact that the two had a combined net worth of over $25 million. Pa168; Pa173 at 113:15-114:4. They were customers, and First Bank made the "business decision" not to obtain full relief from them because of that relationship. Pa173 at 114:22-115:4; Pa174 at 119:19-24.

5. DeMaio Committed Fraud Which Had Nothing To Do With Greenbaum's Legal Representation

What remains undisputed is that DeMaio defrauded First Bank to induce it into lending $6 million, and how the Loan proceeds were used. According to the deposition testimony of Bank representatives, DeMaio's fraud included, but was not limited to:

> 1) Providing First Bank with false inventory reports during its due diligence stating he owned unencumbered vehicles worth at least $4.5 million [Pa177 at 38:25-39:6; 51:20-22];
>
> 2) Falsely representing to CRS that the vehicles in those reports were unencumbered during CRS's field exam [Pa177 at 51:20-22];
>
> 3) Providing First Bank with false inventory reports post-closing stating he owned unencumbered vehicles worth at least $4.5 million [Pa258 at 76:3-77:19];
>
> 4) Misrepresenting the amount due to Volkswagen that was secured by the VW Mortgage [Pa249 at 39:10-15; Pa179 at 62:10-15];
>
> 5) Providing First Bank with false financials concerning the Borrower, which in reality did not have a $24 million net profit but was instead in dire financial trouble [Pa171 at 61:4-7; Pa249 at 37:24-38:6]; and

> 6) Misrepresenting that the Loan proceeds would be used to purchase Holtham's interest in CTE 1 when he needed the money to pay other expenses [Pa257 at 71:23-25; 72:4-7].

First Bank representatives admitted in their depositions that DeMaio committed these and other multiple frauds. Pa249-250 at 40:22-41:2; Pa172 at 103:10-12. It does not (and cannot) hold Greenbaum responsible for such fraud:

> Q. To your understanding having looked at the Complaint, does the bank hold Greenbaum Rowe responsible for Mr. DeMaio's fraud?
>
> ***
>
> A. Not specifically to his fraud.
>
> [Pa180 at 92:8-13].

The Bank also admitted this fraud when asserting that Defendants were hired to prevent the fraud.

6. Martin Jennings Expert Report

Plaintiff retained Jennings as its liability expert. Pa184. Jennings testified that he is not working on any amendments or supplemental reports, and his report contains all of his conclusions and all of the facts he relies upon. Pa400 at 9:3-21.

a. The Alleged Duty

(i) Unencumbered Cars

Jennings claims, with-out citing any authorities, that it is the "duty" of an attorney representing a bank to protect the Bank's interest as to collateral and it

was up to Defendants to determine whether or not the cars were unencumbered. Pa424 at 108:13-17; Pa200. This testimony by Jennings is consistent with the Bank's theory of liability – Defendants had an implied duty to prevent a fraud. When Jennings was asked what document he relied upon to show that Defendants were asked or otherwise charged with the responsibility to determine if there was a fraud regarding the unencumbered cars, he testified "[i]t's the standard duty that a lawyer who is representing a bank has to do when he is representing a bank" **despite** the absence of any document in this case memorializing or creating such a duty. Pa404 at 28:5-9; Pa402 at 18:15-18 (emphasis added).

According to Jennings, based on some unwritten standard and despite having no supporting document, he asserts in a conclusory manner that Defendants had a "duty" to determine if the cars were unencumbered. Pa200. Jennings utterly fails to cite to any standard of care for this supposed duty, not any treatise, case, article or any recognized standard. Pa405 at 30:24-31:7; 31:16-32:2; Pa409 at 47:1-12; Pa182-208.

Jennings did not even know whether the Bank asked Wilkes if the cars were unencumbered or if they existed. Pa402 at 18:2-18; Pa428 at 121:3-8. Nowhere in Jennings' Report or testimony is there any reference to any

document or other source, which substantiates such a baseless and unfounded "opinion." Pa182-208.

Additionally, Jennings never reviewed the report from CRS which was specifically hired by the Bank to determine whether the cars were unencumbered – not Wilkes. Pa401 at 14:19-15:5. Jennings also admitted that he did not know why CRS was hired and did not have any knowledge as to what recommendations CRS made in its report. Pa401 at 16:15-18; Pa413 at 62:6-12.

Even worse, Jennings testified that he was not aware of any document in the universe that demonstrates the Bank asked Wilkes to implement the recommendations in the CRS report and was not aware of anything specific that he could point to indicating that the Bank asked Wilkes to determine if the cars were unencumbered. Pa427 at 120:7-10; Pa428 at 121:3-8.

(ii) The VW Mortgage

Jennings further claims in his report that Wilkes had a "duty" to advise the Bank that the VW Mortgage was open-ended, but failed to do so. Pa198. However, Jennings – again – fails to point to any support for this statement, ignoring critical testimony by Wrobel that he knew the VW Mortgage was open-ended, and in any event that the Bank relied upon DeMaio for the available equity on the property, not Greenbaum. Pa182-208; Pa407 at 39:5-15; Pa420 at 89:10-17.

Of further importance, though Jennings heavily relies upon the PFA to support his "opinion" as to what Wilkes' duties were to the Bank, Jennings expressly acknowledged that there is no language in the PFA that states Wilkes was tasked with anything other than documenting the loan. Pa428 at 121:9-15; Pa182-208.

Jennings confirmed that he is not giving any opinions that:

- Wilkes did not accurately document the loan as set forth in the PFA [Pa425 at 110:7-10];
- Wilkes did not draft loan documents in compliance with the PFA [Pa430 at 131:17-21];
- Wilkes failed to discover deeds, mortgages or judgments that were of record [Pa410 at 51:4-7];
- Any UCC search was missed by Wilkes [Pa406 at 34:1-7]; and
- Any search was performed negligently by Wilkes [Pa406 at 34:13-15].

b. Failure to Review Documents

Jennings admitted in his testimony that he failed to review critical documents, including as follows:

- Deposition transcripts (he was only provided excerpts selected by Plaintiff's counsel) [Pa401 at 14:9-18];
- CRS Report [Pa401 at 14:19-15:5];
- Wrobel's Deposition Transcript [Pa408 at 41:20-22];

- VW Mortgage [Pa411 at 54:21-22];
- Bank's Credit Policy [Pa412 at 57:19-20];
- TMCC Representative Transcript [Pa412 at 60:9-12];
- Guaranties of Zeccardi and Stabile [Pa422 at 98:6-8];
- Settlement Agreement between the Bank and Zeccardi and Stabile [Pa426 at 114:6-8].

c. Joint Tortfeasor

Jennings includes a section in his report that DeMaio's false statements were not a proximate cause of the Bank's damages, and thus Wilkes and Greenbaum are not entitled to seek a finding of DeMaio's percentage of fault under the joint tortfeasor statutory scheme. Pa202. Jennings also erroneously testified that DeMaio did not factually defraud the Bank or defraud the Bank as a matter of law because "the Bank did not rely upon DeMaio's representations or statements." Pa419 at 87:8-14.

However, this directly contradicts the Bank's testimony (which was ignored by Jennings) in which First Bank representatives admitted that DeMaio misrepresented that he had an inventory of $4.5 million of unencumbered vehicles that could be used as collateral, in addition to DeMaio's misrepresentation concerning the amount due on the VW Property and other frauds and that they do not (and cannot) hold Greenbaum responsible for. Pa429 at 126:12-15; Pa407 at 39:5-15; Pa256-257 at 68:24-69:25.

Jennings also acknowledged that he is not an expert on joint tortfeasor law, allocation of negligence, contribution, or fraud. Pa418 at 81:12-15; Pa419 at 86:17-18; Pa432 at 137:9-11. Despite this testimony, Jennings claims that Greenbaum is not entitled to a jury charge on allocation or apportionment because "he can read the law and give an opinion." Pa424 at 105:19-24.

STANDARD OF REVIEW

The standard of review on appeal from the grant of either a summary judgment motion or a motion to dismiss is *de novo*; that is, the reviewing court applies the same standard as the motion judge. See Templo Fuente v. Nat'l Union Fire, 224 N.J. 189, 199 (2016) (stating standard of review of appeal of decision on motion for summary judgment); Baskin v. P.C. Richard & Son, 246 N.J. 157, 171 (2021) (stating standard of review of appeal of decision on motion to dismiss).

Under Rule 4:6-2(e), a motion to dismiss should be granted if the complaint "fails to state a claim upon which relief can be granted. In resolving this type of motion, courts examine the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). A court must dismiss the complaint if the plaintiff fails to articulate a legal basis entitling it to relief. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). A motion to dismiss "may not be denied

based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

Plaintiff bears the burden of demonstrating that the Defendants committed legal malpractice. See Lovett v. Estate of Lovett, 250 N.J. Super. 79, 88 (Ch. Div. 1991) (citation omitted). "Expert testimony is particularly critical to support claims for legal malpractice. The absence of admissible expert testimony is almost inevitably fatal to legal malpractice claims. See, e.g., Garcia v. Kozlov, Seaton, 179 N.J. 343, 362 (2004) (holding that an expert report regarding deviation from the appropriate standard of care is required in legal malpractice actions); Kaplan v. Skoloff & Wolff, P.C., 339 N.J. Super. 97, 103-04 (App. Div. 2001)(observing that expert testimony is required where the finder of fact would have to decide whether a lawyer acted reasonably). Furthermore, without a liability expert opining on the particular standard of care and whether there was a deviation therefrom, a plaintiff cannot proceed on its complaint. See Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 104 (App. Div. 2001).

The Trial Court correctly applied the law in dismissing Plaintiff's legal malpractice claims against Defendants and Plaintiff has presented no valid grounds for reversal.

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT DID NOT ERR IN GRANTING THE ORDER BARRING PLAINTIFF'S EXPERT, THE ORDER DENYING PLAINTIFF'S APPLICATION FOR A DISCOVERY EXTENSION, AND THE ORDER DENYING PLAINTIFF'S RECONSIDERATION MOTION (1T:42-50; 52:3-5; and 527A-539A)

A. The Trial Court Did Not Err in Ruling That Defendants Owed No Duty to Plaintiff To "Backstop" Fraud Based on Applicable Law and the Retainer Agreement

As the Trial Court properly held, New Jersey courts have specifically held an attorney does not have an affirmative duty to detect and prevent fraudulent conduct, and that the attorney is not a "backstop" to his client. Grubbs v. Knoll, 376 N.J. Super. 420 (App. Div. 2005) (the Appellate Division held that an attorney who provided representation in a real estate transaction and failed to protect the client from the fraud of the other party, by failing to reveal that the property sold was severely constrained by wetlands, was not liable for the other party's fraud, rejecting the "backstop" theory of legal malpractice liability in which an attorney would have an affirmative duty to detect and prevent fraudulent conduct). See also, 1 Mallen & Smith, Legal Malpractice, at § 26:4 (no duty to protect client from unexpected criminal conduct, which ultimately resulted in its financial loss); Prosser, Handbook of the Law of Torts (4th ed. 1971), sec. 33 (no duty to protect against the criminal conduct of third parties).

The rationale for this legal doctrine is clear:

> When a business transaction goes awry, a natural target of the disappointed principals is the attorneys who arranged or advised the deal. Clients predictably attempt to shift some part of the loss and disappointment of a deal that goes sour onto the shoulders of the persons who were responsible for the underlying legal work. Before the loss can be shifted, however, the client has an initial hurdle to clear. It must be shown that the loss suffered was in fact caused by the alleged attorney malpractice. It is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway, the client already knew of problems with the deal, or where the client's own misconduct or misjudgment caused the problems. It is the failure of the client to establish the causal link that explains decisions where the loss is termed remote or speculative. Courts are properly cautious about making attorneys guarantors of their clients' faulty business judgment. Bauman, Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and Threatening Flood (1988) 61 Temp. L.Rev. 1127, 1154–1155, fns. omitted, italics added.

An attorney is not vicariously liable for the conduct of those not under the attorney's control or supervision. Id. at 420; Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 34-35 (App. Div. 1998). The Trial Court was correct when it explicitly rejected the so-called "backstop theory" – which essentially holds that an attorney is responsible for detecting and preventing fraud on behalf of its client.

Plaintiff argues that Grubbs v. Knoll, is distinguishable from this case, and that the Trial Court simply "cherry-picked" language pertaining to an attorney's alleged duty to backstop fraud, and improperly relied on this case in finding Defendants did not owe an implied duty to Plaintiff to detect fraud.

Plaintiff does not dispute that the Appellate Division in Grubbs held that an attorney "should not be viewed as a 'backstop'" but argues that the holding should not be applied to legal malpractice defendants who are obliged to investigate a transaction in the presence of alleged fraud. Plaintiff argues that since the Appellate Division held that an attorney "should not be viewed as a 'backstop'" in the context of awarding attorney fees, such holding somehow does not apply here. The Grubbs holding is not so limited, and Plaintiff continues to maintain its legally erroneous position that Defendants had a duty to detect fraud. In fact, Plaintiff argues that "determining the veracity of the information about the collateral proffered by the [Borrower] was the significant and sole responsibility of the Attorneys," in complete ignorance of the behemoth record presented to this Court, in which multiple officers of the Bank testified that they did not rely on Defendants to verify the collateral and even hired CRS to perform that exact task.

Though essentially one argument, Plaintiff dovetails this argument into another argument (Point I, C), which focuses on the retainer agreement, and

asserts that the Trial Court also "erred in ruling that the attorneys are absolved because the retainer agreement did not specifically task the attorneys with investigating for fraud."

However, the focal point of Greenbaum's Motion to Strike Plaintiff's expert report was simple: Plaintiff's expert could not metamorphose the duty of an attorney hired to close a loan transaction into a so-called implied duty to prevent fraud by a third-party. Yet, similar to its previous arguments, Plaintiff again repeats its same baseless and legally hollow argument which is that despite the utter and complete lack of any basis in fact or the law in this state (or anywhere in this country for that matter), Greenbaum had an "implied duty" to verify the legal validity of the collateral for the loans made by the Plaintiff – that was their job – [and] that duty is implicit in and attendant to counsel's retention." (Pb. p. 24).

Plaintiff's expert's testimony is that "Greenbaum was engaged by the Bank to represent them in a loan transaction." Essentially, the Plaintiff argues that since the standard (retainer agreement) with First Bank did not specifically "carve out" an exception for investigating fraud, such is "compelling evidence that it was implicit in the terms of representation." (Pb., p. 24). Basically, it is Plaintiff's position that if the (retainer agreement) is devoid of a carve-out, then the attorneys' responsibilities and duties are boundless. Not only is such

argument essentially akin to proving a negative (i.e. inserting language in a retainer agreement pertaining to fraud that had not yet been perpetuated) – a fool's errand – such argument was – and remains to be – devoid of any support by facts, case law, or other legal authority.[2]

Despite Plaintiff's arguments to the contrary, the Trial Court properly made a legal determination on this issue, as the law explicitly holds whether a duty exists is a question of law for the Court. DeAngelis v. Rose, 320 N.J. Super. 263, 274 (App. Div. 1999)("whether an attorney owes a duty to the client is a question of law to be decided by the court").

As the Trial Court held:

> THE COURT: What is –- what has been agreed to in the papers and from this oral argument is that there is –- there's an agreement that **there is no expressed duty of Wilkes and Greenbaum, Rowe to sort of ferret out the fraud**.
>
> There's nothing in a retainer agreement that imposes that duty, and again, it's undisputed that it's not based on any expressed obligation. And really, the Court – the Court agrees with defendant's characterization that this all rises or falls based upon an implied duty to discover fraud.

[2] Plaintiff's reference to Berman v. Gurwicz, 189 N.J. Super. 89, 102 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49 (App. Div. 1983) is inapposite, as neither a loan transaction nor legal malpractice were at issue, and an attorney's "duty" – or lack thereof – to detect fraud was simply not discussed. It involved sales agreements that the Court held the attorneys failed to review, which ultimately precluded plaintiffs from recovering in a fraud matter. This matter bears no relation and/or relevance to an attorney's duty to detect fraud by a third-party when it was not hired to perform the task (verifying vehicle collateral), but rather a third-party (CRS) was retained to perform such task.

> And likewise agrees that when you're dealing with the standard of care rising out of the legal obligation, it is an issue for the Court to pass on. And it is – and again, certainly in terms of (indiscernible) within the rules, there's – parties can argue for good faith extension of the law.
>
> This is more than that. This is – what is contained in the Jennings report and really confirmed by the deposition of Mr. Jennings, is seeking to come back and – the Court agrees that this, with the defendant's characterization that this really is an implied duty or a backstop if you can go there to the lawyer if you're unable to go after the seller.

[1T 43:21-44:18 (emphasis added)].

Moreover, as the Trial Court correctly pointed out, there was no direction or request from Plaintiff to Greenbaum to prevent or detect a fraud by DeMaio – nor was it contained in any retainer letter. To the contrary, Plaintiff was "anxious" to have DeMaio and his multiple car dealerships become bank customers, and Plaintiff's direction to Greenbaum was to close the Loan as soon as possible. Pa264 at 97:23-98:9; Pa344 at 75:11-76:21.

In following the letter of the law, based on all of the evidence presented to the Trial Court – or lack thereof – including Jennings' failure to identify a standard of care and how Greenbaum breached such standard of care (further described below) – the Trial Court made a finding that no "implied" duty existed.

As such, the Trial Court properly rejected the creation of the unprecedented, implied duty for a closing attorney to prevent a fraud by the

adverse party. Since there is no implied duty, Jennings was appropriately barred by the Trial Court from offering his erroneous opinions.

B. The Jennings' Report Does Not Satisfy the Standard for Admission of Expert Testimony

Plaintiff argues that the Jennings' Report satisfies the standard for admission of expert testimony. However, the Jennings' Report is the epitome of a net opinion, and does not come close to satisfying the criteria of admissibility per New Jersey law.

To be admissible under New Jersey law, an expert opinion must satisfy multiple tests. For each opinion an expert offers, he must be qualified, must apply a recognized methodology, must have a sound factual basis for each opinion, and must explain how he reached that opinion (the "whys and wherefores" of the opinion). An expert opinion that fails to satisfy ***any*** of these tests necessarily fails and is considered a net opinion.

Rule 702 of the New Jersey Rules of Evidence addresses the methodology upon which expert testimony must be based:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Court in its gatekeeper function is charged with determining whether the proffered expert testimony constitutes reliable "scientific, technical or other specialized knowledge [that] will assist the trier of fact." Id.

New Jersey substantive law is quite clear regarding the permissible methodology upon which an expert opinion may be based to satisfy this standard. Labeled as the "net opinion" rule, it was developed to ensure that only expert testimony that has the ability to assist the trier of fact be presented. The rule dictates that expert opinion testimony "must relate to generally accepted . . . standards, not merely to standards personal to the witness." Taylor v. Delosso, 319 N.J. Super. 174, 180 (App. Div. 1999); see also Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 11 (App. Div. 2001) (prohibition against net opinion "bars expert testimony based on unfounded speculation or mere possibilities"); Daubert v. Merrill Dow Pharm., Inc., 113 S.Ct. 2786, 2795 (1993)(expert opinion cannot be based on "subjective belief or unsupported speculation").

"A standard which is personal to the expert is equivalent to a net opinion." Taylor, 319 N.J. Super. at 182 (emphasis added)(the Court criticized the expert because of his lack of any testimony referring to any textbook, treatise, standard, custom or recognized practice, other than his *personal* view); see also Kaplan v. Skoloff & Wolfe, PC, 339 N.J. Super. 97 (App. Div. 2001) (the Court concluded

that the expert "provided only his personal view, which, as we have explained, 'is equivalent to a net opinion.'"); Grzanka v. Pfeifer, 301 N.J. Super. 563, 582 (App. Div. 1997) (noting that plaintiff's expert failed to research any standards, treatises, that referred to the issue at hand).

Plaintiff makes no reference to this law, and ignores the Trial Court's analysis as to why the Jennings' Report did not satisfy the criteria of Rule 702 and constituted a net personal opinion. The Trial Court explicitly held "with respect to 702, this is – and I agree with Defendants' argument that this goes beyond a typical net opinion argument, that the expert opinions has to be more than the expert's personal opinion. And the Court finds that, essentially, we're dealing with personal opinions here when there's a lack of a legal standard, which the Court can consider in considering this particular application." 1T 48:11-18. Thus, the Trial Court did not simply "disregard" the standard for admission of expert testimony; rather, it properly applied it. In fact, as the law in New Jersey holds as set forth above, a personal opinion ***IS*** a net opinion.

Plaintiff further contends that the Jennings' Report "comprises specialized knowledge (legal knowledge), beyond the ken of the average juror that would assist the trier of fact to understand what the standard of care is with respect to an attorney retained to provide a lender legal representation in a commercial loan transaction." Plaintiff then proceeds to cite quotes from Defendants' expert

report (Mark Rattner Esq.) and cherry-picks certain quotes from his deposition to seemingly "confirm" Jennings' conclusions. However, Rattner's testimony is simply not relevant to the viability of Plaintiff's expert or whether Plaintiff's expert has properly carried out his functions as an expert. Put simply, Plaintiff cannot pirate Rattner's expert testimony to bolster its own expert's testimony.

Plaintiff's entire argument ignores critical failures and omissions. Plaintiff fails to mention the deposition testimony of Jennings, and the innumerable fatal flaws in Jennings' opinion.

i. The Bank Relied Upon DeMaio's Misrepresentations Relating to the Unencumbered Cars

As the undisputed facts show, the Bank has admitted DeMaio's fraud and that it in fact relied upon the misrepresentations made by DeMaio. Pa249 at 38:21-39:15; Pa250 at 41:2; Pa262 at 89:1-15; Pa172 at 103:12; Pa177 at 38:19; Pa178 at 51:22; Pa179 at 62:15; Pa274 at 140:9.

ii. CRS Was Hired To Verify If the Cars Were Unencumbered

Additionally, Plaintiff hired and solely relied upon CRS to verify whether the vehicles were unencumbered and expressly excluded Defendants from that process. For instance, the Bank, in its PFA, relied upon DeMaio in the first instance regarding the availability of at least $4.5 million in unencumbered cars for collateral to the

Bank. The PFA states clearly that DeMaio submitted a "detailed listing of cars and MSO's, which are **owned free and clear**" (emphasis added). Pa055.

Significantly, the PFA then immediately states what the Bank would do to verify this information from DeMaio. The PFA states that the Bank will confirm that the cars are unencumbered by hiring an independent company, CRS, to perform that work. The PFA specifically states that "a field audit will be conducted prior to closing to ensure the unencumbered inventory schedule is accurate." Pa055.

From that point forward, after the Board of Directors approved the PFA, Greenbaum was **never** asked to verify or assume the duty to ensure that the unencumbered inventory was accurate.

The Bank dealt solely with CRS, CRS took instructions only from the Bank, CRS reported its findings only to the Bank, and Greenbaum was never copied with nor made aware of the CRS report or its findings. In fact, the Bank simply ignored all of CRS's specific concerns and recommendations and never communicated them to Greenbaum.

Even if the Bank subsequently limited the scope of what it asked CRS to do, Greenbaum was not made aware of it and was never asked to and did not assume any such role.

In contrast to these **undisputed** facts, Jennings was asked in his deposition where in the record Greenbaum assumed the task of verifying that the unencumbered

cars were "free and clear," and he falsely stated the PFA. Pa435 at 149:19. This is a classic example of an expert giving an opinion which is contradicted by the record evidence.

Additionally, Wrobel, the Bank representative directly involved in preparing the PFA and managing the loan process, testified that the reason why the Bank hired CRS to conduct the field examination was to ensure that the cars were unencumbered. Pa253 at 56:8. Nowhere in the PFA or otherwise did Plaintiff look to Greenbaum for that work. In fact, after the PFA was adopted by the Board of Directors, Greenbaum was excluded from that task and the Bank dealt directly and exclusively with CRS. Jennings admitted in his deposition that Greenbaum was not asked to verify the unencumbered cars. Pa428 at 121:13.

iii. Jennings Utterly Failed to Identify The Proper Standard of Care and/or Breach of Such Standard of Care

Plaintiff completely ignores the deposition testimony by Jennings on the standard of care, and for good reason. That deposition testimony reveals that, other than uttering the phrase "standard of care," nowhere in his Report does Jennings identify the applicable standard of care.

Plaintiff ignores the fact that Jennings first cites to sources such as a Louisiana case, and other out of state cases in which he admits in his deposition do not establish standard of care. He testified that he cited to those cases because he **could not find**

any New Jersey authority supporting his opinion. Pa405 at 31:7; Pa419 at 85:15; Pa431 at 135:25.

As to the reliance on an opinion from the Committee on Unauthorized Practice of Law, that opinion merely sets forth what constitutes the unauthorized practice of law in a real estate transaction, and never addresses what the standard of care should be for an attorney in such a transaction. Jennings admitted in his deposition that this ethics opinion only addressed the unauthorized practice of law issue. Pa405 at 32:11.

As to the two cases which allegedly set forth the standard of care, neither case comes close. For instance, the St. Pius X House of Retreats v. Camden Diocese, 88 N.J. 571 (1982) case dealt with the sale of residential property, and did not involve or address duties of a closing attorney in a commercial loan where the collateral was personalty, not real estate. The only other case Plaintiff relied upon is Les Realty Corp. v. Hogan, 314 N.J. Super. 203 (Ch. Div. 1998), a case involving the priority of liens under the "first in time, first in right" doctrine, but that case does not address any standard of care issue. Plaintiff, however, quotes that case as saying "[A]n examination of the searches remains within an attorney's duties." (Pb. at p. 5). However, that quote is a **complete fabrication** – it does not appear anywhere in that case, as the Court also succinctly pointed out during the motion to strike hearing. Regardless, the fabricated quote is not helpful to Plaintiff because the made-up quote is not relevant to any issue in this case. Moreover, even if this qote were relevant to

any issue in this case, Plaintiff ignores the fact that Wilkes did order searches against all obligors involved in the transaction and reviewed the results of those searches with the Bank.

There is no issue in this case, nor does Jennings allege, of any deficiency, regarding Wilkes' discovery or examination of deeds, mortgages, judgments or liens that were of record. Id. In fact, there is no dispute over whether Wilkes ordered the appropriate searches, reviewed the same and communicated the results to the Bank. Thus, the only alleged basis for Jennings' standard of care is completely lacking.

With respect to an actual "breach" of a "duty," Jennings fails to identify a single UCC search that was "missed" by Wilkes, never identified any work that Wilkes performed "imperfectly," did not identify any mortgage that Wilkes should have reviewed, and did not identify any observable defect, deficiency, or imperfection of title overlooked by Wilkes. Pa406 at 34:15-34:25.

Additionally, Jennings admits that the loan documents are consistent with the PFA, that there is no evidence that Wilkes failed to accurately document the loan as set forth in the PFA, or that Wilkes did not draft loan documents in compliance with the PFA. Pa425 at 109:14-17; Pa430 at 131:17-21. Moreover, there is no dispute in this case over whether the loan documents properly reflect the deal terms expressly communicated by Wrobel, the Bank officer directly responsible for implementing the terms of the PFA.

Finally, Jennings testified that he agreed that if collateral for a loan is machinery in a building, the closing attorney does not have to go to the building to look to see if the machinery is inside – the exact same logic applied in this matter - further demonstrating that Jennings' opinions are unsupported and lack a factual basis. Pa434 at 148:9-20.

All of these facts are unsurprisingly missing from Plaintiff's brief, and further demonstrate how the Jennings' Report does not even come close to satisfying the standard for admission of expert testimony.

C. The Trial Court Did Not Err in Denying Plaintiff's Eleventh Hour Motion to Reopen Discovery

Plaintiff argues that the Trial Court erred in denying its oral motion for an extension of discovery.

Plaintiff does not contest that the appropriate legal standard to be applied is "exceptional circumstances," and that is in fact what the Trial Court applied to Plaintiff's belated, last-ditch discovery motion. In applying the appropriate standard, the Trial Court properly found that "exceptional circumstances do not exist to warrant the extension of discovery, therefore a reconsideration of the Court's denial of Plaintiff's Motion to extend discovery is not within the interest of justice," and that "the delay in hearing the Motion to bar did not restrict Plaintiff's ability to move to extend discovery, as Plaintiff claims." The Trial Court held that though Plaintiff previously requested two adjournments, it failed

to move to extend discovery before the discovery end date, despite having been noticed that Defendants had moved to bar its expert witness.

The Trial Court noted that it was only AFTER the Defendants' Motion was granted on December 2, 2024 that Plaintiff made its oral application. The Trial Court also appropriately found that the delay in the Defendants' Motion hearing did not restrict Plaintiff's ability to make its oral application.

R. 4:24-1(c) provides that "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." See also Bender v. Adelson, 187 N.J. 411, 427 (2006) (upholding the trial court's ruling barring the addition of expert testimony after the scheduling of the trial date). The requirement to demonstrate exceptional circumstances is strictly construed if an extension is requested after arbitration or after a trial date has been set. Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 396-98 (2005). Exceptional circumstances have been defined as legitimate problems beyond an attorney's mere negligence, inadvertence, or the pressure of a busy schedule. O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003). Any request to extend discovery after arbitration or after a trial date has been set must be supported by a precise explanation of the cause of delay and all actions taken to abide by the deadline. Bender, 187 N.J. at 429. "But were we to extend discovery and grant amendments for every untimely

request with conclusory references to specialized and hard to locate experts, we would revert to the pre-Best Practices approach to discovery—an approach that litigants, courts, and the public at large all found highly unsatisfactory." Id. A party's mere dilatoriness does not even satisfy the "good cause" standard to extend discovery before there has been an arbitration and before a trial date has been set, much less exceptional circumstances that would need to be demonstrated here. Tynes v. St. Peter's, 408 N.J. Super. 159, 169, 176 (App. Div.), certif. denied, 200 N.J. 502 (2009).

Rule 4:24-1(c) emanates from the substantial changes to the New Jersey Rules of Court through the Best Practices project, the goal of which was to create state-wide uniformity in the discovery process. Bender, 187 N.J. at 426. As a result of the Best Practices project, the amended rules "render it substantially more difficult to obtain extensions and amendments once discovery has ended and a trial or arbitration date is set." Id. (citing R. 4:24-1(c)). "The revised rules represent a carefully orchestrated compromise intended to 'end[] the general expectation that a case [will] be reached for trial only after multiple adjournments.'" Id. (quoting Pressler, Current N.J. Court Rules, comment 4 on R. 1:1-2 (2026)). The new rules emphasized the importance of set trial and arbitration dates because the "raison d'etre" of the amendments is "to render

trial dates meaningful." Ponden v. Ponden, 374 N.J. Super. 1, 10 (App. Div. 2004).

Since the enactment of Best Practices, New Jersey courts have barred untimely requests for extensions and amendments in a number of published opinions. See e.g., Bender v. Adelson, 187 N.J. 411, 427 (2006); Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 396–97 (2005); Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 471–74 (App. Div.), rev'd on other grounds, 185 N.J. 290 (2005); Smith v. Schalk, 360 N.J. Super. 337, 344–46 (App. Div. 2003); Zadigan v. Cole, 369 N.J. Super. 123, 132–34 (Law Div. 2004); O'Donnell v. Ahmed, 363 N.J. Super. 44, 52 (Law Div. 2003); Vitti v. Brown, 359 N.J. Super. 40, 52–53 (Law Div. 2003); Montiel v. Ingersoll, 347 N.J. Super. 246, 248–55 (Law Div. 2001).

Plaintiff made this request after a trial date had already been set. See 4:24-1(c). In fact, Plaintiff's fate was properly sealed during oral argument when the Trial Court appropriately denied Plaintiff's last-ditch request to reopen discovery. As the Trial Court noted, it graciously afforded Plaintiff with an almost unlimited opportunity to choose its expert and amend/and or supplement its report. Plaintiff was afforded numerous extensions to submit its expert report by the final deadline, had ample opportunity to supplement and/or amend its report, find a different expert, and properly respond to Defendants' motion, but

failed to do so. The Plaintiff's last request to extend discovery was made out of desperation to save its case. Absolutely nothing has changed since the Trial Court's decision that would warrant a different outcome.

Plaintiff also erroneously argues that if Greenbaum's Motion had been heard earlier, that somehow Plaintiff would have been given a "second chance" to obtain a new expert once its sole liability expert was barred. However, such argument ignores the fact that there is no law or court rule which entitles it to such relief. The New Jersey Court Rules provide a specific procedure for the Court to fix the date by which final expert reports must be served (R. 4:17-4(e)) – and that date expired on September 22, 2023.

The Trial Court properly found that no exceptional circumstances existed to grant Plaintiff's extension.

CONCLUSION

For the foregoing reasons, this Court should affirm the Trial Court's Orders dismissing Plaintiff's Complaint with prejudice for failure to have a competent expert and denying Plaintiff's request to reopen discovery.

DATED: November 17, 2025

WILENTZ, GOLDMAN & SPITZER, P.A.
Attorneys for Defendants-Respondents
Greenbaum, Rowe, Smith & Davis LLP and
Charles J. Wilkes

BY: */s/ Brian J. Molloy*
BRIAN J. MOLLOY

MASELLI, MILLS & FORNAL, P.C.
By: Paul J. Maselli, Esquire
Attorney No. 036101986
pmaselli@masellilaw.com
400 Alexander Park, Suite 101
Princeton, New Jersey 08540
(609) 452-8411
Attorneys for Appellant First Bank

FIRST BANK Plaintiff/Appellant, v. GREENBAUM, ROWE, SMITH & DAVIS, LLP and CHARLES J. WILKES Defendants/Responde	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appeal Docket No. 2946-24T4 On Appeal From: Superior Court of New Jersey Law Division, Mercer County Trial Docket No. MER-L- 000128-21 Sat Below: Hon. R. Brian McLaughlin, J.S.C.

REPLY BRIEF OF APPELLANT, FIRST BANK

Dated: December 15, 2025

Of Counsel:
PAUL J. MASELLI, ESQUIRE

On the Brief:
PAUL J. MASELLI, ESQUIRE
LIZA SHERMAN, ESQUIRE

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PROCEDURAL HISTORY

In this appeal, the procedural history is paramount to the facts. Defendants/Respondents Greenbaum, Rowe, Smith & Davis, LLP and Charles J. Wilkes Esquire (the "Attorneys") make several significant misrepresentations.

The Attorneys contend that "Plaintiff claimed that Defendants should have protected it against the fraud by Carmine DeMaio, the principal of borrower." (Rb 3). The complaint and appellate brief of Plaintiff Appellant First Bank (the "Bank") contain no such statement because that has never been the claim or the position of the Bank.

STATEMENT OF FACTS

The facts pertaining to the underlying case are largely irrelevant to the adjudication of the issues on appeal. The issue on appeal is whether an expert report should have been barred.

For purposes of this appeal, the universe of facts is very small. In or around April 2019, a $6 million loan was made by the Bank to a borrower. The fundamental terms of the loan were agreed to by the Bank and the borrower and approved by Bank management. Because of the size of the loan, the Bank was

obligated by its internal regulations to engage counsel for representation in the loan transaction. The Bank retained the Attorneys. The borrower defaulted on the loan. It was at that time that the Bank became aware, for the first time, that it did not have liens in the collateral in accordance with the agreed upon loan terms. Subsequent investigation revealed facts upon which the Bank asserts claims of legal malpractice by the Attorneys in their representation of the Bank in the loan transaction.

LEGAL ARGUMENT

The Attorneys endeavor to replicate the masterful legal sleight-of-hand performed before the trial court, by calling this Court's attention to non-issues and subverting the actual issues in this case. On appeal, this case presents one primary issue: whether the report of the Bank's expert Martin Jennings (the "Jennings Report") was admissible as a matter of law.

The Attorneys state: "The central issue in this transactional legal malpractice case is whether the Attorneys owed a duty, either express or implied, to Plaintiff to prevent the fraud[1] by Plaintiff's

[1] The term "fraud" is a legal term with legal meaning well beyond the colloquial use of the term. As discussed in the Bank's opening brief, the very fact that the Bank retained counsel to verify the validity of the transactions belies the legal conclusion that fraud occurred because the element of reliance is missing.

borrower in a loan transaction." (Rb 1). This issue framed in this way is *not* the issue now and it *never was* the issue before the trial court and it most certainly is not the issue on appeal.

The issue that *is* before this Court is whether the Jennings Report was legally adequate to permit its submission to the finders of fact to allow the substance of the case to proceed on its merits. The trial court was waylaid by the Attorneys' arguments on the merits of the case.[2] This is likely due, in no insignificant part, to the repetition of certain facially compelling phrases that the Attorneys repeatedly utilize. For example, the Attorneys perpetually repeat that the Bank wishes to hold the Attorneys liable for failing to "***detect a fraud***" or ***"prevent a fraud."*** Not only is this untrue, it is irrelevant both to the admissibility of the Jennings Report and also to the merits of the case. The reasons the borrower was unable to pay—whether fraud or insolvency or any other reason—makes no difference in the resolution of the issue on appeal. The legal issue posed to the Attorneys at the time of their

[2] Notably, the argument advanced by the Bank was that the Attorneys had a professional obligation to ensure the legal efficacy of a plan for securitization of a certain loan where, as here, the Attorneys were retained to advise the Bank as to the legal implications of that loan before it closed. The Attorneys were not engaged as counsel to serve as scriveners; they were engaged as counsel to provide counsel. Just as a physician cannot merely announce a diagnosis in Latin and exit a medical appointment, an attorney shares a professional duty to diagnose, explain and advise with respect to those matters in which they are retained. It not a matter of "ferreting" out deceit; it is a matter of advising the client of the legal consequences of their proposed plan of action.

retention was a simple one: From a title perspective, can the borrower deliver the collateral in accordance with the terms of the loan? Conflating a duty to "detect fraud" with a duty to verify the state pf the title to the assets to be pledged confuses the issue.

The other phrase which the Attorneys bandy about is that an "***attorney is not a backstop"*** for a client who is a victim of fraud. That is not a position the Bank has ever advanced. Rather, the Bank seeks to hold the Attorneys liable for their own professional failures in failing to adequately advise the Bank that the proposed collateral for the loan did not provide them the security required by the loan terms.

Neither of these issues is actually relevant for purposes of this appeal. The Attorneys' arguments have surface appeal but that is all they have. Those arguments speak to the merits of the case and not to the admissibility of the Jennings Report. Based on the foregoing, the Bank asks this Court to award its petition for appeal.

I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING THE ORDER BARRING EXPERT, THE ORDER DENYING DISCOVERY EXTENSION AND THE ORDER DENYING RECONSIDERATION. THE RESPONDENTS' ARGUMENTS HAVE NO MERIT. (1T:42-50; 52:3-5; and 527A-539A)

A trial court's decision regarding the admission of expert testimony is reviewed under an abuse-of-discretion standard. *Townsend v. Pierre*, 221 N.J. 36, 52-53, 110 A.3d 52 (2015).

A. THE JENNINGS REPORT SATISFIES THE STANDARD FOR ADMISSION OF EXPERT TESTIMONY AND IS NOT A NET OPINION. (1T48:11-18)

In Point I.A. of the Bank's appellate brief, the Bank argues that the Jennings Report meets the standard for admissibility and is not a net opinion. The Attorneys address this argument in Point I.B. of the Attorneys' respondent brief. Despite their contention that "[T]he Jennings' Report is the epitome of a net opinion." (Rb 31), the Attorneys do not refute that they conceded to the trial court on December 2, 2024 that "this is not a strict net opinion case." (1T14:19-20).

By way of reply to the Attorneys' opposition, it is noted the Jennings Report was ultimately excluded by the trial court as a "net opinion." (1T47:11-18) A "net opinion" is an opinion based on bare

conclusions untethered to facts. *Creanga v. Jardal*, 185 N.J. 345, 349 (2005). As the Attorneys point out, "expert testimony 'must relate to generally accepted standards, not merely to standards personal to the witness.'" (Def.Br. at 32, *quoting Taylor v. DeLosso,* 319 N.J.Super. 174, 180 (App.Div. 1999).

The Attorneys make quick work of the undisputed fact that the Jennings Report identifies as the bases for its conclusions, not only common standards as set forth in reported decisions and treatises, but also many of the predicates their own expert (Mark Rattner, Esquire) readily conceded with no qualification or reservation. In a forty-four page brief, the Attorneys devote half of one paragraph (roughly a quarter of one page) half-heartedly denying the indisputable significance of that fact. (Rb 34). However, the proof of the sufficient grounding of the Jennings Report in "generally accepted standards" is evident in the profound overlap of those standards with the Attorneys' own expert.

The Attorneys' own expert corroborates the factual premises, the common standards set forth in case law and treatises, and the methodological framework on which the Bank's expert relied.

Also in Point I.A. of the Bank's appellate brief, the Bank argues that the Jennings Report was improperly excluded because the lower court, instead of focusing on principles of admission of expert testimony, determined that the Bank's claim of legal malpractice was fundamentally without merit and that therefore no expert opinion could be proffered. (Ab 13). In the Attorneys' opposition they continue to argue the merits of the underlying claims in Point I.B.(i) and (ii) of their respondent Brief. That argument is not responsive to the Bank's argument in Point I.A. and remains inapposite to the subject of this appeal.

B. THE DECISION IN *GRUBBS* DOES NOT BEAR ON THE ADMISSABILTY OF THE JENNINGS REPORT. (1T44:19-45:3 and 532a-536a).

In Point I.B. of the Bank's appellate brief, the Bank argues that the *Grubbs* decision has no bearing on the issue of admissibility of the Jennings Report. The Attorneys address this argument in Point I.A. of the Attorneys' respondent brief.

The Bank reasserts that the phrase that "an attorney is not a backstop" for fraud does not mean what the Attorneys use it to mean.

The phrase is taken from *Grubbs v Knoll,* 376 N.J.Super. 420 (App.Div. 2005), a case which the Attorneys continually miscite and whose actual holding and import the Attorneys contort. In *Grubbs*, a case where a seller in a real estate transaction committed actual fraud[3], the real estate agent and the buyer's attorney were found to have liability for the harm to the plaintiff. *Grubbs* discussed the apportionment of liability because *there was liability for the attorney.* Counsel was not dismissed from the case on the grounds that an attorney is not a "backstop" for a party committing or attempting to or commit fraud—counsel was found to be liable. The holding of *Grubbs* was that attorneys can be held liable even when there is an instance of fraud. That is exactly opposite of the proposition for which Attorneys repeatedly cite it.

The Attorneys claim the Jennings' Report boiled down to the following: "[T]hat there was an implied duty by the Defendants to detect a fraud because Defendants were hired to document the loan transaction." (Rb 1). Nowhere does the Jennings Report state or suggest that the Attorneys had any such duty; that is an invention of the Attorneys.

[3] Not "fraud" in its colloquial sense, but fraud in its legal sense.

C. THE COURT BELOW ERRED IN RULING THAT THE ATTORNEYS ARE ABSOLVED BECAUSE THE RETAINER AGREEMENT DID NOT SPECIFICALLY TASK THE ATTORNEYS WITH INVESTIGATING FOR FRAUD. (1T43:21-44:2 and 530a-532a)

In Point I.C. of the Bank's appellate brief, the Bank argues that the lower court erred in ruling that the Attorneys are absolved of responsibility because the retainer agreement did not specifically task them with investigating for fraud.

"By their nature, retainer agreements are inclusive of all duties comprising the standard of care unless they are specifically drafted to restrict or eliminate those duties." (Ab 23). The Attorneys address this argument in Point I.A. of the Attorneys' respondent brief and hyperbolically allege that "if the [retainer agreement] is devoid of a carve-out, then the attorneys' responsibilities and duties are boundless." (Rb 28).

The Bank does not suggest or imply that an attorney's "responsibilities and duties are boundless." Rather, the Bank states that the duties of an attorney "include[s] all of the tasks and obligations typically attendant to performing the job of an attorney and what comprises those tasks is the standard of care—and the standard of care is what requires an expert opinion." (Pb 24).

Moreover, an attorney is responsible for all issues that affect a client, unless the attorney has excluded specific services in the attorney's agreement with the client. *N.J.RPC* 1.2; *Twp. of Knowlton*, 387 N.J. Super. 1, 16 (App. Div. 2006); *Lerner v. Laufer*, 359 N.J. Super. 201, 218 (App. Div. 2003.) The court below held that a lawyer's retainer agreement must include fraud investigation to require the lawyer to undertake that task. The law is just the opposite. The retainer agreement must specifically exclude the task of fraud investigation, in writing, and absent such a writing, the attorney is tasked with fraud investigation if it is necessary to protect the client.

D. THE COURT ERRED IN DENYING THE BANK'S MOTION FOR AN EXTENSION OF DISCOVERY. (1T50:20-52:5 and 537a-539a)

The Attorneys' arguments regarding the decision of the trial court to deny the Bank's motion to extend discovery are without merit.

There are four inquiries a court must make to determine whether to extend discovery for exceptional circumstances. Those inquiries are articulated as follows:

> In order to extend discovery based upon "exceptional circumstances," the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time. [*Rivers v. LSC Partnership*, 378 N.J. Super. 68, 79, 874 A.2d 597 (App.Div.) (quoting *Vitti v. Brown*, 359 N.J. Super. 40, 51, 818 A.2d 384 (Law Div.2003)), *certif. denied*, 185 N.J. 296, 884 A.2d 1266 (2005).]

Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, LLC, 439 N.J. Super. 446, 460 (App. Div. 2015).

The trial court made no inquiries, nor did it give the Bank an opportunity to file a more formal motion to allow the Bank to address the inquiries. At the conclusion of the Court's ruling barring the Jennings Report, the Bank moved for an extension of time to submit a revised report and the Court denied the motion.

The Bank's attorney stated:

> This motion was originally returnable before the discovery end date. I'd like to move now, or if the Court requires by formal motion, to extend the discovery date to allow the plaintiff to get an

> updated changed or a revised expert report on the issues that were raised here. (1T49:20-25).

The court responded:

> I –- I have to agree that this motion had been pending for so long, and it was made within the period for discovery. These –- there's –- sometimes there are –- sometimes the matter can be fully briefed and there's clear issues that come up for the first time in oral argument, and the Court is simply, you know, it's not a matter of, you know, being a pop quiz or something like that. But, nothing –- nothing came up today. It was really just a reiteration of arguments that have been fully briefed and had been, you know, motions that have been pending for such time –- for some time. So, the Court will deny the application. Thank you. (T150:9-21)

In setting forth the reasons for its ruling, the court below addressed none of the four inquiries. It did not address the fact that the Bank had been diligent in pursuing discovery, the fact that if the motion to bar had been timely adjudicated, the Bank would have had an opportunity to move for an extension of discovery before the discovery period ended (a motion which would not have required exceptional circumstances), the fact that a plaintiff's expert is essential to a plaintiff's case, and that it was beyond the

control of the Bank's attorney to schedule the motion to bar within the discovery period.

In addressing these four inquiries, this Court must determine that the court below should have granted the Bank an extension of time to submit a new or revised expert report to address the deficiencies articulated by the court below in its ruling barring the Jennings Report.

In *Garden State*, in a professional malpractice case, a defendant did not move to bar an expert until after the discovery end date with a trial scheduled three months later. The trial judge barred the expert but stated that the plaintiff should move to adjourn the trial date "so that plaintiff could obtain another expert report, which would be 'the fairest way to handle the matter.'" *Id*. at 453. It was assumed by the trial judge that the plaintiff had the right to produce an expert report even though discovery had expired and a trial date was scheduled.

The plaintiff made the motion to adjourn the trial and extend discovery. The motion was made after the parties had 802 days of discovery. A different trial judge heard the motion and denied it. *Id*.

The appellate court reversed on the merits, finding that the trial court should not have barred the expert report. The appellate court went on to rule that even if as a matter of substantive law, the expert report should have been barred, the trial court abused its discretion in denying, as a matter of procedural law, an extension of discovery for the plaintiff to get an admissible expert report. "However, even if the judge had correctly decided that most of the PCA report should be barred, the judge's decision, coming literally on the eve of trial, presented an exceptional circumstance that warranted the extension of time for discovery…" *Id*. at 460.

The circumstances in *Garden State* are similar to the circumstances here. The court below abused its discretion in denying an extension of discovery when the plaintiff's expert witness was barred after the discovery end date on the eve of trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below, vacate the Order Barring Expert and remand the matter to the trial court for further proceedings.

MASELLI, MILLS & FORNAL, P.C.
Attorneys for Plaintiff/Appellant

By:_____
PAUL J. MASELLI

Dated: December 15, 2025