608-610 MULLICA HILL ROAD, LLC and MJS ENTERPRISES, INC., Plaintiffs, v. CUMBERLAND COUNTY IMPROVEMENT AUTHORITY, a public body corporate and politic of the State of New Jersey, FRALINGER ENGINEERING P.A.; MARATHON ENGINEERING and ENVIRONMENTAL SERVICES, INC.; ENTERPRISE NETWORK RESOLUTIONS CONTRACTING, LLC, FABBRI BUILDERS, INC.; and COMMUNITY HEALTH CARE, INC. d/b/a COMPLETE CARE HEALTH NETWORK, INC. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002975-23 CIVIL ACTION On Appeal From: Final Order of the Superior Court of New Jersey, Law Division, Cumberland County DOCKET NO.: CUM-L-624-21 Sat Below: HON. JAMES R. SWIFT, J.S.C

BRIEF OF APPELLANTS 608-610 MULLICA HILL ROAD, LLC and MSJ ENTERPRISES, INC.

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PRELIMINARY STATEMENT

This matter is before the Appellate Division on the appeal of Plaintiffs/Appellants 608-610 Mullica Hill Road, LLC and MSJ Enterprises, Inc. ("Plaintiffs") of the trial court's 1) final Order, dated May 10, 2024, wherein the trial court denied Plaintiffs' motion for reconsideration, 2) the October 20, 2023 oral decision, wherein the Court awarded Defendant Fralinger Engineering, P.A. ("Fralinger") attorney's fees and costs; 3) the Order entered on December 5, 2023, setting attorney's fees and costs; 4) the Order entered March 6, 2024, granting Defendant Cumberland County Improvement Authority ("CCIA") summary judgment; and 5) the Order entered on March 6, 2024, denying Plaintiffs' cross-motion for partial summary judgment for a declaration that there was a taking by the CCIA.

This litigation involves claims for inverse condemnation, just compensation, and damages which Plaintiffs sustained as a result of unauthorized entries and excavation by various entities on Plaintiffs' property located at 39 North Laurel Street, Bridgeton, New Jersey (the "Property"). Plaintiffs own and operate a Domino's Pizza on the Property. These unauthorized entries, excavation, and damages were authorized by the CCIA in connection with its redevelopment project, which occurred on adjacent properties. These unauthorized entries and activities

constituted a physical taking of a portion of Plaintiffs' Property without just compensation.

Despite clear evidence of a physical taking, the trial court entered summary judgment in favor of the CCIA and denied Plaintiffs' cross-motion for partial summary judgment. The court rationalized the unauthorized physical entries on the basis that they were conducted as a part of CCIA's environmental remediation, implying that Plaintiffs received a benefit from the remediation, and that, therefore, these unauthorized entries and activities did not constitute a taking. The trial court's holding contradicts the purpose and intent of the environmental remediation statute and deviates from decades of well-established condemnation jurisprudence. Moreover, there were genuine disputes of material fact regarding the installation and characterization of an Active Subsurface Depressurization System ("ASDS") that was installed on Plaintiffs' Property which should have precluded the entry of summary judgment in favor of the CCIA.

Plaintiffs also sued CCIA's engineer, Fralinger, which had prepared a project site plan that depicted project site improvements on Plaintiffs' Property. Various contractors associated with the project relied upon these plans and, in reliance on those plans, entered the Plaintiffs' Property and conducted excavation and other activities on Plaintiffs' Property without Plaintiffs' authorization or consent. The

trial court ultimately dismissed Fralinger from the litigation and entered an Order subjecting Plaintiffs to frivolous litigation sanctions.

The trial court's holding that Plaintiffs engaged in frivolous litigation in this matter is inconsistent with the trial court's own prior ruling, wherein the trial court held that Plaintiffs could pursue common law negligence and trespass claims without the need for an expert. In reliance on the trial court's prior ruling, Plaintiff pursued discovery and, during the course of discovery, confirmed that several parties relied upon Fralinger's site plan in concluding that Plaintiffs' Property was part of the redevelopment project. Further, based upon interrogatory responses submitted by Fralinger, there was a fact question as to whether or not Fralinger trespassed onto Plaintiffs' Property which should have precluded a determination that Plaintiffs engaged in frivolous litigation.

For these reasons and the reasons to follow, the rulings at issue should be reversed and this matter should be remanded to the trial court for further proceedings.

PROCEDURAL HISTORY

This matter was initiated by the filing of a complaint alleging inverse condemnation against the CCIA on September 8, 2021, and general negligence and trespass claims against the remaining Defendants, who are CCIA's environmental engineers, site planners, and general contractors. (Pa000001).

On March 24, 2022, Defendant Marathon Engineering and Environmental Services, Inc., ("Marathon") the environmental remediation contractor retained by the CCIA, filed a motion for summary judgment. On April 1, 2022, Fralinger, CCIA's engineer that prepared the project plans, filed a motion for summary judgment. (Pa000030).[1] Both motions were filed before discovery was exchanged. Both motions argued that dismissal was warranted because Plaintiffs had not filed an affidavit of merit within 120 days pursuant to N.J.S.A. 2A:53A-27. With respect to Fralinger's motion, Plaintiffs opposed, arguing that based upon the allegations that were being asserted against Fralinger, an affidavit of merit was not needed to pursue claims against Fralinger because Plaintiffs were only pursuing general negligence and trespass claims that did not require expert testimony. (Pa000073-Pa000083). On May 27, 2022, the trial court denied both motions in part, and in relevant part, held that Plaintiffs could pursue general negligence and trespass claims against Fralinger. (Pa000084; 1T Hearing).[2]

Shortly thereafter, on June 29, 2022, Fralinger served Plaintiffs with a R. 1:4-8 frivolous litigation letter. (Pa000121). On July 28, 2023, after the close of

[1] Complete Care Health Care Network, a party not relevant to this appeal, also filed a motion to dismiss which was denied at this time.

[2] There were four hearings with the trial court relevant to this dispute, as follows:
1T Hearing 05/27/2022
2T Hearing 10/20/2023
3T Hearing 02/28/2024
4T Hearing 03/07/2024

discovery, Fralinger filed a second motion for summary judgment. (Pa000086). The trial court granted the motion on August 25, 2023. (Pa000426). Thereafter, on September 13, 2023, Fralinger filed a motion for frivolous litigation sanctions, arguing that the Plaintiffs' litigation against Fralinger was frivolous on the basis that Plaintiffs had not obtained an expert pertaining to an engineering duty of care. (Pa000428-Pa-000456). Plaintiffs opposed the motion on the basis that expert testimony was not necessary, and that Plaintiffs had articulated viable theories of ordinary negligence and trespass. (Pa000457-Pa000477). Without oral argument, the trial court granted Fralinger's motion with an oral decision on the record on October 20, 2023. (2T Hearing). Fees were determined pursuant to a written Statement of Reasons entered by the trial court on December 5, 2023. (Pa000637).

On November 27, 2023, CCIA filed a motion for summary judgment, relying exclusively on inapposite regulatory taking jurisprudence, and argued that there was not a taking. (Pa000573). On January 9, 2024, Plaintiffs filed opposition and cross-moved for partial summary judgment that the CCIA had taken the Plaintiffs' Property without just compensation and that the compensation for the taking should be determined pursuant to the Eminent Domain Act. (Pa000639-Pa000868). Oral argument was conducted on February 28, 2024. (3T Hearing). On March 6, 2024, the court granted the CCIA's motion for summary judgment and denied Plaintiffs' cross-motion for summary judgment. (Pa000869-Pa000879).

On March 26, 2024, Plaintiffs moved for reconsideration of the Order for summary judgment in favor of CCIA, which dismissed Plaintiffs' inverse condemnation claims with prejudice, and the award of frivolous litigation sanctions that were awarded to Fralinger. (Pa000880). Oral argument was conducted on May 7, 2024. (4T Hearing). The trial court denied Plaintiffs' motion for reconsideration on May 10, 2024. (Pa000926).

At this time, all of the Plaintiffs' claims had been dismissed by the trial court with prejudice.[3]

This appeal followed. (Pa000928).

STATEMENT OF FACTS

FACTUAL BACKGROUND AS TO CCIA

The Plaintiffs' Property is located at 39 North Laurel Street, Bridgeton, New Jersey. The Property is improved with a "Domino's Pizza" carry-out and delivery store, which had on-site customer and employee parking with access via Church Lane. The Property is located in a redevelopment area designated by the City of Bridgeton pursuant to N.J.S.A. 40A:12A-1, et seq. The redevelopment of the area is known as the Downtown Bridgeton Development Project (the "Project").

[3] Marathon and ENRC likewise filed motions for summary judgment, which were granted by the trial court on March 6, 2024. Defendant Fabbri Builders, Inc. and Complete Care Health Network, Inc. had settled out prior to dismissal. Since Plaintiffs are not appealing those orders and the dismissed parties are not relevant to this appeal, the irrelevant procedural history and facts as it pertains to those entities are being excluded from this briefing.

(Pa000002). There is no dispute by the parties that the CCIA was the designated redeveloper of the Project and has the power of eminent domain. (Pa000272). There is no dispute that CCIA was responsible for the environmental remediation in connection with the Project. (Pa000272, page 16, line 5 to line 11; Pa000274, page 24, line 1 to line 23; Pa000721). There is no dispute that CCIA had sent an offer letter to Plaintiffs in 2013, but that CCIA did not acquire the Plaintiffs' Property. (See Pa000317, page 17, line 8 to line 15; Pa000765).

Plaintiffs' representative, Salim Joarder, testified during his deposition about particular activities conducted on his Property, particularly the taking of soil borings, the installation of temporary well points, and the excavation of the Property, and testified that these activities were conducted without Plaintiffs' permission or consent. (Pa000322, pg. 36, line 2 to 6; Pa000323, pg. 40, line 13 to line 24; Pa000325, pg. 49, line 14 to line 19). Mr. Joarder further testified that he was never made aware of the original site plans for the Project, which incorporated his Domino's Property into the Project, and that he had **no** understanding that the Property was to be incorporated into the Project. (Pa000326, pg. 52, line 15 to line 25; Pa000344, pg. 124, line 1 to line 20; Pa000775).

Marathon representative Robert Carter confirmed that Marathon, CCIA's authorized environmental remediation contractor, took soil borings, B-11, B-2, and B-7 on Plaintiffs' Property on or about on February 20, and February 21, 2017.

(Pa0002019, page 47, line 3 to pg. 49, line 18; Pa000786). Robert Carter also confirmed that temporary well points were installed on Plaintiffs' Property. (Pa000222, page 58, line 1 to pg. 59, line 16; Pa000788). These were installed on or about March 15, 2017. (Ibid.) Exterior soil vapor samples were also taken on Plaintiffs' Property on May 18, 2017. (Pa000790). None of the parties in connection with their summary judgment motions against Plaintiffs provided any proof that they had consent from the Plaintiffs for these particular activities.

Thereafter, based upon the results of this unauthorized testing, Marathon sought and obtained permission to install air canisters on the Property for the purpose of a 24-hour testing of the indoor air quality. This occurred **after** they had already intruded upon Plaintiffs' Property, took soil borings, and installed temporary well points. (Pa000777 at ¶ 16); Pa000333, page 79, line 16 to line 24; Pa000336, page 93, line 1 to line 11). In connection with seeking consent to take interior air samples, Marathon threatened that the Plaintiffs' business might be shut down if Plaintiffs did not allow Marathon to conduct the air sampling. (Pa000777 at ¶ 16; Pa000333, pg. 80, line 9 to line 15; Pa000333, page 81, line 9 to line 14; Pa000353, page 158, line 18 to line 24).

Thereafter, Marathon installed a vapor intrusion mitigation system, also known as an active subsurface depressurization system ("ASDS"), inside the Plaintiffs' Property. Plaintiffs acknowledge that they allowed CCIA's contractor, Marathon,

access to install the ASDS, but that permission was given based upon the threats and representation that the disturbance to the business would be minimal. (Pa000619; Pa000777 at ¶ 19-20; Pa000333, page 80, line 2 to line 15; Pa000339, page 103, line 3 to line 14; Pa000371, page 232, line 4 to line 22). Mr. Joarder also certified that he would not have permitted access had the actual scope of the ASDS work been accurately and fairly represented. (Pa000778-Pa000779 at ¶ 21-30). Fran the Radon Man was the proposed contractor for the installation of the system. Fran the Radon Man's proposed scope of work for the installation of the ASDS was never provided to the Plaintiffs in connection with obtaining Plaintiffs' consent for the installation of the system. (Pa000370, page 229, line 8 to line 15; Pa000804). Plaintiffs were instead only provided CCIA's softened, less informative, proposed ASDS mitigation plan which Marathon submitted to New Jersey Department of Environmental Protection ("NJDEP"), as part of a voluminous submittal. Mr. Joarder was only copied on that submittal and testified that he had no expertise in engineering or environmental remediation. (Pa000371-Pa000372, pg. 233 line 3 to page 234, line 1; Pa000615). The ASDS was installed on and through the walls of Domino's and remains on site to date. (Pa000822).

Enterprise Network Resolutions Contracting, LLC ("ENRC") was the excavation contractor retained by the CCIA. ENRC was hired by the CCIA via an agreement dated September 13, 2019. (Pa000668; Pa000287, page 76, line 4 to line

13). ENRC was retained for the excavation, removal, transport, and disposal of contaminated soil. (Pa000287, pg. 76, line 21 to pg. 77, line 10).

ENRC was CCIA's contractor responsible for the excavation of the Plaintiffs' Property. (Pa000220, page 52, line 4 to pg. 53, line 17; Pa000817). Excavation occurred in or about October of 2019. (Pa000228, page 79, line 5 to pg. 84, line 20; Pa000297, pg. 116, line 7 to pg. 117, line 8; Pa000244, page 43, line 3 to line 12; Pa000264, pg. 122, line 18 to line 23; Pa000843). Excavation occurred **before** Fralinger modified its site plan. Marathon's mapping of its project environmental investigation includes Plaintiffs' Property. (Pa000826). The contamination within Plaintiffs' Property had migrated from the adjacent project property. **(Pa000211; Robert Carter Deposition, page 17, line 15 to line 20; page 32, line 17 to line 20).** The location of the contamination is located in the same area where unauthorized entries were made onto Plaintiffs' Property and where soil was excavated, leaving behind a crater. (Pa000817). The crater eliminated Plaintiffs' parking area. (Pa000779 at ¶ 30; Pa000345, page 128, line 22 to line 25; Pa000828). Gerard Velazquez, the president and CEO of the CCIA, testified that he became aware of the crater as a result of the excavation on the Property. (Pa000298, page 119, line 9 to line 25; pg. 122, line 12 to line 16). Robert Carter, the licensed LSRP for the project employed with Marathon, testified that Plaintiffs' Property was not restored to grade with clean fill because he understood the

remaining excavated portion of the Plaintiffs' Property was part of the project. (Pa000247, page 54, line 11 to pg. 55, line 8; Pa000828. As such, the crater was left behind by the Defendants. (Pa000236, page 225, line 22 to page 226, line 7; Pa000817). ENRC certified in answers to interrogatories that all work was done "at the direction of the Cumberland County Improvement Authority and its professionals…" (Pa00083, response # 12)**.**

ENRC also installed chain link security fencing and soil and sediment control fencing on Plaintiffs' property which separated Plaintiffs' building from the balance of Plaintiffs' land. (Pa000810-Pa000815). Mr. Velazquez did not dispute that the installation of the fencing on Plaintiffs' Property was a physical entry onto the Plaintiffs' Property. (Pa000285, page 66, line 6 to line 20; pg. 67 line 8 to line 18; Pa000308, page 160, line 1 to line 2; Pa000289, page 85, line 18 to pg. 87, line 6; Pa000814). Mr. Velazquez did not dispute that the installation of soil and sediment control fencing was on the Plaintiffs' Property without Plaintiffs' permission. (Pa000284-Pa000285).

In January of 2020, Complete Care Health Network ("CCHN") was in the process of purchasing the project from the CCIA. On or about January 16, 2020, Howard Melnicove, Esq., on behalf of CCHN, wrote to several Defendants, including Fralinger and CCIA, informing them that there was no written agreement of "any type between CCIA and Mr. Joarder regarding the development" of the

Project. (Pa000380; Pa000294, page 105, line 14 to line 21). This correspondence occurred prior to the sale of the Project. (Pa000293, page 101, line 4 to line 21). The CCIA remained responsible for the Project environmental remediation after the sale to CCHN.

Pursuant to N.J.S.A. 58:10B-16, the CCIA was required to obtain the Plaintiffs' consent in **writing** to enter the Property for any environmental testing and/or remediation and, if consent could not be obtained, the CCIA was required to make an application with the Court. Mr. Velazquez for the CCIA acknowledged that a writing providing consent was necessary for CCIA and its representatives to access the Property, and testified that no such writing exists. (Pa000294, page 102, line 20 to page 103, to line 2; pg. 104, line 9 to line 16 ("I know we didn't receive written consent."); pg. 105, line 10 to line 21; pg. 112, line 9 to line 14; Pa000283, page 59, line 2 to line 15; Pa000284, pg. 65, line 5 to line 23). The CCIA never obtained a written agreement or received written consent from Plaintiffs for the approval and/or development of the Property. (Pa000294, page 105, line 4 to line 21). Mr. Velazquez further testified that CCIA was going to go forward with the Project site improvements on the Plaintiffs' Property regardless of whether or not Plaintiffs consented. (Pa000276, page 33, line 9 to line 13).

FACTUAL BACKGROUND AS TO FRALINGER

In or about the fall of 2020, Plaintiffs brought to this law firm's attention several unauthorized entries onto the Plaintiffs Domino's Pizza property in Bridgeton, New Jersey which were apparently related to a CCIA redevelopment project in the downtown Bridgeton area. Plaintiffs' attorneys subsequently investigated the matter. That investigation included, but was not limited to, discussions with the Plaintiffs' representative, a site inspection, review of public records of the CCIA and the municipality with respect to the Project, plans associated with the Project, and environmental issues associated with the Project. Among the documents reviewed were several site plans that were prepared by Fralinger. One of the site plans, dated February 28, 2017 ("SP 3"), depicts proposed parking on portions of Plaintiffs' Property as if Plaintiffs' Property was part of the Project. (Pa000458 at ¶ 3-9). Based upon the investigation, it was apparent that Fralinger had prepared the site plans for the Project that incorporated portions of Plaintiffs' Property. As a result, Plaintiffs named Fralinger as a Defendant for negligence and trespass. Plaintiffs' allegations did not involve or require complex or technical expertise, and Plaintiffs did not allege professional malpractice. (Pa000459 at ¶ 11-14).

On April 1, 2022, before any discovery was received from any of the Defendants, Fralinger filed a motion for summary judgment arguing that dismissal

was warranted because Plaintiffs had not filed an affidavit of merit within 120 days pursuant to N.J.S.A. 2A:53A-27. Plaintiffs opposed, arguing that based upon the allegations that were being asserted against Fralinger, an affidavit of merit was not needed to pursue claims against Fralinger under the common knowledge exception to the affidavit of merit statute, because Plaintiffs were pursuing general negligence and trespass claims. (Pa000459 at ¶ 15-18; Pa000078). The trial court initially agreed with Plaintiffs. (Pa000459 at ¶ 15-14; 1T Hearing; Pa000084). When the standard of an engineer's duty of care was raised by Fralinger, the trial court expressly disagreed with Fralinger's position that an expert or Affidavit of Merit was needed for Plaintiffs to pursue their claims. During oral argument on the motion, the trial court made the following relevant findings:

> THE COURT: Okay. [Mr.] Tomaino [Fralinger's counsel], my concern is I think there are some allegations here against Fralinger that could go either way. Could be professional negligence claims requiring an affidavit of merit, or it could be claims that may not need an affidavit of merit. In other words, you know, if there's an allegation here that Fralinger directed certain materials to be placed on the plaintiffs' property during the course of construction. Now, I don't know if that happened or didn't happen. I'm not really sure. It doesn't seem to be disputed that it happened. And clearly there's a plan that says they should put things. And I read the plan that says that they should, that the contractor should put different things onto plaintiffs' property. I don't think that requires an affidavit of merit. So there are some mixed claims here. But I -I have no problem, Mr. Tomaino, entering an order that any professional negligence claims are dismissed.

> And then we just have to get to the root of what is a - you know, what claims could be professional negligence claims, and what claims are regular negligence claims, because I think there could be both here.
>
> ….
>
> So to the extent that there are professional negligence claims asserted in the end, those claims will be dismissed, and plaintiff can only proceed on regular negligence claims. And -- and I think in this case there's a little bit of a mix, and I can't at this stage go through each and every one and say well, this is a professional negligence claim, and this is a regular negligence claim, because we don't know exactly all the claims at this point, and whether or not there's gonna be discovery that's going to support some of the things that they're saying…
>
> 1T Hearing, page 17, line 7 to pg. 18, line 16.

In response to the court's ruling, Fralinger argued as follows:

> MR. TOMAINO: …if I could step back to the language of the affidavit of merit, the language very clearly states resulting from an alleged act of malpractice or negligence by a licensed person. So there is no distinction in the affidavit of merit. It's professional malpractice or negligence.
>
> THE COURT: **I disagree.**[4]
>
> MR. TOMAINO: Now there is --
>
> THE COURT: **I disagree**[5], Mr. Tomaino. You're telling me that if Fralinger directed contractors to place materials onto

[4] Emphasis added.
[5] Emphasis added.

> plaintiffs' property during the construction stage, or directed the, you know, the erection of certain fencing, or around the property that wasn't -- wasn't plaintiffs', or that, you know, that -- and trespassed upon plaintiffs' property knowingly, some of those things are not professional negligence, and **they do not require an affidavit of merit in my view.**[6]
>
> 1T Hearing, page 21, line 6 to line 20.

In response, Fralinger's counsel argued that the issue before the Court was the actual interpretation of the plan and that there was a need for expert testimony as to the engineering duty of care. (This is the same argument Fralinger would make in connection with the second summary judgment application that resulted in dismissal of the action against Fralinger.) The following exchange also occurred:

> MR. TOMAINO: …where I would disagree with you is that is all based on interpretation of the plan. You cannot say that's common knowledge. So they're trying to say well, if Fralinger's plan directed this, directed something to go on plaintiffs' property, it's not -- it's not as simple as they make it out because you need a professional to say what is the duty, what is the responsibility of a professional engineer in a development like this.
>
> THE COURT: **I disagree.**[7]
>
> ….

[6] Emphasis added.

[7] Emphasis added.

THE COURT: …. I don't think that -- I don't think a jury needs to know what the standards are for an engineer. Everybody knows that you're not allowed to tell people to put materials onto somebody else's property. I don't think that requires an expert to state what the -- what the standard of care is. I disagree.

MR. TOMAINO: But then you're allowing a jury to speculate on a professional's plan, and how that comes about. That -- that to me is an interpretation of the standard of care.

THE COURT: Maybe --

MR. TOMAINO: That's not something that's within the ken of the average juror.

THE COURT: Maybe, maybe not. But again, we'll have to -- we'll have to sort out those claims when we get there, because I think some of them can be. And clearly -- clearly an affidavit of merit is not required in all claims against a professional. In other words, somebody cited the case where, you know, a dentist pulls the wrong tooth. Well, that would obviously need a professional – or that would need an affidavit of merit and a standard of care expert. But if the dentist tripped the patient as they were entering the office, that wouldn't require an Affidavit of Merit.

1T Hearing, page 21, line 21 to pg. 23, line 23.

The trial court expressly reserved the issue of the standard of care for a later time and denied Fralinger's motion for summary judgment. The trial court held that the Plaintiffs were entitled to discovery and could pursue general negligence and trespass claims. Moreover, in the trial court's memorialized order, the trial court provided that any claims that do not require expert testimony survived. (Pa000084).

On June 22, 2022, Fralinger provided interrogatory responses and a response to Plaintiffs' first notice to produce. (Pa000053). In sole reliance upon Fralinger's discovery, without any additional discovery from the remaining defendants or any depositions testimony, Fralinger served a frivolous litigation letter on the Plaintiffs on June 29, 2022. The frivolous litigation claim was based on three documents pertaining to the vacation of Church Lane, the approval of revised plans by the Bridgeton City Planner, Barbara Fegley, and an email from the city engineer approving those changed plans. (Pa000459-Pa000460 at ¶ 20-21; Pa000121). The documents were created in 2021. (Pa000121). Moreover, in Fralinger's response to interrogatories, Fralinger **acknowledged** that a representative of Fralinger ***may have*** trespassed on Plaintiffs' Property in connection with the preparation of site plans (Pa000108). None of the factual averments or documents referenced in the frivolous litigation letter refuted, in any way, an allegation of trespass, nor did they explain the reason why SP 3 showed proposed project improvements on Plaintiffs' Property when Plaintiffs had not authorized any activities or construction on their Property. In relevant part, Fralinger's SP 3 depicts the installation of Project parking lot spaces and a dumpster location on the Plaintiffs' Property. (Pa000378).

In reliance on this ex parte limited production, Fralinger argued that "[t]here is absolutely no support for any 'common knowledge' negligence claim against Fralinger" and argued that a "jury is not capable of interpreting professional plans or

understanding an engineer's duty of care in the context of this project without expert testimony." (Pa000121). The trial court, however, had already ruled that a jury **could** potentially find Fralinger negligent, and that expert opinion was not necessary to pursue general negligence or trespass claims against Fralinger. (1T Hearing).

Thereafter, discovery was conducted, which revealed that Fralinger prepared the site plan for the Project on behalf of the CCIA. During his deposition, Robert Carter from Marathon testified that it was Marathon's understanding that Plaintiffs' Property was part of the Project based upon SP 3, which incorporated Plaintiffs' Property into the Project. (Pa000227, page 78, line 20 to line 25; pg. 79, line 5 to pg. 82, line 11; Pa000253, page 17, line 4 to line 11[8]; Pa000378). Mr. Valezquez from CCIA also testified that the Project originally contemplated portions of Plaintiffs' Property. (Pa000277, page 36, line 25 to pg. 37, line 22; pg. 41, line 12 to page 42, line 7). Furthermore, in January of 2020, a full year before Fralinger modified the site plan to remove Plaintiffs' Property from the project, CCHN, which was in the process of purchasing the project, wrote to several of the Defendants, including Fralinger, informing them that there was no written agreement of "any type between CCIA and Mr. Joarder regarding the development" of the Project depicted on SP 3. (Pa000380; Pa000294, page 105, line 14 to line 21). Written consent from Plaintiffs for the approval and/or development of the Property in accordance with SP 3 was

[8] The deposition of Robert Carter took place over two days.

never obtained. (Pa000294, page 102, line 20 to page 103, to line 2; pg. 104, line 9 to line 16 ("I know we didn't receive written consent."); pg. 105, line 10 to line 21; pg. 112, line 9 to line 14; Pa000283, page 59, line 2 to line 15; Pa000284, pg. 65, line 5 to line 23).

On July 28, 2023, Fralinger filed a second summary judgment motion, essentially arguing the same position that it had argued in its first motion for summary judgment. (Pa000086). Plaintiffs opposed, arguing that expert opinion was not necessary for a jury to find that Fralinger's negligence contributed to Plaintiffs' damages. (Pa000195). The trial court, however, granted summary judgment in favor of Fralinger on August 25, 2023. (Pa000426). Thereafter, Fralinger filed a motion for sanctions on September 13, 2023. (Pa000428). The trial court decided the application on the papers without hearing oral argument from any party. Via email the trial court informed the parties that it had granted Fralinger's motion and requested the submission of an affidavit of services. (Pa000484). The trial court placed its decision on the record on October 20, 2023. (2T Hearing). Thereafter, Fralinger submitted an affidavit of legal services seeking approximately $90,000.00 in fees. (Pa000478). Plaintiffs opposed the fee request (Pa000557), and on December 5, 2023, the trial court entered an Order and Statement of Reasons awarding Fralinger $30,000.00 in attorney's fees and costs. (Pa000637).

In its oral decision granting sanctions, the trial court noted that there was no evidence of trespass by Fralinger. (2T Hearing). The trial court also stated that, while there were plans prepared by Fralinger that admittedly would impact the Plaintiffs' property, "after Plaintiff complained that they did not want to be involved in this re-development project, Fralinger changed the plans." (2T Hearing, page 8, line 5 to line 16). The trial court failed to appreciate that Plaintiffs were not aware that their Property had been incorporated into the Project. The trial court also failed to appreciate that when Plaintiffs had complained about the redevelopment plan, the damage had already been done. (Pa000326, pg. 52, line 15 to line 25; Pa000344, pg. 124, line 1 to line 20; Pa000775; Pa000788; Pa000810; Pa000814; Pa000817; Pa000822). In reliance upon that site plan, Marathon and ENRC had **already** physically intruded upon the Plaintiffs' property and excavated a substantial portion of Plaintiffs' property. The activities complained of occurred in 2017, 2018, 2019, and 2020, prior to Fralinger modifying its site plan in 2021. (Pa000121). Fralinger, admittedly, only modified the plans in 2021 (Pa000435). The trial court subsequently stated as follows: "Plaintiffs were aware of what was going on. They participated in this. And these new plans were developed prior to any work being down on the properties at all." (2T Hearing, page 8, line 17 to line 20). Respectfully, the trial court's statement is a misstatement of the factual record in this matter, which Plaintiffs brought to the trial court's attention via their motion for reconsideration.

Plaintiffs asserted that they were not aware of SP 3 or the fact that their Property was a part of the Project until well after all the unauthorized physical entries and damages in this matter had already occurred. There was no evidence presented that Plaintiffs were aware of SP 3 prior to the unauthorized activities complained of by Plaintiffs. (Pa000380; Pa000294, page 105, line 14 to line 21; Pa000322, pg. 36, line 2 to 6; Pa000323, pg. 40, line 13 to line 24; Pa000325, pg. 49, line 14 to line 19). Mr. Joarder further testified that he was never made aware of the original site plans for the Project, which incorporated his Domino's Property into the Project, and that he had **no** understanding that the Property was to be incorporated into the Project. (Pa000326, pg. 52, line 15 to line 25; Pa000344, pg. 124, line 1 to line 20; Pa000775).

In addition, while the Plaintiffs acknowledged that they allowed access for the installation of the ASDS, Plaintiffs' representative Salim Joarder previously certified and testified that he only permitted access and the installation of the system based upon the misleading description of the work to be performed as "minimal". He further certified that he would not have permitted access if the scope of the work had been accurately and fairly represented. (Pa000619; Pa000777 at ¶ 19-20; Pa000333, page 80, line 2 to line 15; Pa000339, page 103, line 3 to line 14; Pa000371, page 232, line 4 to line 22; Pa000778-Pa000779 at ¶ 21-30). Such alleged statements were material facts in dispute that should have precluded the entry of summary judgment.

For these reasons and the reasons to follow, the trial court's 1) final Order, dated May 10, 2024, 2) the oral decision entered on October 20, 2023, wherein the court awarded the Defendant Fralinger attorney's fees and costs, 3) the Order entered on December 5, 2023, setting attorney's fees and costs, 4) the Order entered on March 6, 2024, wherein the court granted the CCIA summary judgment; and 5) the Order entered on March 6, 2024, wherein the court denied Plaintiffs' cross-motion for summary judgment, must be reversed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFFS' COMPLAINT AGAINST THE CCIA AND DENYING PLAINITFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT. (Pa000869) (Pa000871) (Pa000873) (Pa000926).

A. Standard of Review.

The Appellate Division's review of rulings of law and issues regarding the applicability, validity, or interpretation of laws, statutes, or rules is de novo. See Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (applicability of charitable immunity) In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special

deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Further, if a trial court judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and it becomes an arbitrary act, not subject to the usual deference. Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020); Alves v. Rosenberg, 400 N.J. Super. 553, 563 (App. Div. 2008). In such cases, the reviewing court must adjudicate the controversy in the light of the applicable law in order to avoid a manifest injustice. State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010); State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).

For the reasons to follow, the Appellate Division should reverse and remand this matter back to the trial court to avoid a gross miscarriage of justice.

B. The Unauthorized Entries and Excavation of Plaintiffs' Property by Defendant Cumberland County Improvement Authority Constituted a Taking for Which Plaintiffs are Entitled to Just Compensation.

The Federal and State Constitutions provide that private property shall not be taken for public use without just compensation. U.S. Const. amend. v; N.J. Const. art. 1, para. 20. When the government physically acquires private property for public use, the Takings Clause obligates the government to provide the owner

with just compensation. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 429-30, 102 S.Ct. 3164, 3172-73, 73 L.Ed.2d 868, 878 (1982). The Supreme Court in Cedar Point Nursery v. Hassid, 594 U.S. 139; 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) reaffirmed this decades long jurisprudence and held that a government's physical entry onto the property of another is a *per se* taking:

> Physical takings jurisprudence is "as old as the Republic." Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 322. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. See United States v. General Motors Corp., 323 U.S. 373, 374-375, 65 S.Ct. 357, 89 L.Ed. 311 (1945); United States ex rel. TVA v. Powelson, 319 U.S. 266, 270-271, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943). The same is true when the government physically takes possession of property without acquiring title to it. See United States v. Pewee Coal Co., 341 U.S. 114, 115-117, 71 S.Ct. 670, 95 L.Ed. 809 (1951) (plurality opinion). And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. See United States v. Cress, 243 U.S. 316, 327-328, 37 S.Ct. 380, 61 L.Ed. 746 (1917). These sorts of physical appropriations constitute the "clearest sort of taking," Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), and we assess them using a simple, *per se* rule: The government must pay for what it takes. See Tahoe-Sierra, 535 U.S. at 322, 122 S.Ct. 1465.
>
> …
>
> [A] physical appropriation is a taking whether it is permanent or temporary.… The duration of an appropriation—just like the size of an appropriation, see Loretto, 458 U.S. at 436-437, 102 S.Ct. 3164—bears only on the amount of compensation. See United States v. Dow, 357 U.S. 17, 26, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).
>
> [594 U.S. 140]

Thus, to accomplish a physical taking, the government only needs to enter the land without authorization. United States v. Clarke, 445 U.S. 253, 255–56, 100 S.Ct. 1127, 1129–30, 63 L.Ed.2d 373, 376–77 (1980) (citing United States v. Dow, 357 U.S. 17, 21, 78 S.Ct. 1039, 1044, 2 L.Ed.2d 1109, 1114 (1958)). In a physical invasion case, the law is clear that the size and the duration of the invasion does not affect the owner's right to compensation. See Loretto, 458 U.S. at 429-30 (observing that "occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land").

There is no genuine dispute of fact that several unauthorized physical entries occurred on Plaintiffs' Property, including, but not necessarily limited to, the installation of temporary well points, the taking of soil borings, and the excavation of the Plaintiffs' Property, which left a crater in the Plaintiffs' parking lot which, to date, has not been repaired. There **is** a dispute of fact, which was never addressed by the trial court, pertaining to the installation of the ASDS. Despite these facts, the trial court entered summary judgment in favor of the CCIA and denied Plaintiffs' cross-motion for partial summary judgment. (Pa000869; Pa000871). In its Statement of Reasons, the trial court acknowledges Cedar Point in response to the Plaintiffs' legal argument, wherein the United States Supreme Court held that

the government's unauthorized temporary physical entry onto private property constitutes a taking, but the trial court distinguished that case from the matter at hand. (Pa000876-Pa000877). The trial court instead relied on Cedar Point's reference to Loretto v. Teleprompter Manhattan, 458 U.S. 419, 102 S. Ct. 3164 (1982) in concluding that Plaintiffs had no right to exclude the CCIA and its contractors from engaging in CCIA's environmental remediation obligations, and therefore, no taking had occurred. (Pa000877).

The trial court's reliance on Cedar Point's reference to Loretto is misplaced. Loretto at that time discussed the heightened concerns about the permanence and absolute exclusivity of a physical occupation in contrast to temporary limitations on the right to exclude. The Court, therein, stated that "[n]ot every physical invasion is a taking." (458 U.S. 419, 435, n. 12). Loretto, however, was addressing the claim of a permanent taking. In contrast, Cedar Point, subsequently decided, determined that unauthorized temporary physical takings can also constitute per se takings as well.

Cedar Point did recognize three categories of governmental entry onto private property that would not constitute a taking: 1) a trespass based upon isolated entry; 2) entry based on longstanding common law background restrictions on property rights (e.g., to abate a nuisance, or to avert an imminent public disaster, or to make a criminal arrest); and 3) a property owner's having to grant

access as a condition of receiving a permit, license, or registration under governmental health and safety regimes (e.g., pesticide, hydroelectric project, and pharmaceutical inspections). None of these exceptions is applicable here. Rather, CCIA simply invaded and appropriated Plaintiffs' Property in derogation of the Constitution and the applicable statute.

It is important to note that in Cedar Point the Court expressly stated that the right to exclude others is a fundamental property right, and that the "right to exclude" is not an "empty formality that can be modified at the government's pleasure." Cedar Point, 594 U.S. at 158. The trial court and the Supreme Court in Cedar Point acknowledged a distinction between a single individualized trespass and a taking. There is no dispute that there were numerous planned and repeated unauthorized entries and activities on Plaintiffs' Property by CCIA through its contractors which amount to more than a simple trespass, including the soil borings, the installation of temporary well points, substantial excavation of the parking lot, installation of sediment control fencing, and the physical installation and occupation of the ASDS. These are physical invasions of personnel, materials, and equipment and are, without question, outside the limited tort trespass contemplated by Cedar Point. The Supreme Court made clear that a physical occupation constitutes a *per se* taking regardless of whether it results in only a trivial economic loss. Cedar Point, 594 U.S. at 154-156. "[A] physical

appropriation is a taking whether it is permanent or temporary.… The duration of an appropriation—just like the size of an appropriation-- bears only on the amount of compensation." Id. at 154 (citing Loretto, 458 U.S. at 436-437).

In granting summary judgment in favor of the CCIA, the trial court implied that the activities of the CCIA were justified because the intrusions were "not for the benefit of itself or another, but for the benefit of the public, and more importantly, the plaintiff." (Pa000877). However, all takings of private property must be done "for the benefit of the public." Such, however, does not negate a private property owner's right to just compensation. "The right to exclude is 'one of the most treasured' rights of property ownership." Cedar Point, 594 U.S. at 149 (Citation omitted).

N.J.S.A. 58:10B-16, the environmental remediation statute, specifically protects and enforces property owners' right to exclude. The statute and procedure outlined in the statute protect property owners from unlawful entry onto and activities within the property owner's land. The statute provides that only reasonable access may be granted, and the property owner is entitled to indemnification and other protections for the conduct of the environmental remediation entity. None of these requirements was met. N.J.S.A. 58:10B-16 provides the means by which CCIA might have obtained a lawful right of access to Plaintiffs' Property for the purpose of environmental remediation. CCIA did not

avail itself of the statute. As a result, CCIA's entries onto Plaintiffs' private Property by its contractors constituted a taking. Moreover, Plaintiffs' Property was not the source of the contamination. The contamination migrated from the adjacent Project land. Therefore, Plaintiffs would not be liable for any clean-up costs for their Property. Those costs would be the responsibility of the fund established for environmental clean-up, so any claim that CCIA had conferred a benefit on the Plaintiffs was irrelevant speculation. See N.J.S.A. 58:10-23.11g. The issue before the trial court was whether there was a taking.

The trial court essentially concluded that the CCIA was entitled to immunity for its several undisputed unlawful physical entries, soil borings, installation of temporary well points, substantial excavation, and the installation of the ASDS. The trial court's ruling would allow condemning authorities and governmental entities to physically enter onto an owner's private property without due process of law, as long as they "claim" that the property owner is receiving a benefit. According to the trial court below, there was no need to obtain the owner's permission, or to seek entry under the statute by order of the court, or to pay just compensation for the unauthorized physical taking. Such a holding is inconsistent with the constitutional requirements of due process and just compensation, as well as the Legislative intent of the environmental remediation statute. For these reasons, this matter should be reversed and remanded for further proceedings.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS' CLAIMS AGAINST FRALINGER ENGINEERING, P.A. WERE FRIVOLOUS. (2T Hearing, 10/20/2023) (Pa000637) (Pa000926).

The Frivolous Litigation Statute is codified as N.J.S.A. 2A:15-59.1 and is applied via R. 1:4-8. The purpose of the statute and the rule is to provide a safeguard against litigants who abuse the court system by requiring parties or attorneys who file pleadings or other court papers that have no merit to pay the opposing party's legal fees and associated costs. Pursuant to N.J.S.A. 2A:15-59.1(b), in order to find that a "complaint, counterclaim, cross-claim or defense" is frivolous, the judge must find on the basis of the "pleadings, discovery, or the evidence presented" that action was "commenced, used or continued in **bad faith**, solely for the purpose of harassment, delay or malicious injury" or that the "nonprevailing party **knew, or should have known**, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." See N.J.S.A. 2A:15-59.1(b).

"A claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is

completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999), citing Fagas v. Scott, 251 N.J. Super. 169, 189 (Law Div. 1991). "False allegations of fact will not justify a fee award unless they are made in bad faith, for the purpose of harassment, delay, or malicious injury." McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993).

The term "frivolous" as used in the statute must be given a restrictive interpretation. Id. at 561. The statute does not counterbalance the general rule that each litigant bears his or her own litigation costs, even when there is litigation of "marginal merit." Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997). Thus, "[w]hen the plaintiff's conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." McKeown-Brand, 132 N.J. at 563; see also Deutch & Shur, P.C. v. Roth, 284 N.J. Super. 133, 138 (Law. Div. 1995). Even when a complaint is dismissed on a motion for summary judgment, that dismissal "does not predetermine that plaintiff 'commenced, used or continued' [its] complaint 'in bad faith, solely for the purpose of harassment, delay or malicious injury' in violation of N.J.S.A. 2A:15-59.1b(1)." Ibid.

When a prevailing defendant's allegation is based on the absence of "a reasonable basis in law or equity" for the plaintiff's claim, an award cannot be sustained if the "plaintiff did not act in bad faith in asserting" or pursuing the

claim. McKeown–Brand, 132 N.J. at 549. "[T]he burden of proving that the non-prevailing party acted in bad faith" is on the party who seeks fees and costs pursuant to N.J.S.A. 2A:15–59.1. Id. at 559; see Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. 401, 408 (App. Div. 2009). Simply put, ("[A]n award cannot be sustained if the 'plaintiff did not act in bad faith in asserting' or pursuing the claim." Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. at 408 (quoting McKeown-Brand, 132 N.J. at 549)); United Hearts, L.L.C., 407 N.J. Super. 379, 389 (App. Div. 2009) ("Where a party has [a] reasonable and good faith belief in the merit of the cause, attorney's fees will not be awarded." (quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007))).

"The court must strictly interpret the frivolous litigation statute and Rule 1:4-8 against the applicant seeking attorney's fees and/or sanctions." Wolosky v. Fredon Twp., 31 N.J. Tax 373, 390 (Tax Ct. 2019) (citing LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009)). Courts should exercise restraint in awarding frivolous litigation sanctions. See McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 499 (App. Div. 2011) ("Sanctions are not to be issued lightly."). The goal of the statute is to "deter baseless litigation," but "without discouraging honest, creative advocacy," and "keep[ing] in mind our significant policy that litigants should usually bear their own litigation costs." DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226-27 (App. Div. 2000) accord Iannone v. McHale, 245 N.J. Super.

17, 26-28 (App. Div. 1990). A judge should only award sanctions for frivolous litigation in exceptional cases. Wolosky, 31 N.J. Tax at 28.

The Plaintiffs named Fralinger as defendant in this matter as a result of significant investigation and review. A party to litigation is not required to accept another party's pre-litigation representations, or even discovery representations, as gospel. In continuing their claims against Fralinger, Plaintiffs, in part, relied upon the trial court's initial ruling wherein the court agreed with Plaintiffs that a cause of action could be maintained against Fralinger without the need for expert testimony. Plaintiffs' confidence in their legal position was bolstered after depositions, wherein the representative of Marathon Engineering testified that it relied upon Fralinger's site plan in determining that that Plaintiffs' Property was a part of the Project. Based upon this reliance, Marathon and ENRC participated in unauthorized remediation and excavation activities on the Plaintiffs' Property.

The trial ourt ultimately dismissed Plaintiffs' complaint against Fralinger because Plaintiffs did not have an expert on the duty of care (Pa000426), but failure of the Plaintiffs to obtain an expert on duty of care does not equate to frivolous litigation. That is because, in most negligence cases, a plaintiff is not required to establish the applicable standard of care. Moreover, the court initially held that it would need to make a decision on the applicable standard of care at a

latter point in time. (1T Hearing, page 23) ("Maybe, maybe not. But again, we'll have to -- we'll have to sort out those claims when we get there")

It is generally undisputed that expert testimony is required when topics require specialized knowledge or expertise. If a subject is "so esoteric that jurors of common judgment and experience cannot form a valid judgment" then expert testimony is necessary. Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). Expert opinions are necessary when the issues that a jury must decide are outside the scope of the knowledge of an average juror. In other words, expert testimony is required when specialized knowledge is **integral** to the proper findings of the trier of fact. In those situations, "the party with the burden of establishing a proposition must proffer competent expert testimony or suffer the loss of their cause." See Comment 1 to N.J.R.E. 702. In such areas where specialized knowledge is required, expert testimony is necessary, and the finder of fact is not permitted to speculate. See Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). The same principles apply when a jury is tasked with determining standard of care.

However, in most negligence cases, the plaintiff is not required to establish the applicable standard of care. Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961). In those cases, "[i]t is sufficient for [the] plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury[,] which is competent to determine what precautions a reasonably

prudent man in the position of the defendant would have taken." Ibid. In a case such as the one at hand, "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached without the aid of an expert's opinion." Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div.1996).

In some cases, however, the "jury is not competent to supply the standard by which to measure the defendant's conduct." Sanzari, 34 N.J. at 134-35. In those cases, the plaintiff must "establish the requisite standard of care and [the defendant's] deviation from that standard" by "present[ing] reliable expert testimony on the subject." Giantonnio, 291 N.J. Super. at 42. When deciding whether expert testimony is necessary, a court properly considers "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982).

Plaintiffs agreed with Fralinger that in cases where professional negligence is alleged and where the negligence of an engineer is at issue, an affidavit of merit and expert opinion may be necessary. However, those cases which require expert opinion deal with "engineering" issues which are beyond the ken of an average juror. The Plaintiffs have never alleged Fralinger breached a professional standard of care. Fralinger's purported negligence in this matter was more obvious, and Plaintiffs did not seek to elicit any complex engineering principles.

Just because a claim is asserted against a professional does not mean that an affidavit of merit is required, or that expert opinion is needed, to prevail on a negligence claim where the negligence is readily obvious to a lay person. "The affidavit-of-merit statute cannot apply to those professional negligence claims that can proceed without expert testimony." Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 321 (App Div. 1999) (citing Keeper v. Janelli, 317 N.J. Super. 309, 313 (Law. Div. 1999), overruled on other grounds). In other words, an expert is not necessary to demonstrate that a defendant breached a duty of care simply because the defendant is an engineer. Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 394 (2001) (holding that an affidavit of merit **was not** required in a case where a dentist removed the wrong tooth); see also Klimko v. Rose, 84 N.J. 496 (1980) (stating that if expert opinion is not required, neither is an affidavit of merit). Where the allegations do not require proof of a deviation from a professional standard of care, no affidavit or expert testimony is required. Syndicate 1245 at Lloyd's v. Walnut Advisory Corp., 721 F. Supp. 2d 307, 315 (D.N.J. 2010).

Claims against licensed professionals that require proof of ordinary negligence do not require expert testimony. Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469 (1999). Lay persons using their "ordinary understanding and experience" are able to determine the Defendant's "negligence without the benefit of the specialized knowledge of experts." Estate of Chin, 160 N.J. at 469.

The purported "carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience.'" Id. at 469-70 (1999) (quoting Rosenberg ex rel. Rosenberg v. Cahill, 99 N.J. 318 (1985)).

The technical substance of Fralinger's site plans was **not** at issue. The existence of the site plan itself, which included Plaintiffs' Property without Plaintiffs' consent or authorization, formed the factual basis for Plaintiffs' negligence cause of action against Fralinger. Fralinger's plan provided for construction activities on Plaintiffs' Property without Plaintiffs' authorization or consent, and that plan was relied upon by third parties to enter Plaintiffs' Property. Marathon and CCIA relied upon those plans, and that reliance caused the Plaintiffs harm. The allegations that Fralinger 1) "proposed parking and dumpsters on the Plaintiff's Property", 2) that Fralinger prepared a plan providing for the removal of Plaintiff's driveway, and that 3) Fralinger prepared a plan utilizing the entire former Church Lane right of way when the right of way of Church Lane to its centerline adjacent to the Property had vested in the Plaintiff clearly do not require expert testimony. (Pa000001).

Thus, Plaintiffs were reasonable in asserting that an average layperson could apply his or her general understanding and knowledge to find that Fralinger was negligent in the preparation of its plans which provided for construction activities on the Plaintiffs' property without the Plaintiffs' knowledge or consent.

With respect to Plaintiffs' trespass claim, Fralinger answered in certified interrogatories that a representative of Fralinger engineering **may have** trespassed onto Plaintiffs' property in connection with Fralinger's preparation of its plans. Fralinger **did not deny** that it may have trespassed. This is also a critical fact which the trial court did not consider when considering Plaintiffs' mind set in pursuing their claims against Fralinger and whether Plaintiffs' claims were pursued in bad faith. Plaintiffs pursued discovery from representatives of CCIA and Marathon to ascertain whether or not Fralinger trespassed onto Plaintiffs' Property in connection with Fralinger's preparation of SP 3. In its decision on the record outside the presence of counsel, the court notes that there was no evidence of trespass by Fralinger. (2T Hearing, page 6, line 23 to line 25). However, that purported fact could not have been determined prior to the conclusion of all fact discovery in this matter, and therefore, it was improper to award sanctions dating back to the date of the frivolous litigation letter, which occurred several months before depositions in this matter. The trial court similarly took issue with the fact that Plaintiffs did not depose a representative of Fralinger. (2T Hearing, page 7, line 15 to line 18). Parties in litigation are not required to depose each and every possible witness in the action. Plaintiffs made a strategic decision to depose representatives of CCIA and Marathon as opposed to a representative of Fralinger: this strategical decision, while ultimately unsuccessful, does not amount to frivolous litigation.

The trial court also incorrectly stated that Fralinger changed SP 3 "after Plaintiff complained that they did not want to be involved in this re-development project…" for the proposition that Plaintiff was not justified in naming Fralinger as a defendant. (2T Hearing at page 7, line 5 to line 16). The court failed to appreciate that Plaintiffs were not aware that their Property was incorporated in the Project. The Court also failed to appreciate that when Plaintiffs had complained about the redevelopment Project, the damage had already been done. Marathon and ENRC, in reliance upon Fralinger's site plan, had **already** invaded the Plaintiffs' property and excavated a substantial portion of Plaintiffs' property. The court subsequently stated the following: "Plaintiffs were aware of what was going on. They participated in this. And these new plans were developed prior to any work being done on the properties at all." (2T Hearing, page 8, line 17 to line 20). The trial court's statement is contrary to the factual record in this matter. Plaintiffs asserted that they were **not aware of SP 3** or the fact that their Property was a part of the project until well **after** all the unauthorized physical entries and damage in this matter had already been done. To the extent that CCIA's representative testified otherwise, this was a material fact in dispute, and it was improper for the trial court to make a credibility determination in support of a motion for attorney's fees and costs based upon frivolous litigation following entry of summary judgment.

The facts pleaded by the Plaintiffs and evidence adduced during discovery adequately supported the pursuit of a claim for general negligence and trespass against Fralinger. Under the precedent in New Jersey pertaining to general negligence and trespass claims, and the extremely high standard for the imposition of frivolous litigation sanctions, it was unjust and an abuse of the trial court's discretion to enter an order finding Plaintiffs in violation of the frivolous litigation statute and awarding attorney's fees and costs to Fralinger.

CONCLUSION

For the foregoing reasons and based upon the above cited precedent, the trial court's 1) final Order, dated May 10, 2024, 2) the oral decision entered on October 20, 2023, 3)the Order entered on December 5, 2023, setting attorney's fees and costs; 4) the Order entered on March 6, 2024, wherein the court granted the CCIA summary judgment; and 5) the Order entered on March 6, 2024, wherein the court denied Plaintiffs' cross-motion for summary judgment, should be reversed, and this this matter should be remanded to the trial court for further proceedings.

Respectfully submitted,

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Attorneys for Appellants

By: */s/ Daniel J. Carbone*
DANIEL J. CARBONE, ESQ.

Dated: July 29, 2024

608-610 MULLICA HILL ROAD, LLC AND MSJ ENTERPRISES, INC., Plaintiffs, v. CUMBERLAND COUNTY IMPROVEMENT AUTHORITY, a public body corporate and politic of the State of New Jersey; FRALINGER ENGINEERING, P.A.; MARATHON ENGINEERING and ENVIRONMENTAL SERVICES, INC.; ENTERPRISE NETWORK RESOLUTIONS CONTRACTING, LLC; FABBRI BUILDERS, INC.; and COMMUNITY HEALTH CARE, INC. d/b/a COMPLETE CARE HEALTH NETWORK, INC. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002975-23 CIVIL ACTION On Appeal From: Final Order of the Superior Court of New Jersey, Law Division, Cumberland County DOCKET NO. CUM-L-624-21 Sat Below: HON. JAMES R. SWIFT, J.S.C.

BRIEF OF RESPONDENT-CROSS APPELLANT FRALINGER ENGINEERING, P.A.

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PRELIMINARY STATEMENT

Fralinger Engineering, P.A. was subjected to frivolous litigation by Plaintiffs-Appellants in this matter. It now seeks affirmation of the trial court's decision to sanction Plaintiffs and further seeks the full amount of fees originally requested in its November 6, 2023 certification of fees.

Plaintiffs' current appeal is only another example of their bad faith attempts to drag Fralinger into litigation. Fralinger was originally hired to draft site plans for a redevelopment project taking place in downtown Bridgeton, New Jersey. With respect to Plaintiffs' Property, the proposed improvements were (1) a paved parking lot; and (2) a new location for dumpsters that were already located on Plaintiffs' Property. Before these improvements could be implemented, Fralinger, at Plaintiffs' request, modified the site plans to exclude Plaintiffs' Property from the redevelopment project. ***None*** of these proposed improvements to Plaintiffs' Property were therefore ***ever*** implemented. And still, Plaintiffs alleged, without ever obtaining expert testimony as required under the Affidavit of Merit statute, that Fralinger breached some duty of care for failing to get Plaintiffs' consent with respect to the initial site plans – ***the ones that were never implemented because Plaintiffs objected to them***.

Plaintiffs also claim, in bad faith, that Fralinger was responsible for trespass onto their Property because another contractor, ***with whom Fralinger***

never communicated, assumed that the Property was part of the redevelopment project due to its inclusion in the preliminary site plan, and in reliance on this site plan, performed environmental remediation on the Property. However, as Plaintiffs were well aware, ***Fralinger's site plans never called for any sort of environmental remediation***. Any "reliance" on the site plans with respect to the environmental remediation of which Plaintiffs complain (but would have been legally obligated to perform regardless) cannot, on any rational basis, be contributed to Fralinger.

Fralinger ultimately had to file two separate motions for summary judgment to get out of the case. The trial court itself was aware of Plaintiffs' bad faith attempts to keep Fralinger in the litigation, and even noted, on multiple occasions, that Plaintiffs were misrepresenting its decision on Fralinger's first motion for summary judgment to try and justify the argument that Fralinger was "per se" negligent – an argument that clearly requiring expert testimony, which Plaintiffs failed to obtain.

Plaintiffs' bad faith conduct and misrepresentations ultimately led to the trial court granting Fralinger's motion for sanctions. Unfortunately, the trial court, in calculating Fralinger's fee award, failed to take into consideration all necessary factors under Rule of Professional Conduct 1.5(a), resulting in an

award only one-third of that requested by Fralinger in spite of detailed invoices depicting the work performed by counsel on this matter.

Plaintiffs may try to argue that Fralinger's counsel performed excessive work on this matter. However, it was Plaintiffs' own misconduct that led to this situation. After being served a safe harbor letter early in the litigation, Plaintiffs declined to dismiss Fralinger from the case, resulting in Fralinger remaining in the case ***for over a year***, during which time Plaintiffs sought ***no discovery*** from Fralinger in furtherance of any claims they may have had against it. And yet, Plaintiffs ***still*** tried to oppose Fralinger's second motion for summary judgment, filed after the discovery end date expired. Although the requested fee award was only for the period beginning with the service of the safe harbor letter and lasting until the motion for sanctions was filed, Fralinger respectfully asks this Court to take into consideration Plaintiffs' bad faith conduct throughout the entirety of this litigation when it considers awarding the requested fees.

For these reasons and the reasons set forth below, the trial court's decision sanctioning Plaintiffs should be affirmed, but the fee award re-calculated to grant Fralinger the full amount of fees requested.

PROCEDURAL BACKGROUND

Plaintiff-Appellants 608-610 Mullica Hill Road, LLC and MSJ Enterprises, LLC ("Plaintiffs") commenced this matter via Complaint filed in the Superior Court of New Jersey, Law Division, Cumberland County, on September 8, 2021. (Pa000001). The Complaint alleged negligence and trespass with respect to Defendant-Respondent-Cross-Appellant Fralinger Engineering, P.A. ("Fralinger"). (Pa000007-8; Pa000011-12).[1] Fralinger answered the Complaint on October 28, 2021. (Pa000014).[2]

On April 1, 2022, Fralinger filed its first Motion for Summary Judgment seeking dismissal of Plaintiffs' claims against it for failure to serve an Affidavit of Merit pursuant to N.J.S.A. § 2A:53A-27. (Pa000043). Plaintiffs opposed this Motion on April 19, 2022. (Pa000073). The Motion was granted in part on May 27, 2022, with the trial court dismissing Plaintiffs' professional negligence claims against Fralinger. (Pa000084). Plaintiffs were allowed to pursue their "common knowledge" negligence and trespass claims against Fralinger. (Id.; 1T at 25:1-10).

[1] All citations prefaced by "Pa" are citations to the Plaintiff-Appellants' Appendix, previously filed with this Court.

[2] Reference to any pleadings or filings by co-defendants of Fralinger have been excluded from this briefing as irrelevant.

On June 23, 2022, Fralinger served Plaintiffs with Responses to Interrogatories. (Pa000102). On June 29, 2022, Fralinger served Plaintiffs with a safe harbor letter pursuant to Rule 1:4-8, referencing exhibits and directing Plaintiffs to dismiss Fralinger from the litigation within twenty-eight days of service of the letter. (Pa000121).

Plaintiffs never responded to the safe harbor letter and never deposed anyone from Fralinger to explore their theories of liability. On July 28, 2023, after the close of discovery, Fralinger filed a second Motion for Summary Judgment. (Pa000086). Plaintiffs opposed this Motion on August 15, 2023 and improperly argued, among other things, that Fralinger was "per se" negligent for not obtaining Plaintiffs' consent prior to preparing the preliminary site plan for the redevelopment project. (Pa000195).[3] Fralinger filed a Reply Brief in further support of the Motion on August 21, 2023. (Pa000383). The second Motion for Summary Judgment was granted in Fralinger's favor on August 25, 2023, dismissing Plaintiffs' remaining claims against Fralinger. (Pa000426). Plaintiffs never sought reconsideration of this decision, and they are not appealing Fralinger's dismissal.

[3] Plaintiffs' appeal brief at page 38 repeats this erroneous "lack of consent" position twice on the same page, which exemplifies the baseless nature of the claims against Fralinger.

On September 13, 2023, Fralinger timely filed a Motion for Frivolous Litigation Sanctions against Plaintiffs, citing to the safe harbor letter dated June 29, 2022 and Plaintiffs' bad faith and undue delay in refusing to dismiss Fralinger. (Pa000428). Plaintiffs filed Opposition to this Motion on September 28, 2023. (Pa000457). On October 20, 2023, the trial court, in an oral decision, articulated its many reasons for granting the Motion for Sanctions, and in an email dated that same day directed counsel for Fralinger to submit a Proposed Order and certification of legal fees. (2T; P000484).

Fralinger complied and submitted the certification of fees on November 6, 2023, requesting $89,072.19. (Pa000478). On November 14, 2023, Plaintiffs filed Opposition that did not dispute the hourly rate charged but disputed the reasonableness of the time expended and billed. (Pa000557). In a written order dated December 5, 2023, the trial court reduced Fralinger's fee award to $30,000. (Pa000637).

After further litigation against Fralinger's co-defendants, Plaintiffs filed for Reconsideration of the Award of Sanctions on March 26, 2024. (Pa000880). Fralinger cross-moved for Reconsideration on April 18, 2024, seeking the full amount of fees requested. (Pa000892). Plaintiffs filed a Reply to this Cross-Motion on April 22, 2024. (Pa000920). During a May 7, 2024 conference, the trial court denied both Plaintiffs' Motion for Reconsideration as well as

Fralinger's Cross-Motion. (4T). An Order to this extent was entered on May 10, 2024. Plaintiffs' appeal and Fralinger's cross-appeal follow. (Pa000928; Da01).[4]

STATEMENT OF FACTS

1. The Redevelopment Project

Fralinger is a civil engineering firm. On February 24, 2016, it was retained by co-defendant Cumberland County Improvement Authority ("CCIA") to prepare a preliminary site plan for a redevelopment project taking place in the City of Bridgeton, New Jersey. (Pa000389). This preliminary site plan was prepared in 2017. (Pa000378; Pa000390).

As part of this project, CCIA also retained Marathon Engineering and Environmental Services, Inc. ("Marathon"), a remediation contractor, to address environmental contamination at the redevelopment project; Enterprise Network Resolutions Contracting, LLC ("ENRC"), an excavation contractor; and Fabbri Builders, a general construction contractor. (Pa000001-000013). In March 2020, the redevelopment project was sold to defendant Complete Care Health Network ("Complete Care"), though CCIA remained responsible for overseeing

[4] "Da" is in reference to Fralinger's Appendix, filed in conjunction with this brief.

remediation efforts. (Pa000622). Plaintiffs' claims in this matter arise from environmental remediation performed on the Property. (Pa000001-000013).

At CCIA's direction, Fralinger's preliminary site plan contemplated that Plaintiffs' Property, located at 39 North Laurel Street in Bridgeton, New Jersey, would be part of the redevelopment project and that improvements to the Property would be made at no cost to Plaintiffs. (Pa000390 at ¶ 3). Specifically, the preliminary site plan contemplated the construction of new, paved parking spaces and a location for dumpsters on Plaintiffs' Property. (Id.; Pa000199 at ¶ 10).[5] The preliminary site plan by Fralinger **did not** call for "any remediation efforts, soil excavation, storage of construction materials, or installation of security fencing to be performed on Plaintiffs' [P]roperty." (Id. at ¶ 7).

(a) Marathon's Remediation Efforts

Between 2017 and 2020, Marathon performed certain environmental remediation projects on Plaintiffs' Property. First, on or about February 20 and 21, 2017, Marathon personnel took soil borings from Plaintiffs' Property. (Pa000219 at 47:3 to 49:18; Pa000786). Around March 15, 2017, Marathon installed temporary well points on the Property. (Pa000222 at 59:1 to 59:6; Pa000788). On May 18, 2017, Marathon took exterior soil vapor samples. (Pa000790). Plaintiffs allege that Marathon did not obtain consent to perform

[5] Plaintiffs' existing parking lot and area for dumpsters was not paved.

this remediation. During his deposition, Salim Joarder, the corporate representative of 608-610 Mullica Hill Road, LLC and owner of the Domino's franchise located on the Property, revealed that he did not want the remediation to take place on his Property because he had reservations about Marathon performing the remediation work free of charge:

> Why would somebody offer me free something? I've been doing business for 25 years. That is strange…Somebody is going to do without their own, you know, benefit. Why would they want to do something, offer it to me for free? I never heard of that before…Never free anything, that is all I learned from my mother, never anything free."

(Pa000325 at 48:11-22).

Despite these apparent reservations, Joarder consented to Marathon performing other remediation services on the Property. In August 2017, he consented to Marathon performing indoor air sampling of the Property. (Pa000606). Then, in March 2018, he consented to the installation of a vapor intrusion mitigation system at the Property. (Pa000619-21). Plaintiffs further claimed not to be aware of the preliminary site plan's inclusion of the Property; however, Gerald Velazquez III, a representative of CCIA who was consistently in contact with Joarder throughout the redevelopment project, claimed to have shown Joarder a copy of the preliminary site plan and received his initial approval of same. (Pa000296 at 111:19 to 112:8). Further, the plans were a

matter of public record and were available for review following a public notification. (Pa000275 at 28:4 to 29:10).

At his deposition, a Marathon representative stated that he believed the Property to be part of the redevelopment project based on the preliminary site plan Fralinger had prepared at CCIA's direction. (Pa000237 at 17:4-11). As noted above, however, the preliminary site plan prepared by Fralinger did not call for any remediation efforts, nor did anyone from Fralinger direct anyone from Marathon to perform remediation activities in accordance with the site plan. (Pa000390). In fact, the Marathon representative testified that he never had any conversations with anyone at Fralinger during his involvement with the project. (Pa000237 at 14:11-14). As conceded by the Marathon representative, CCIA, **not Fralinger**, was the entity "responsible for obtaining permission…to enter the [P]roperty." (Pa000215 at 32:9-12).

(b) Revisions to the Final Site Plan

On February 2, 2021, a dispute arose between counsel for Complete Care and Plaintiffs' counsel with respect to Plaintiffs' property lines, specifically, whether the Property encompassed a vacated roadway called Church Lane that ran along the southern edge of the Property. (Pa000439). Counsel for Complete Care was then made aware of an ordinance that essentially made a portion of Church Lane part of Plaintiffs' Property. (Pa000438). In response to this, as

well as Plaintiffs' request that the Property not be included as part of the redevelopment project, on February 3, 2021, counsel for Plaintiffs (the same counsel currently representing Plaintiffs in this matter) was advised that Fralinger's preliminary site plan would be revised so the proposed construction improvements (the paved parking spaces) would not occur on Plaintiffs' Property. (Pa000440). Again, the preliminary and revised plans did not call for (and had nothing to do with) any ongoing remediation activities by co-defendant Marathon on Plaintiffs' Property, and the revised plan in 2021 did not call for any future remediation or construction activities on the Property. (Pa000390 at ¶ 7).

Fralinger did what was asked and prepared a revised site plan to address the objections by Plaintiffs and their counsel. (Pa000435-36). On February 9, 2021, Plaintiffs' counsel was informed, via email, that the site plan had been revised to remove all proposed construction improvements to Plaintiffs' Property – there would be no paved parking spaces on the Property, and half of Church Lane would be annexed to the Property. (Id.). A copy of the new site plan was attached to this email. (Id.). In this same email, Plaintiffs were warned that, if the Property was not included in the redevelopment project, the vacant area being annexed to the Property would be "useless, unsightly, unimproved and a detriment to Domino's business." (Pa000435).

Plaintiffs' Property was now excluded from redevelopment construction activities. The revised plans, like the preliminary plans, did not address the ongoing remediation activities being performed by Marathon. Fralinger's revised plans were independently reviewed and approved by the city planner and an independent engineer. (Pa000123-28).

2. Plaintiffs' Complaint, Exchange of Discovery, and Fralinger's Motions for Summary Judgment

Plaintiffs filed suit on September 8, 2021 – seven months after Fralinger had already revised the final site plan per Plaintiffs' objections. (Pa000001). Plaintiffs never retained a professional engineer to review Fralinger's plans and affirm that there was a reasonable probability that the care, skill, or knowledge exhibited in this matter fell outside acceptable professional standards. Plaintiffs' Complaint incorrectly accused Fralinger of negligence for preparing not only the site plans, but also the soil erosion and sedimentation control plans, and additionally designing soil erosion and sedimentation control fencing – despite Fralinger's site plans lacking any reference to soil erosion or sedimentation control. (Pa00007).[6] Plaintiffs further accused Fralinger of trespass. (Pa000011-12).

[6] Deposition testimony later revealed that ENRC was responsible for the fencing plan to remediate soil erosion and sedimentation. (Pa000295 at 108:7-22).

Plaintiffs responded to Fralinger's First Set of Interrogatories on March 29, 2022. (Pa000053). In the Responses, Plaintiffs conceded that, despite signing a complaint and filing a cause of action for trespass against Fralinger, ***they "[did] not know whether Fralinger physically entered upon the Property without the Plaintiff owner's and/or Plaintiff tenant's authorization or that Fralinger's actions resulted in others doing so***." (Pa000060) (emphasis added). Also in these responses, Plaintiffs acknowledged that Fralinger's alleged negligence was limited to the design of, and the Property's incorporation into, the preliminary site plan. (Pa000066).

Fralinger filed its first Motion for Summary Judgment seeking dismissal of the Complaint on April 1, 2022. (Pa000043). The basis for filing this motion was that: (1) Plaintiffs had not served an Affidavit of Merit with respect to Fralinger's engineering services and site plans, as required under N.J.S.A. § 2A:53A-27, et seq.; and (2) Plaintiffs conceded that they were unaware of whether Fralinger actually trespassed onto the Property. (Pa000046-47). Fralinger further argued that the Affidavit of Merit statute was designed to weed out frivolous claims and applied to claims of "professional malpractice **or** negligence." Id. (emphasis added).

On May 27, 2022, the trial court, recognizing that the case was early in discovery, granted the motion in part, dismissing with prejudice "any claims

alleging professional negligence." (Pa000084-85). In its decision, the trial court drew a distinction between any "common knowledge" claims Plaintiffs could maintain against Fralinger and any negligence claims that would have required an Affidavit of Merit. Specifically, the trial judge defined Plaintiffs' potentially viable "common knowledge" claims as "Fralinger direct[ing] [someone] to place construction materials on plaintiff's property, obstructing their use of the property." (Pa000471-72 at 28:24 to 29:1). Fralinger respectfully objected to this common knowledge claim because it would require a lay person to interpret engineering plans and speculate on the duty of care of a design professional. (Pa000468 at 21:3 to 22:19).

On June 23, 2022, Fralinger served Plaintiffs with Responses to Interrogatories, in which Fralinger again affirmed that it performed **no remediation work** in connection with the redevelopment project, and attached a copy of the February 9, 2021 email advising Plaintiffs and their counsel that the preliminary site plan was revised in accordance with their wishes. (Pa000106; Pa000109). Again, the revised plan did not call for any future construction activities on Plaintiffs' Property.

Specifically, in response to Interrogatory No. 23, Fralinger explained that the preliminary site plan (requested by CCIA) contemplated incorporating the entirety of Church Lane into the redevelopment project. (Pa000115). However,

after Plaintiffs objected to their Property being included in the project and requested that they retain their portion of Church Lane pursuant to the ordinance, Fralinger was instructed to revise the site plan to only incorporate that portion of Church Lane that was not being annexed to Plaintiffs' Property. (Id.). As a consequence of these revisions, a portion of a sidewalk that would have traversed Plaintiffs' Property was removed, and the remaining portion of Church Lane that was not annexed to Plaintiffs' Property was rendered useless, as it was no longer wide enough to allow for safe vehicle traffic. (Id.). The revised site plan was reviewed and approved by the city planner, Barbara Fegley, as well as an independent engineer, Joe Maffei of EDA Associates. (Id.; Pa000123-28).

On June 29, 2022, Fralinger served Plaintiffs with a safe harbor letter pursuant to Rule 1:4-8 and N.J.S.A. § 2A:15-29.1. (Pa000121). As explained in the letter, the February 2021 email showed that the final site plan was drafted in accordance with Plaintiffs' wishes **before** any of the proposed improvements to the Property could take place, and Plaintiffs were warned of any issues that may arise from their decision to retain their half of Church Lane. (Id.).

Additionally, in the safe harbor letter, Fralinger warned Plaintiffs that there was "absolutely no support for any 'common knowledge' negligence claim[s] against Fralinger," as "[a] jury is not capable of interpreting professional plans or understanding an engineer's duty of care in the context of

this project without expert testimony." (Id.). This was especially true in light of the fact that both the city planner and an independent engineer approved the plans. (Id.).

Finally, Plaintiffs were advised that any trespass was attributable to co-defendants, per interrogatory responses provided by the other parties to the litigation. (Id.). Because of this, Plaintiffs could not sustain any sort of common knowledge negligence or trespass claims against Fralinger, and they were advised to release Fralinger from the litigation within twenty-eight days of service of the letter or risk sanctions under New Jersey rules and statutes governing frivolous litigation. (Pa000122).

Despite receiving this letter, Plaintiffs and their counsel pursued discovery against the other parties and kept Fralinger in the case for a year, causing it to accumulate additional defense costs. During this time, Plaintiffs never deposed any Fralinger representatives, nor did they request any further discovery from Fralinger. Plaintiffs initially noticed Fralinger's deposition on September 28, 2022; however, after Fralinger incurred costs to prepare a representative for the deposition, it was adjourned the day prior by Plaintiffs' counsel and never rescheduled. (Pa000558). In other words, Plaintiffs did ***nothing*** to develop their purported common knowledge negligence or trespass claims against Fralinger, despite receipt of the detailed frivolous lawsuit letter.

After Plaintiffs allowed their claims against Fralinger to languish, on July 28, 2023, Fralinger filed a second Motion for Summary Judgment. (Pa000086). Plaintiffs opposed the motion by arguing, for the first time in almost two years of litigation, that Fralinger was "per se" negligent because it needed Plaintiffs' consent before preparing the preliminary site plan. (Pa000198). Plaintiffs continue to make this misplaced argument at page 38 of their appeal brief. Not only was this need-for-consent argument factually and legally wrong, but it would require an expert to comment on an engineer's duty of care. However, the professional negligence claims were already dismissed over one year earlier, along with any claims that would require expert standard of care testimony. (Pa000084-85).

Plaintiffs also tried to argue that their trespass claim should be allowed to stand because, according to testimony from Marathon's representative (the remediation contractor), he believed the Property to be part of the redevelopment project because he was provided a copy of Fralinger's preliminary site plan by CCIA. (Pa000199). This misplaced reliance argument was not persuasive to the court.[7] Further, had Plaintiffs and their counsel complied with the Affidavit of

[7] As the trial court noted in its decision denying Plaintiffs' Motion for Reconsideration, "[j]ust because [Marathon] relied upon that site plan and wrongly assumed that this project was – or that [Plaintiffs'] property was involved in a project, that's got nothing to do with Fralinger. He didn't violate

Merit statute, they could have consulted with an engineer who would have advised them that Fralinger's plans did not call for remediation work. (Pa000389).

As for Plaintiffs' meritless "per se" negligence claim, Fralinger responded by presenting an affidavit from Stephen Nardelli, the Vice President and Director of Engineering for Fralinger. (Pa000389). Nardelli is a licensed professional engineer and a certified municipal engineer. (Id. at ¶ 1). Nardelli confirmed, in his affidavit, that "[t]he preparation of a preliminary site plan [does] not require Fralinger to obtain the consent of Plaintiffs," and that neither the preliminary site plan nor the final site plan called "for any remediation efforts, soil excavation, storage of construction materials, or installation of security fencing to be performed on Plaintiffs' property," rebutting Plaintiffs' deficient reliance argument. (Pa000390 at ¶¶ 6, 7). Nardelli's affidavit further discussed the general practice engineering firms follow when drafting site plans for projects such as this one:

> For large redevelopment projects within the scope and scale of the Bridgeton project, it is fairly common for the client [CCIA in this case] to request modifications to site plans before these plans are finalized. It is also common to include other property in preliminary site plans. The consent of the private property owners is not

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anybody's duty at that point in time. The site plan was out there and if somebody else wrongly relied upon it, that's not Fralinger's fault." (4T at 31:11-17).

> required and would not be the responsibility of the civil engineer preparing the preliminary site plans.

(Pa000391 at ¶ 11). An engineering expert, had Plaintiffs retained one, would have explained that engineers do not need to obtain the consent of adjacent property owners when they are retained to prepare preliminary plans. (Pa000390-91 at ¶¶ 6, 11). The Court granted Fralinger's Motion for Summary Judgment on August 25, 2023. (Pa000426).

3. Fralinger's Motion for and Award of Sanctions

On September 13, 2023, Fralinger moved for sanctions against Plaintiffs, citing Plaintiffs' counsel's violation of Rule 1:4-8(a). (Pa000428). As Fralinger previously noted to Plaintiffs in its safe harbor letter, "by signing the Complaint, [Plaintiffs' counsel] certified the allegations contained in the Complaint, including the allegations that Fralinger was negligent and/or trespassed on Plaintiffs' [P]roperty." (Pa000122). However, the 2021 email exchange between Plaintiffs' counsel and counsel for Complete Care clearly showed that Plaintiffs were aware of the redevelopment project and had communications with the developer and contractors working on the project. Plaintiffs' appeal brief at page 7 also states that "[t]here is no dispute that CCIA was responsible for the environmental remediation in connection with the Project." Moreover, Plaintiffs (through counsel) objected to Fralinger's preliminary site plan and were aware that the plan was revised in response to their objections. Plaintiffs

and their counsel were also warned of any possible detriments to the Property that could arise should they decide to exclude the Property from the redevelopment project. (Pa000121). Nevertheless, Plaintiffs and their counsel sued Fralinger without any basis in law or fact – ignored the requirements of the Affidavit of Merit statute and the safe harbor letter citing the frivolous lawsuit statute and rule.

Plaintiffs elected to pursue common knowledge negligence and trespass claims "at their own peril," and they refused to withdraw their trespass claims against Fralinger after co-defendants' Responses to Interrogatories clearly established that co-defendants were responsible for the alleged instances of trespass, such as the environmental remediation and the erection of fencing and signage on and around the Property. (Id.). Plaintiffs then kept Fralinger in the case for a year, during which time they did not seek any discovery to support their common knowledge negligence or trespass claims, even after being advised that these claims were non-viable and made in bad faith.

Plaintiffs tried to oppose the Motion for Sanctions on the grounds that, in its decision denying Fralinger's first Motion for Summary Judgment, the trial court held that Plaintiffs could pursue a viable common knowledge negligence claim against Fralinger without the need for expert testimony. (Pa000460). Plaintiffs also claimed that they made a strategic choice in deciding not to

depose any Fralinger representatives. (Id.). The trial court was unconvinced, and granted the motion, directing counsel for Fralinger to provide a Proposed Order and certification of fees. (Pa000484).

In its oral decision, the trail court confirmed that Plaintiffs had been misrepresenting its earlier decision on Fralinger's first Motion for Summary Judgment:

> I did not say that Plaintiff[s] could go forward on any type of professional negligence claims that required common knowledge or something like that. None of those claims really existed anyway. Really what I was talking about, and I think I made clear at the time, was any trespass complaints or any other related type of complaints wherein Fralinger might have directed people…to enter on to Plaintiff[s'] property, things like that.

(2T at 6:5-14). The trial court took further issue with the fact that, after receiving the safe harbor letter from Fralinger, Plaintiffs never conducted any discovery "or somehow try to develop their case" against Fralinger. (Id. at 7:15-18). The trial court further noted that, according to the emails submitted with the safe harbor letter, Plaintiffs participated in discussions with defendants that ultimately led to Fralinger revising the site plan before any construction could take place on the Property. (Id. at 8:17-25).

On November 6, 2023, counsel for Fralinger submitted a certification of fees in accordance with the trial court's direction. (Pa000478). Attached to this

certification were invoices showing that Fralinger had incurred $89,072.19 in attorneys' fees since June 29, 2022 (when Plaintiffs were first served the safe harbor letter). (Pa000482; Pa000490-556).

In the certification, Joseph Tomaino, Esq., lead counsel Fralinger in this matter, confirmed that he personally reviewed each invoice and deducted "any time and expense [believed] to be inefficient or excessive." (Pa000479 at ¶ 4). After this, the Hanover Insurance Group, Fralinger's insurance company who pays the invoices, performed a second review of the invoices and made any further deductions deemed necessary. (Id. at ¶ 5). This double-review process was brought to the trial court's attention so it could "consider any reductions [as] part of the overall reasonableness of the fee request." (Id. at ¶ 6). The certification also pointed out that Fralinger personally spent $25,000 of its own money, in the form of a deductible, towards the defense of this frivolous claim. (Id. at ¶ 24).

Plaintiffs opposed this amount on the basis that it was unreasonable. (Pa000637). In its December 5, 2023 written decision granting only partial fees, the trial court essentially adopted Plaintiffs' opposition arguments without conducting a thorough analysis of the invoices attached to Fralinger's certification. (Id.). Specifically, the trial court adopted Plaintiffs' Opposition, and without a review of the detailed entries, took issue with: (1) the 82.4 hours

billed for the second Motion for Summary Judgment; (2) the 74.6 hours billed for preparing and attending 14 hours-worth of depositions; and (3) the 6.3 hours billed for litigation reports to the insurance carrier. (Pa000638). The trial court ultimately awarded only $30,000 in sanctions, finding that the amount of time Fralinger's counsel spent on certain matters was unreasonable. (Id.). Fralinger contends that the trial court did not conduct a proper lodestar analysis of the billing entries in ruling on the $30,000 amount.

4. The Motions for Reconsideration

Plaintiffs filed a Motion for Reconsideration of the trial court's decision to grant sanctions to Fralinger on March 26, 2024. (Pa000880).[8] In their memorandum of law in support of reconsideration, Plaintiffs argued that Fralinger was not entitled to sanctions because their failure to get an expert on the duty of care did not amount to frivolous litigation. Second, Plaintiffs argued that their trespass claim, though ultimately dismissed, was reasonable: Fralinger, in its Responses to Interrogatories, could not recall whether any of its employees

[8] In this same motion, Plaintiffs also sought reconsideration of the trial court's decision dated March 6, 2024 dismissing the Complaint as to co-defendant CCIA. (Pa000869). Fralinger takes no position with respect to that part of Plaintiffs' appeal seeking reversal of this dismissal, but this appeal contains facts which further detail Plaintiffs' pre-suit knowledge of problems with remediation activities at its Property that have nothing to do with Fralinger's preliminary plan. This underscores the frivolous nature of the allegations against Fralinger.

"[were] present on and/or in the area of the" Property at the time it was drafting the preliminary site plan. (Pa000108). Third, Plaintiffs argued that the trial court's finding that Fralinger had already changed the site plan prior to the Complaint being filed was not pertinent to a finding that Plaintiffs had acted frivolously – by the time the site plan had been revised, the trespass and environmental remediation by the other parties had already occurred.[9]

In its own Cross-Motion for Reconsideration, Fralinger argued that it was entitled to the full amount of attorneys' fees requested. (Pa000892). The basis for Fralinger's argument in favor of reconsideration was that the trial court, in limiting sanctions to $30,000, failed to conduct a proper lodestar analysis or consider all factors laid out in Rule of Professional Conduct 1.5(a).

At oral argument, Plaintiffs' counsel did not properly address any arguments as to why Fralinger was not entitled to sanctions, instead speaking at length about issues that, as the trial court pointed out, were never previously briefed. (4T at 29:5-14). The trial court then continued:

> I did not permit you to go forward on negligence claims that – that would require an affidavit of merit. And what you're talking about today is that Fralinger prepared a site plan for somebody else…that your client

[9] This argument ignores the fact the Fralinger's preliminary plan for future paved parking spaces did not call for any remediation activities on Plaintiffs' Property. Further, Plaintiffs sued co-defendant Marathon regarding the remediation work, and they could have explored this reliance argument against Marathon.

> ultimately rejected and then [Fralinger] re-did a site plan to exclude your client's property and somehow that violated some duty of care they owed you…
>
> …[T]he only thing I let you go forward on were trespass claims that your client said they could never establish one way or the other if Fralinger ever went on their property. You never even took any depositions of Fralinger's individuals to try to establish that they went on your client's property.

(Id. at 30:8 to 31:4). The trial court again correctly acknowledged that Fralinger's site plan was completely unrelated to the remediation efforts performed by Marathon and the other defendants. (Id. at 32:18-24). The trial court then denied all Motions for Reconsideration – including Fralinger's, without giving counsel for Fralinger an opportunity to address Fralinger's reconsideration position at oral argument. Plaintiffs' appeal and Fralinger's cross-appeal follow. (Pa000928; Da01).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFFS' CLAIMS AGAINST FRALINGER WERE FRIVOLOUS. (2T Hearing, 10/20/2023) (Pa000637) (Pa000926).

When reviewing a trial court's decision to award sanctions pursuant to Rule 1:4-8, this Court applies an abuse of discretion standard. United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 390 (App. Div. 2011); Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005). An "abuse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error of judgment." Id. (internal citations omitted).

A party who is subjected to frivolous litigation may be awarded attorneys' fees and costs pursuant to N.J.S.A. § 2A:15-59.1. This statute is enforced through Rule 1:4-8. Pursuant to Rule 1:4-8(a), by signing a pleading, an attorney certifies that, to the best of his knowledge, information, and belief, formed after an inquiry under reasonable circumstances, "**the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation**;" that "the claims…therein are warranted by existing law or the establishment of new law;" and that "the factual allegations have evidentiary support or, as to specifically identified allegations,

they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support." (emphasis added).

If an attorney violates Rule 1:4-8(a), opposing counsel may seek sanctions. Pursuant to Rule 1:4-8(b)(1), prior to moving for sanctions, the applicant's notice and demand, attached to its supporting certification, must include the following:

> (i) State that the paper is believed to violate the provisions of this rule,
> (ii) Set forth the basis for the belief with specificity,
> (iii) Include a demand that the paper be withdrawn, and
> (iv) Give notice…that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand.

Prior to moving for sanctions, the applicant must serve offending counsel with a safe harbor letter pursuant to Rule 1:5-2, advising counsel of the frivolous nature of the offending filing. An assertion is deemed "frivolous" for purposes of imposing sanctions when "no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable." First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007) (quoting Fagas v. Scott, 251 N.J. Super. 169, 190 (Law Div. 1991)). "Where a party has [a] reasonable and good faith belief in the merit of the cause,

attorney's fees will not be awarded." Id. (citing DeBrango v. Summit Bancorp., 328 N.J. Super. 219, 227 (App. Div. 2000); K.D. v. Bozarth, 313 N.J. Super. 561, 574-75 (App. Div.), certif. denied, 156 N.J. 425 (1998)). When considering whether to award sanctions under Rule 1:4-8, the court must give a "restrictive interpretation" to the term "frivolous" in order to avoid limiting access to the court system. Id. at 433 (quoting McKeown-Brand v. Trump Castle Hotel and Casino, 132 N.J. 546, 561-62 (1993)).

"[C]ontinued prosecution of a claim or defense may, based on facts coming to be known to the party after the filing of the initial pleading, be sanctionable as baseless or frivolous even if the initial assertion of the claim or defense was not." Iannone v. McHale, 245 N.J. Super. 17, 31 (App. Div. 1990) (applying N.J.S.A. § 2A:15-59.1). The "requisite bad faith or knowledge of lack of well-groundedness [sic] may arise during the conduct of the litigation." Id. (citing Chernin v. Mardan Corp., 244 N.J. Super. 379 (Ch. Div. 1990)). Sanctions will also be awarded where a complaint is "commenced" or "continued in bad faith, solely for the purpose of harassment, delay, or malicious injury." Id. at 25 (citing N.J.S.A. § 2A:15-59.1(b)(1)). Sanctions are warranted "only when the pleading as a whole is frivolous or of a harassing nature." Id. at 32. That some of the allegations made at the beginning of litigation later proved

to be unfounded does not render frivolous a complaint that also contains some non-frivolous claims. Id.

This Court has upheld trial courts' awards of attorneys' fees in cases where the frivolous nature of the litigation was not as egregious as it is here. For example, in Borough of Englewood Cliffs v. Trautner, 478 N.J. Super. 426, 432 (App. Div. 2024), a borough sued its former counsel for professional malpractice arising out of the counsel's representation of the borough in housing litigation. The matter was ultimately deemed frivolous, however, as it was clearly a politically-motivated suit brought by the borough council. See also Gooch v. Choice Entertaining Corp., 355 N.J. Super. 14 (App. Div. 2002) (third-party litigation alleging that statements made in the course of first-party litigation were defamatory was frivolous); DeBrango, 328 N.J. Super. at 219 (lawsuit brought by couple against bank for funds allegedly withdrawn by their employee-son-in-law was frivolous, based upon evidence that the son-in-law did not work at the bank when the fraudulent conduct occurred).

1. Plaintiffs' Negligence Claims Were Frivolous

Plaintiffs and their counsel violated the frivolous lawsuit statute and rule. They had pre-suit knowledge that Fralinger complied with Plaintiffs' request to have the Property excluded from the redevelopment project, with Fralinger revising the site plans to address this request. Despite this knowledge, Plaintiffs

and their counsel sued Fralinger and ignored their obligation to comply with New Jersey's Affidavit of Merit statute, which was enacted to weed out frivolous claims. Meehan v. Antonellis, 226 N.J. 216, 228 (2016). They made a decision not to consult with an engineer to determine an engineer's duty of care when preparing preliminary plans for a redevelopment project, or how to interpret these plans.

After this, Plaintiffs received Fralinger's Interrogatory Responses and safe harbor letter explaining why their claims were frivolous. (Pa000102-18; Pa000121-22). In response, Plaintiffs conducted ***no*** discovery from Fralinger to advance their common knowledge negligence and trespass claims. Litigation then continued for another year.[10]

Even after needlessly keeping Fralinger in this case for a whole year, Plaintiffs opposed the second Motion for Summary Judgment by arguing, for the

[10] After the professional liability claims were dismissed, Plaintiffs and their counsel apparently misinterpreted the trial judge's statements from the hearing on May 27, 2022. The trial judge, denying Fralinger's first Motion for Summary Judgment in part, clearly provided that only Plaintiffs' common knowledge claims, involving the issue of whether "Fralinger directed [someone] to place construction materials on plaintiff's property, obstructing their use of the property" could move forward. (Pa000471-72). These claims, which were essentially trespass claims, **were the only claims that survived summary judgment**. There were no "common knowledge" negligence claims that Plaintiffs could have asserted against Fralinger, as was made abundantly clear to them throughout this litigation. If Plaintiffs wanted to assert any negligence claims against Fralinger arising from the preliminary site plan, they needed an expert on the duty of care.

first time, that Fralinger was "per se" negligent for preparing preliminary site plans without obtaining Plaintiffs' consent. (Pa000201; Plaintiffs-Appellants' Brief at p. 38).

This belated argument was made in bad faith since it is not "common knowledge" that a professional engineer needs to obtain consent from a property owner before preparing a preliminary site plan. In fact, consent is **not** required. (Pa000390-91 at ¶¶ 6, 11). To argue otherwise would require an expert, and any professional liability claims were already dismissed for Plaintiffs' failure to comply with the Affidavit of Merit Statute. The "per se" negligence argument, first espoused by Plaintiffs and their counsel almost two years after commencing this lawsuit, is not within the ken of the average jury.

Fralinger engineer Steve Nardelli addressed the "per se" negligence claim in his affidavit. An engineer does not have a duty of care to notify adjacent property owners of preliminary plans. (Pa000390-91 at ¶¶6, 11).[11] In addition, the preliminary and revised site plans in question did not call for any remediation activities on the Property – activities which make up the entirety of Plaintiffs' alleged damages. (Pa000390 at ¶¶ 5, 7).

[11] If Plaintiffs' "per se" negligence theory was somehow allowed, any engineer who prepares a site plan for a redevelopment project in the State of New Jersey would not be afforded the protection of the Affidavit of Merit statute.

Fralinger's preparation of a preliminary site plan in 2017 at the request of the CCIA did not breach any sort of common knowledge duty owed to Plaintiffs or constitute a trespass onto the Property. The remediation activities performed by Marathon, which do relate to the alleged trespass and damages, had nothing to do with Fralinger's preliminary or revised site plans, which, again, **did not call for any remediation activities**. (Pa000390 at ¶¶ 5, 7).

Plaintiffs attempt to argue that expert testimony is not necessary where "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached without the aid of an expert's opinion." Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996). The case law Plaintiffs rely on for this proposition, however, is inapposite. For example, Estate of Chin v. Saint Barnabas Med. Ctr. was a case in which a patient undergoing a hysterectomy passed away after nursing staff failed to properly connect a hysteroscope, causing nitrogen to leak into the patient's abdomen. 160 N.J. 454, 467-68 (1999). A nursing staff's failure to properly connect medical equipment is a very different situation from an engineer's draft of a preliminary site plan – any layperson would know that failure to properly connect a patient's medical equipment runs the risk of causing harm to the patient. The hospital-defendant in Estate of Chin even ***conceded*** that it was a matter of "common

knowledge" that an incorrect hook-up constituted professional negligence. Id. at 470.

The emails attached to Fralinger's safe harbor letter are evidence that, not only did the preliminary site plan never come to fruition (with respect to installing a paved parking area around Plaintiffs' Property), but it was modified in accordance with Plaintiffs' wishes months before the Complaint was filed. (Pa000121). Plaintiffs' counsel involved in this litigation and appeal participated in these pre-suit emails. (Id.). Therefore, Plaintiffs and their counsel were aware of this information prior to initiating this frivolous lawsuit against Fralinger.

2. Plaintiffs' Trespass Claim Against Fralinger Was Frivolous

The other allegation against Fralinger was the alleged trespass claim. In an attempt to justify their pursuit of this unsupported claim, Plaintiffs reference two pieces of information. First is Fralinger's Response to Interrogatory No. 12 asking it to identify all physical entries onto Plaintiffs' Property. (Pa000108). Fralinger responded that it did not recall any physical entry onto Plaintiffs' Property related to the redevelopment project, but it was "possible" that an employee was "on and/or in the area" of the Property to conduct survey work. (Id.). The possibility of conducting survey work on or in the area of Plaintiffs'

Property is not a trespass, and it certainly did not cause Plaintiffs to sustain any damages.

By contrast, Plaintiffs' Responses to Interrogatories stated that they did "not know whether Fralinger physically entered upon the Property without" Plaintiffs' consent. (Pa000060). After the exchange of this written discovery between the parties, Plaintiffs kept Fralinger in the case for over one ***year*** after being served the safe harbor letter. Plaintiffs and their counsel claim that their failure to seek discovery from Fralinger was a "strategic decision." If so, it was a blatant failure to prosecute their own claims after being put on notice of the frivolous nature of their allegations, forcing Fralinger to accrue unnecessary litigation expenses, a situation that constitutes undue delay and harassment, and therefore bad faith litigation. See Iannone, 245 N.J. Super. at 25; R. 1:4-8(a)(1).

The second piece of information Plaintiffs cite to repeatedly in support of their trespass claim against Fralinger is the testimony from the remediation contractor, Marathon. Marathon's representative testified that he believed Plaintiffs' Property was part of the redevelopment project based upon his being provided with the preliminary site plan drafted by Fralinger. (Pa000237).

This misplaced reliance argument is flawed for many reasons and should be rejected by this Court. First, Plaintiffs fail to acknowledge that there is a difference between the environmental remediation work performed by Marathon

and other contractors at the request of CCIA (which Plaintiffs claim caused damage to their Property) and the preliminary site plan prepared by Fralinger, which called for paved parking spaces and **did not** call for any remediation activities. (Pa000005-06; Pa000390). Plaintiffs' alleged claims regarding soil samples and temporary well points have nothing to do with Fralinger. The preliminary site plan regarding paved parking spaces was objected to by Plaintiffs and their attorney in 2021, and Fralinger consequently revised the plan so no parking improvements would be made to Plaintiffs' Property. (Id.).

Plaintiffs' reliance argument is further weakened by the testimony of the Marathon representative, who stated that he did not have any conversations with anyone from Fralinger at any time during his involvement with the project. (Pa000237). Further, for Plaintiffs' far-fetched reliance theory to constitute anything more than unfounded speculation against Fralinger, Plaintiffs would need an engineering expert, which they elected not to retain. This expert would then have to articulate how an engineer, who is asked to prepare a preliminary site plan relating to the proposed future installation of paved parking spaces, is somehow at fault for remediation activities performed by remediation contractors. Again, the preliminary site plan at issue did not call for any remediation activities, and Fralinger never had any contact with the remediation contractor. (Pa000390; Pa000237).

Plaintiffs sued Marathon and were free to conduct discovery to confirm that Fralinger's preliminary site plan regarding future paved parking spaces had nothing to do with Marathon's remediation activities. Further, the Marathon representative testified that CCIA (not Fralinger) was responsible for obtaining Plaintiffs' permission to enter the Property. (Pa000215 at 32:9-12).

The lower court properly rejected Plaintiffs' argument in the context of Marathon's remediation activities as well. "Just because [Marathon] relied upon that site plan and wrongly assumed that this project was – or that [Plaintiffs'] property was involved in a project, that's not nothing to do with Fralinger. He didn't violate anybody's duty at that point in time. The site plan was out there and if somebody else wrongly relied upon it, that's not Fralinger's fault." (4T at 31:11-17).

Plaintiffs' purported reliance arguments are even more dubious in light of email evidence that Plaintiffs **consented** to Marathon's remediation as early as August 2017. (Pa000606). Plaintiffs' counsel knew of this consent; knew or should have known that Fralinger was not involved with remediation efforts; and knew that the site plan was modified in accordance with Plaintiffs' wishes before any parking-related construction commenced. Further, Plaintiffs had no knowledge of any trespass by Fralinger (as later confirmed by their Interrogatory Responses), yet still, Plaintiffs and their counsel signed and filed a Complaint

against Fralinger alleging negligence and trespass. They never retained an engineering expert, and they kept Fralinger in this case, without doing any discovery to further their arguments, despite receipt of a safe harbor letter advising them of the baseless nature of their claims.

Although the email evidence shows otherwise, even if Plaintiffs could somehow argue that they had a good faith basis to initially assert a claim against Fralinger at the start of the litigation, they had no grounds to continue to pursue this claim in good faith. They did not obtain an Affidavit of Merit to support any professional negligence claims against Fralinger, they opposed Fralinger's first Motion for Summary Judgment on the theory of common knowledge negligence, and then they failed to conduct any discovery in furtherance of this common knowledge negligence claim.

Fralinger was ultimately forced to file a second Motion for Summary Judgment, which Plaintiffs opposed by claiming "per se" negligence because Fralinger did not obtain Plaintiffs' consent before it prepared the preliminary site plan. (Pa000201). Prior to this assertion, however, Plaintiffs had conceded in their Interrogatory Responses that they were not sure if Fralinger trespassed onto its Property, and Plaintiffs never amended their Interrogatories with new facts to support any trespass by Fralinger. Given these facts, and the pre-suit knowledge possessed by both Plaintiffs and their counsel, the trial judge did not

abuse his discretion when he made the decision to sanction Plaintiffs and award Fralinger attorneys' fees and costs from the date of the safe harbor letter until the award of sanctions. (2T).

POINT II

THE TRIAL COURT ERRED IN NOT AWARDING FRALINGER ITS FULL FEE AWARD. (4T Hearing, 5/7/2024) (Pa000637) (Pa000926).

Courts awarding sanctions calculate the amount of the award using the "lodestar" method, which multiplies the "number of hours reasonably expended by the successful party's counsel in the litigation" by "a reasonable hourly rate." Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). The factors for determining whether an attorney's fees are reasonable are laid out in Rule of Professional Conduct 1.5(a) as follows:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform, the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature or length of the professional relationship with the client;

7. The experience, reputation, and ability of the lawyer or lawyers performing the services; [and]
8. Whether the fee is fixed or contingent.

The lodestar method "mandates that the trial court determine the reasonableness of the hourly rate of 'the prevailing attorney in comparison to rates for similar services by lawyers of reasonably comparable skill, experience, and reputation in the community.'" Litton Industries, 200 N.J. at 387 (quoting Furst, 182 N.J. at 22) (internal quotation omitted). The court must determine reasonable hourly billing rates that are "fair, realistic, and accurate." Rendine v. Pantzer, 141 N.J. 292, 337 (1995).

The trial court may decide to deduct a certain percentage of fees from the total award based on what is reasonable under the circumstances of a specific case. For example, in Grow Co., Inc. v. Chokshi, the trial judge gave a thorough explanation as to why, taking into consideration defense counsel's "thoroughness," she decided to reduce his award of attorney's fees to a more reasonable amount. 424 N.J. Super. 357, 365 (App. Div. 2012).

Recently, in Hansen v. Rite Aid Corp., the Supreme Court of New Jersey upheld an award of attorney's fees where the trial court, in determining the reasonable amount of hours spent on legal services provided in connection with a discrimination lawsuit, provided a detailed opinion and spreadsheet using line-

by-line deductions of time entries, identifying categories of legal work that were improperly included in the attorney's fee application. 253 N.J. 191, 221 (2023).

More recently, in Borough of Englewood Cliffs, the Appellate Division upheld an award of sanctions for frivolous litigation totaling almost $190,000, despite the litigation being dismissed in its early stages. 478 N.J. Super. at 432. Like the initial decision to award fees, the amount of fees awarded by a trial judge is subject to an abuse of discretion standard. Litton, 200 N.J. at 386.

The trial court, in reducing Fralinger's requested fees to $30,000, did not provide the sort of detailed explanation found in cases such as Grow Co. and Hansen. See 424 N.J. at 365; 253 N.J. at 221. The trial court merely referenced the number of hours billed by Fralinger's counsel to this matter without discussion of what would be deemed a "reasonable" number of hours to bill for each matter, despite the number of hours reasonably expended being an important calculation under the lodestar method. Litton, 200 N.J. at 386.

Specifically, the trial judge took issue with the number of hours Fralinger spent preparing its second Motion for Summary Judgment, contending that the motion was "very similar to the first motion for summary judgment filed," thereby making the amount of time expended on the second Motion for Summary Judgment unreasonable. (Pa000638). The second Motion for Summary Judgment was sufficiently different from the first motion in that the

Affidavit of Merit was no longer at issue. In addition, Fralinger still had to address the negligence and trespass claims, including Plaintiffs' new "per se" negligence argument, and the erroneous "reliance" argument arising from the Marathon representative's deposition testimony. Moreover, an engineer from Fralinger was consulted regarding Plaintiffs' Opposition and an affidavit from the engineer was deemed necessary. This distinct and substantive work (as reflected in the detailed billing entries) relating to the second Motion for Summary Judgment was not similar to the first Motion for Summary Judgment.

The trial court also took issue with the amount of time Fralinger's counsel spent preparing for and attending "3 depositions lasting approximately 14 hours," despite the amount of time billed also including the time spent preparing Fralinger's representative for a deposition that was ultimately cancelled last-minute by Plaintiffs and never rescheduled. (Id.; Pa000498-500; Pa000504-06; Pa000558). This preparation time was overlooked by the trial court, which also did not consider work conducted before and after the depositions of the other witnesses.

Additionally, although Plaintiffs attempted to criticize Fralinger's counsel for attending the other defendants' depositions and billing for same, Fralinger's counsel had no choice. At the time these depositions took place, counsel had no way of predicting what questions would be asked of co-defendants and whether

any testimony would reference Fralinger. Of course, Plaintiffs ultimately **did** try to use such testimony against Fralinger when it opposed Fralinger's second Motion for Summary Judgment, citing to testimony from Marathon's representative that he reviewed the preliminary site plan when determining the Property was part of the redevelopment project. (Pa000199).

The fact that a significant number of hours were expended on a matter does not, in and of itself, render the number of hours unreasonable. Plaintiffs' "strategic decision" not to conduct any discovery regarding Fralinger required its counsel to participate in other means of discovery for one year and then develop a strategy to file a second Motion for Summary Judgment.

As stated above, RPC 1.5(a) sets forth multiple factors for courts to consider when determining whether an attorney's fees charged to a client are reasonable. Many of these factors were not fully considered by the trial court. For example, the trial court declined to consider, in connection with the amount of time involved in this matter, the ultimately successful results obtained. RPC 1.5(a)(4).

Counsel acknowledges the trial court's concerns with the amount of time expended defending this matter. However, Fralinger (and their counsel) had an obligation to complete discovery and prepare a substantive second Motion for Summary Judgment. The trial court's decision regarding Fralinger's fees did

not include an appropriate analysis of this work, or the realities of defending a design professional – even when the claims are frivolous. Additionally, any attempt by Fralinger to file a dispositive motion before the close of discovery would have resulted in the motion being denied as premature, as was essentially the case with the first Motion for Summary Judgment.

Fralinger's counsel submitted a fee certification demonstrating that the supervising member reviewed each invoice for reasonableness before being sent to the insurance carrier. (Pa000478). In addition, the carrier reviewed the invoices and only paid what it deemed was reasonable. (Pa000479). This fee certification only sought fees **after** the carrier had reduced the invoices for time entries that it challenged. As a result, this double-review process ensures that the services rendered were fair and reasonable for defending a professional engineering firm.

Finally, as the trial court itself acknowledged, all this work could have been avoided had Plaintiffs complied with the safe harbor letter and withdrew their frivolous claims. (Pa000638). It also is worth noting that the fee award associated with granting Fralinger's Motion for Sanctions started as of June 29, 2022 and did not include the significant attorney's fees and costs Fralinger incurred for answering the Complaint, conducting certain written discovery in this multi-party litigation, and filing its initial Motion for Summary Judgment.

Fralinger respectfully asks that this Court consider the fee award in the entire context of the litigation – although the fee award is only for a portion of the litigation, the record before this Court demonstrates that Plaintiffs had no basis to file a complaint naming Fralinger as a defendant and ignore the Affidavit of Merit statute. Even now, since the original fee award was granted, Fralinger has had to expend even more time and monies opposing both a Motion for Reconsideration as well as this very appeal. The fee award also did not take into consideration Fralinger personally paying over $25,000 towards litigation costs, which was required for Fralinger to satisfy its deductible.

Fralinger respectfully argues that the trial court abused its discretion when it reduced Fralinger's fee award, due to its failure to consider all factors under RPC 1.5(a), as well as the lack of detail and analysis in the court's decision with respect to the determination of the $30,000 figure. As such, Fralinger should be awarded its full fees from June 29, 2022 through its filing of the Motion for Sanctions, in the amount of $89,072.19.

CONCLUSION

For the reasons set forth above, Fralinger respectfully requests that the trial court's decision dated October 20, 2023, sanctioning Plaintiffs and awarding attorneys' fees to Fralinger, be AFFIRMED; and that the trial court's decisions dated December 5, 2023 and May 7, 2024, limiting the fee award to $30,000, be REVERSED; and that Fralinger be awarded its full fees in the amount of $89,072.19.

Respectfully Submitted,

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/s/ Joseph M. Tomaino
JOSEPH M. TOMAINO, ESQ.

Dated: August 29, 2024

608-610 MULLICA HILL ROAD, LLC, and MJ ENTERPRISES, INC., Appellants/Plaintiffs, vs. CUMBERLAND COUNTY IMPROVEMENT AUTHORITY, a public body corporate and politic of the State of New Jersey, FRALINGER ENGINEERING P.A., MARATHON ENGINEERING AND ENVIRONMENTAL SERVICES, INC., ENTERPRISE NETWORK RESOLUTIONS CONTRACTING, LLC, FABBRI BUILDERS, INC., and COMMUNITY HEALTH CARE, INC., d/b/a COMPLETE CARE HEALTH NETWORK, INC., Respondents/Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002975-23 CIVIL ACTION On Appeal From: Final Order of the Superior Court of New Jersey, Law Division, Cumberland County DOCKET NO.: CUM-L-624-21 Sat Below: Hon. James R. Swift, J.S.C.

BRIEF OF RESPONDENT, CUMBERLAND COUNTY IMPROVEMENT AUTHORITY

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PRELIMINARY STATEMENT

This matter is before the Appellate Division on the appeal of Plaintiffs/Plaintiffs, 608-610 Mullica Hill Road, LLC and MSJ Enterprises, Inc. ("Plaintiffs") of the Trial Court's March 6, 2024 Order Granting the Respondent/Defendant, Cumberland County Improvement Authority's ("Authority") Motion for Summary Judgment dismissing the claims filed by Plaintiffs, as well as a subsequent Order Denying Plaintiffs' Motion for Reconsideration as to the March 6, 2024 Order thereafter entered on May 7, 2024.

Plaintiffs' claims against the Authority pertain to inverse condemnation to which Plaintiffs claim they are entitled to just compensation. Contrary to Plaintiffs' ever-changing position, the claims Plaintiffs had argued through the Trial Court pertained to an environmental remediation conducted by the Authority and responsive to a directive from the New Jersey Department of Environmental Protection ("NJDEP") based upon contaminated soil adjacent to Plaintiffs' property which was in turn generating poisonous vapors and gases in and around Plaintiffs' property, which operates as a Domino's Pizza restaurant serving the public. Any construction activities relating to the redevelopment project, as again referenced in Plaintiffs' Preliminary Statement, were under the direction of another entity, Qalicb Urban Renewal, LLC ("Qalicb"), a subsidiary to another co-Defendant who was voluntarily dismissed from the matter by the Plaintiffs,

CompleteCare Health Network ("CompleteCare"). On March 16, 2020, Qalicb as a subsidiary to CompleteCare, officially took over and replaced the Authority as the redeveloper on the project. Thus, any construction activities, excavation, or storage of equipment issues post-dating March 16, 2020 as it relates to the redevelopment project are wholly misdirected towards the Authority and instead pertain to Qalicb and CompleteCare, which Plaintiffs have completely and voluntarily dismissed. The environmental remediation efforts that solely remained under the Authority's control at all times were fully completed as of January 2020, with the exception of the installation of an Active Subsurface Depressurization System ("ASDS") that was installed during July 2018 and remained in place for ongoing monitoring.

Plaintiffs' inverse condemnation claims were narrowed down to the following instances: the taking of soil borings and the installation of temporary well points on February 20 and 21, 2017 as well as exterior vapor samples on May 18, 2017 conducted by Marathon Engineering & Environmental Services, Inc. ("Marathon"), a newly argued instance at the 11th hour in the Trial Court proceedings regarding now an "uninformed", but written consent by Plaintiffs' owner, Salim Joarder ("Joarder") as to the installation of the ASDS in July 2018 and conducted by Fran the Radon Man ("Fran"), and, the excavation of Plaintiffs' Property to remove contaminated soil performed by Environmental Network Resolutions Contracting, LLC ("ENRC") in or around November 2019.

In terms of just compensation associated with the takings, Joarder did not identify any operational disruptions whatsoever, no closures, no late openings, no early closings, no loss in revenue – simply nothing. Joarder instead testified that the business had seen an increase in profits; and that he never determined, nor discussed with his management team, as to how or even if the environmental clean-up impacted business operations and did not possess any information evidencing how the building, either inside or outside, was adversely impacted by the activities occurring. The Authority relied upon case law to which Plaintiffs did not dispute making clear that if a taking has in fact benefitted the remainder, the benefit may set off against the value of the land taken. Since there were no quantifiable damages signifying just compensation due to Plaintiffs, there was no offset to even consider.

Plaintiffs further contend that there were genuine disputes of material fact regarding the ASDS that was installed on Plaintiffs' Property. This particular factual dispute Plaintiffs rely upon now is whether the ASDS was installed with informed consent, which does not align with the requirements of the law that pertain only to written consent. Joarder received updates and communications repeatedly regarding the status and progress and failed to specify as to what was falsely represented to by either Fran, Marathon or the Authority prior to giving written consent, as the law provides for, not informed consent.

STATEMENT OF FACTS

The Plaintiffs' Property is located at 39 North Laurel Street, Bridgeton, New Jersey. The Property is improved with a "Domino's Pizza" carry-out and delivery store, which had on-site customer and employee parking with access via Church Lane. The Property was at one time located in a redevelopment area designated by the City of Bridgeton pursuant to N.J.S.A. 40A:12A-1, et seq. The redevelopment of the area is known as the Downtown Bridgeton Development Project (the "Project"). (Pa000002). The Authority was deemed the redeveloper, but only up until March 16, 2020 where it is undisputed that the Authority sold all of its interest and rights to the properties identified as Block 84.01, Lot 1 (formerly Block 84, Lots 7, 9, 10, 11, 12, 13, 13.01, and 14 and Block 85, Lots 2, 3, 17 and 19) to a wholly owned subsidiary of CompleteCare, Bridgeton Redevelopment Qalicb Urban Renewal, LLC. (Pa000010).

While at the time the Authority was the designated redeveloper, the Authority's President and CEO, Gerald Velazquez ("Velazquez") testified that he did not witness Joarder attend or participate in any of the public meetings before the City Planning Board with respect to the redevelopment project, despite public notices being issued to Plaintiffs. (Da39 pg. 150, Line 1 to pg. 151, Line 25.) Joarder acknowledged that the Authority did communicate with him, that he had specifically met with Velazquez with respect to the redevelopment project, and

acknowledged receiving notice as to the public meetings in which he could've voiced his concerns and/or inquired further as to what was occurring, but that he did not attend. (Da168 pg. 72, Lines 8-13; Da237 pg 141, Lines 14-22.) Velazquez further testified the Authority issued a certified letter addressed to Joarder with respect to the improvements both before presentation to the City's Planning Board, and post-sale of the Authority's rights to a subsidiary of CompleteCare. (Da8 pg. 29, Line 15 through Da9 pg. 30, Line 16.) Joarder acknowledged that Velazquez was attempting to contact him via a certified letter, including so far as attempting to contact his brother as he failed to respond. (Da145 pg. 49 Line 14 through Da146 pg. 50, line 14.)

There is no dispute that Authority was responsible for an environmental remediation project in connection with the Project. (Pa000272, page 16, line 5 to line 11; Pa000274, page 24, line 1 to line 23; Pa000721). Joarder testified that Velazquez did in fact communicate with him. (Da155 pg. 59, Lines 1-5.)

With regard to remediation efforts, Velazquez testified that it was a combination of the Authority and Marathon who communicated with Joarder as to events going on with regard to the environmental issues and remediation, with the Authority providing general updates and Marathon with technical details. (Da16 pg 59, Line 17 through pg. 60, Line 7; Da17 pg. 62, Lines 3-19.) Joarder testified and acknowledged that Marathon had contacted him to discuss environmental issues

discovered on the property, including authorization to install the vapor mitigation system. (Da138 pg. 42, Lines 11-15; Da175 pg. 79, Line 18 through Da178 pg. 82, Line 10.) By way of several examples as to the collaborative communications coming from both the Authority and from Marathon to Joarder, Velazquez referred to an email correspondence of March 23, 2017 where he confirmed with Marathon that Joarder provided authorization. (Da36 pg. 139, Line 7 through pg. 141, Line 8; Da404.) Joarder testified and acknowledged that he had in fact authorized Marathon to proceed thereafter. (Da185 pg. 89, Line 20 through Da186 pg. 90, Line 17; Da404.)

Velazquez testified that he provided Joarder information in writing subsequent to Marathon's August 23, 2017 email correspondence regarding the indoor air sampling. (Da37 pg. 143, Line 11 through pg. 144, Line 25; Da405-Da407.) Joarder again acknowledged receipt of the August 25, 2017 email and that while he did not recall speaking with Velazquez, he did recall speaking to and authorizing access to Marathon. (Da190 pg. 94, Lines 1-25; Da405-Da407.)

Marathon issued correspondence to Joarder on September 26, 2017 with regard to the results of the indoor air sample collected. (Da408-Da411.) Shortly thereafter on October 10, 2017, Velazquez emailed Joarder and Marathon asking that Joarder follow up with Marathon to schedule an inspection so they can come up with a plan to remediate the issues as outlined on September 26, 2017. (Da412-

Da413.) Joarder again testified that he acknowledged receipt of this communication and that in response, he provided authorization to Marathon for access. (Da198 pg. 102, Line 18 through Da199 pg. 103, Line 14.)

Marathon issued correspondence to the DEP on November 14, 2017 regarding a proposed mitigation plan to address the vapor concerns, to which Joarder was copied as a recipient. (Da414-Da417.) Joarder testified that he did not dispute that he was copied on the correspondence and does not dispute that said correspondence was not sent, but noted that his manager, Mohammed Ismayel ("Ismayel") normally checks the mail, and that Joarder did not recall ever personally seeing such correspondence. (Da336 pg. 240, Line 4 through Da337 pg. 241, Line 3.)

Marathon emailed Joarder on March 19, 2018, not attaching Velazquez, and explained the technical background of the installation of the vapor intrusion mitigation system to which they attained authorization from Joarder and his manager. (Da18 pg. 68, Line 10 through pg. 69, Line 7; Da418-Da422.)

Marathon emailed Joarder on April 2, 2018 with regard to installation of the sub slab depressurization system. (Da423.) Joarder acknowledged that he received the April 2, 2018 email and that he had authorized Marathon to proceed. (Da213 pg. 117, Lines 1-12.)

Marathon emailed Joarder on April 4, 2018 regarding a plumbing contractor who was scheduled to repair the pipe damage during installation of the system. (Da424.) Joarder acknowledged that he received the April 4, 2018 email and that he had again authorized Marathon to proceed. Da214 pg. 118, Lines 1-16.)

With respect to the communications provided by CompleteCare's attorney to Velazquez, Velazquez was asked why he was concerned at the time of Joarder's misrepresentation of the facts and in turn, Velazquez stated his concerns were his direct communication with Joarder as there were many instances where Joarder misrepresented the facts. (Da29 pg. 111, Lines 19-25.) Velazquez further clarified that he had many discussions where he had shown Joarder the plans, several discussions with respect to the site, and that he explained to him exactly what we anticipated doing, and he was fine with that. So this concept that he was not aware of what was going on is just not true. (Da29 pg. 112, Lines 1-8.) Velazquez testified that Mr. Joarder never communicated with him with respect to anything occurring at the Property being negative or in any way impacting Joarder. (Da31 pg. 119, Line 21 to pg. 120, Line 8.) Velazquez testified that there was never an instance where Joarder refused Marathon or any other contractor's access to the Domino's building. (Da40 pg. 157, Lines 1-17.)

Despite these various communications occurring between Marathon, the Authority, and Joarder to which Joarder claims he had no knowledge as to what

was going on, Joarder testified that he never attempted to inquire further into what the circumstances were, nor did he attempt to conduct his own independent investigation. (Da193 pg. 97, Lines 8-16.) Joarder repeatedly noted that he could not attest to what wrongful acts each party had committed, including the Authority specifically, could not specify what specific damages incurred based upon the Authority's actions, including how the Property was deprived, and instead noted that he needs expert help in order to determine what his claims are and who they are directed to. (Da150 pg. 54, Lines 14-16; Da162-Da163 pg. 66 Line 1 through pg. 67, Line 9; Da264 pg. 168, Lines 10-14; Da278 pg. 182, Lines 7-13; Da290-Da291 pg. 194, Line 22 through pg. 196, Line 1; Da295 pg. 199, Lines 20-23; Da306-Da307, pg. 210, Line 22 through pg. 211, Line 3; Da341 pg 245, Lines 8-16.) However, Plaintiffs never retained any experts. Joarder testified that his Statement of Damages represented "all of those illegal entries and all these damages that happened throughout this period from 2014 until today." (Da250 pg. 154, Lines 3-6.) However, when Joarder was asked whether he had incurred any damages with respect to the redevelopment project, he replied, "Not yet." (Da164-Da165 pg. 68, Line 23 through pg. 69, Line 1.)

With respect to financial impacts as it relates to the Domino's business, Joarder testified that his profits have increased during and following the remediation project, even directly acknowledging that the store is making more

money now than before the project. (Da124 pg. 28, Lines 3-11.) Joarder testified that his gross sales in 2021 were approximately $750,000.00, and in 2018 approximately $740,000.00. (Da160-Da161 pg. 64, Line 16 through pg. 65, Line 5.) Joarder testified that he did not document any increases in electrical costs based upon the installation of the system, and while he testified that he would supply electrical bills from one year prior to installation through installation, such records were never produced. (Da211 pg. 115, Lines 3-21.) Joarder also testified that he never determined, nor discussed with his management team, as to how or even if the environmental clean-up impacted business operations and does not possess any information evidencing how the building, either inside or outside, was adversely impacted by the activities occurring. (Da215-Da216 pg. 119, Line 4 through pg. 120, Line 24.)

Joarder testified not once, but multiple times, that he did not bother to question or seek any further clarification, but instead consented to Fran the Radon Man as well as Marathon to install the ASDS. (Da229-Da330 pg. 133, Line 24 to pg. 134, Line 14.) On March 19, 2018, Marathon emailed Joarder and explained the technical background of the installation of the Active Subsurface Depressurization System (ASDS) associated with the remediation. (Da418-Da422.) This March 19, 2018 email had also attached the sixty-day letter report again that was previously sent to the DEP as well as Joarder on November 14, 2017. While

Joarder testified that he never recalled "seeing" the letter, Joarder was in receipt of this written remediation plan on both November 14, 2017 as well as March 19, 2018 and ultimately consented to Marathon's request posed on March 19, 2018 which attached said communication, as evidence by Joarder's text message to Ismayel. (Da18 pg. 68, Line 10 through pg. 69, Line 7; Da414-Da417; Da418-Da422.)

On April 2, 2018, Marathon emailed Joarder with regard to the installation of the sub slab depressurization system. (Da423.) Joarder in response acknowledged that he received the April 2, 2018 email and that he had authorized Marathon to proceed. (Da213 pg. 117, Lines 1-12.) On April 4, 2018, Marathon emailed Joarder again regarding a plumbing contractor who was scheduled to repair the pipe damage during installation of the system. (Da424.) Joarder acknowledged that he received the April 4, 2018 email and that he had again authorized Marathon to proceed. (Da214 pg. 118, Lines 1-16.)

ARGUMENTS
POINT I

PLAINTIFFS' BASIS FOR APPEAL DOES NOT MEET THE STANDARD UNDER THE INTERESTS OF JUSTICE AND SHOULD THEREFORE BE DENIED

A. Standard of Review.

The Appellate Division's review of rulings of law and issues regarding the applicability, validity, or interpretation of laws, statutes, or rules is de novo. *See* Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (applicability of charitable immunity) In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Further, if a trial court judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and it becomes an arbitrary act, not subject to the usual deference. Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020); Alves v. Rosenberg, 400 N.J. Super. 553, 563 (App. Div. 2008). In such cases, the reviewing court must adjudicate the controversy in the light of the applicable law in order to avoid a manifest injustice. State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010); State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).

For the reasons to follow, the Appellate Division should deny Plaintiffs' sought reversal and remand and uphold the Trial Court's previous determinations as it relates to the Authority.

B. Plaintiffs Failed To Quantify Damages As To Just Compensation, and Instead received a Substantial Benefit From the Authority.

Joarder testified that the taking of soil borings, the installation of temporary well points, and the excavation of the Property were conducted without his permission or consent. These events occurred on February 20-21, 2017 and on May 18, 2017. While eight instances were alleged in total in Plaintiffs' original Complaint, their subsequent claims narrowed these instances down to these events. The Court opined on these instances utilizing the authorities heavily relied upon in prior motion practice, specifically Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

In this recent Supreme Court decision, the Court focused on a property owners' right to exclude anyone from their land and concluded that since the California regulation impeded on that right to exclude, a taking had occurred. Regarding the permanency v. temporary invasion, the Court citing Loretta v. Teleprompter Manhattan, 458 U.S. 419, 102 S. Ct. 3164 (1982), at 2074 said "To be sure, Loretta emphasized the heightened concerns associated with the permanence and exclusivity of a physical occupation, in contrast to temporary limitations on the right to exclude and stated that not every physical invasion is a taking." Continuing at 2078, the Court added, "First, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not

undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." Continuing to 2079, "Second, many government-authorized physical invasions will not amount to taking because they are consistent with longstanding background restrictions on property rights…these background limitations also encompass traditional common law privileges to access private property in the event of public or private necessity" which was the case in this instant action.

Plaintiffs argue simply that the Trial Court was wrong, and that the Authority had no immunity from its taking of Plaintiffs' property. Contrary to Plaintiffs' contention that the Trial Court did not give proper consideration to the State and Federal Constitutions, the record fully supports that consideration was in fact given to these authorities, and distinguished same with the case law and concluded that common law privileges to access private property in the event of public or private necessity do not constitute a taking. Plaintiffs' Property possessed contaminated soil and also emitted harmful vapors in a public food establishment. This distinguishing factor could not be any clearer. In United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999), that the Authority relied upon and to which Plaintiffs did not dispute in prior motion practice, makes clear that "if the taking has in fact benefitted the remainder, the benefit may set off against the value of the land taken." The plain reading of this case law shows that the Court did not

err in disregarding the intent of the law surrounding governmental takings but instead elaborated on it during oral argument suggesting that a compare and contrast of the Property value would likely result in monies being owed to the Authority.

Plaintiffs however suggest that the Court set an inappropriate precedent in that public entities can do whatever they want on private property without legal process, so long as that entity, thereafter, claims to have conferred a benefit on the property owner. By this statement and at the February 28, 2024 oral argument for the motions for summary judgment, Plaintiffs acknowledged that the Authority's remediation efforts did in fact confer a benefit to the Property owner, and it was heavily argued that in all reality it would likely be the Authority that would be owed money from the Plaintiffs if a compare and contrast of the Property value pre- and post-remediation was conducted. Notwithstanding this admission, Plaintiffs then contradicted their own statements in indicating that the Court failed to apply the intent of the law as it relates to takings by governmental authorities as it did not consider just compensation due to the Plaintiffs.

With respect to just compensation representing the financial impacts suffered by Plaintiffs, Joarder testified that his profits have increased during and following the remediation project, even directly acknowledging that the store is making more money now than before the project. (Da124 pg. 28, Lines 3-11;

Da164 pg. 68, Lines 3-11; Da160 pg. 64, Lines 16-25; Da161 pg. 65, Lines 1-5; Da215 pg. 119, Lines 4-25; Da216 pg. 120, Lines 1-24.) Joarder testified that his gross sales in 2021 were approximately $750,000.00, and in 2018 approximately $740,000.00. (Da160-Da161 pg. 64, Line 16 through pg. 65, Line 5.) Joarder testified that he did not document any increases in electrical costs based upon the installation of the system, and while he testified that he would supply electrical bills from one year prior to installation through installation, such records were never produced. (Da211 pg. 115, Lines 3-21.) Joarder also testified that he never determined, nor discussed with his management team, as to how or even if the environmental clean-up impacted business operations and does not possess any information evidencing how the building, either inside or outside, was adversely impacted by the activities occurring. (Da215-Da216 pg. 119, Line 4 through pg. 120, Line 24.) Joarder did not identify any operational disruptions whatsoever, no closures, no late openings, no early closings, no loss in revenue – simply nothing.

Plaintiffs further contend that with respect to the ASDS that was installed on the Property, that there is a genuine dispute of material fact regarding whether it was installed with consent, but now adding that it was not installed with "informed consent." Plaintiffs now concede they consented to these actions improperly, but during reconsideration raised a new argument that the consent granted was not informed consent. Again, notwithstanding the fact that this "informed" consent is a

new argument not otherwise raised in prior motion practice, and also not required by law as the law simply clarifies a requirement of written consent, the installation of this system was also not a contested term of an unlawful taking in previous motion practice. Notwithstanding same, this system installation was again based upon a directive issued by the NJDEP based upon unsafe and contaminated conditions existing on the Property placing both Plaintiffs' employees and civilian customers in harm's way and was not a unilateral move the Authority had taken on their own accord. While prior motion practice heavily argued that Plaintiffs owner, Joarder received updates and communications repeatedly regarding the intentions, status and progress of the remediation efforts, Joarder testified not once, but multiple times, that he did not bother to question or seek any further clarification, but instead consented to Fran the Radon Man as well as Marathon to install the ASDS. (Da229-Da330 pg. 133, Line 24 through pg. 134, Line 14.) Plaintiffs argue however that this consent given by Joarder was based upon the representation that the disturbance to the business would be minimal and that the scope of work was falsely represented. However, there is no specification as to what was falsely represented to by either Fran, Marathon or the Authority. Notwithstanding the fact that there were absolutely no interruptions to Plaintiffs' business as outlined above, the proofs on the record show that explicit detail as to remediation plans and the steps to be taken were in fact communicated with Plaintiffs, specifically Joarder.

On November 14, 2017, Marathon issued correspondence to the DEP regarding a lengthy proposed mitigation plan to address the vapor concerns, to which Joarder was copied as a recipient. Joarder did not question these materials nor seek clarification either at the time of receiving this correspondence. (Da414-Da417.) Marathon then emailed Joarder on March 19, 2018 and explained the technical background of the installation of the vapor intrusion mitigation system to which they attained authorization from Joarder and his manager. (Da418-Da422.) This email correspondence of March 19, 2018 had also attached again the November 14, 2017 correspondence. As was with the initial sharing of this communication with Joarder on November 14, 2017, Joarder again did not object to, question, or seek further clarification as to these details when it was subsequently given to him again on March 19, 2018. Instead, Joarder consented again. (Da418-Da422.) Then, Marathon emailed Joarder again on April 2, 2018 with regard to installation of the sub slab depressurization system. (Da423.) Again, Joarder did not question, object or seek clarification and instead acknowledged that he received the April 2, 2018 email and that he had authorized Marathon to proceed. (Da213 pg. 117, Lines 1-12.)

The fact that Joarder failed to ask questions, failed to read communications sent to him, or failed to care whatsoever does not constitute the Authority, Marathon, or Fran the Radon Man falsely representing any of the scope of services

to be performed, or tricking Joarder into giving uninformed consent. Instead, Joarder was ignorant to all information being shared, but nonetheless, **provided consent**.

CONCLUSION

For the foregoing reasons, the Authority respectfully request that the Court enter an order denying Plaintiffs' Appeal as to the Trial Courts March 6, 2024 and May 7, 2024 Orders specific to the relief afforded in favor of the Authority.

MARMERO LAW, LLC

By: */s/ Albert K. Marmero*
Albert K. Marmero

Dated: August 28, 2024

608-610 MULLICA HILL ROAD, LLC and MJS ENTERPRISES, INC.,

Plaintiffs,

v.

CUMBERLAND COUNTY IMPROVEMENT AUTHORITY, a public body corporate and politic of the State of New Jersey, FRALINGER ENGINEERING P.A.; MARATHON ENGINEERING and ENVIRONMENTAL SERVICES, INC.; ENTERPRISE NETWORK RESOLUTIONS CONTRACTING, LLC, FABBRI BUILDERS, INC.; and COMMUNITY HEALTH CARE, INC. d/b/a COMPLETE CARE HEALTH NETWORK, INC.

Defendants.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-002975-23

CIVIL ACTION

On Appeal From:

Final Order of the Superior Court of New Jersey, Law Division, Cumberland County

DOCKET NO.: CUM-L-624-21

Sat Below:

HON. JAMES R. SWIFT, J.S.C

BRIEF OF APPELLANTS 608-610 MULLICA HILL ROAD, LLC and MSJ ENTERPRISES, INC. IN OPPOSITION TO CROSS-APPEAL OF FRALINGER ENGINEERING AND IN REPLY TO THE CUMBERLAND COUNTY IMPROVEMENT AUTHORITY

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PRELIMINARY STATEMENT

This matter is before the Appellate Division on the appeal of Plaintiffs/Appellants 608-610 Mullica Hill Road, LLC and MSJ Enterprises, Inc. ("Plaintiffs") and the cross-appeal of Defendant Fralinger Engineering, P.A. ("Fralinger" or "Cross-Appellant"). This brief is being submitted in opposition to the cross-appeal of Fralinger and in further support of Plaintiffs appeal against Fralinger and the Cumberland County Improvement Authority ("CCIA").

In Fralinger's appellate brief, and in the underlying litigation, Fralinger argues Plaintiffs engaged in bad faith by filing and maintaining this lawsuit against it. Fralinger's statements pertaining to the alleged frivolous actions and alleged bad faith conduct of the Plaintiffs does not appreciate the factual and procedural history in this matter, the fact that Fralinger's first summary judgment motion was **denied**, and the fact that the Court **permitted** Plaintiffs' negligence and trespass claims to proceed even in the absence of an affidavit of merit under the common knowledge exception to the affidavit of merit statute. Notably, Fralinger acknowledges that it had to file **two** separate motions for summary judgment yet fails to acknowledge the fact that the trial court itself did not initially find the claims frivolous or without merit, which is why the trial court denied Fralinger's first motion for summary judgment.

Ultimately, Fralinger filed another motion for summary judgment at the conclusion of discovery. The trial court granted that motion. However, the trial court, having ultimately dismissed Fralinger from the lawsuit does not mean that Plaintiffs engaged in frivolous litigation or pursued this action in bad faith. In light of the fact that the trial court denied Fralinger's first summary judgment motion and determined that an affidavit of merit was not necessary for Plaintiffs to pursue their claims against Fralinger, Fralinger's argument that those initial proceedings were frivolous, or the discovery phase of the litigation was frivolous, is disingenuous and lacks merit.

Fralinger further ignores the fact that all the damages to the Plaintiffs' property in this matter occurred **before** Fralinger allegedly modified its site plan, and glosses over Fralinger's own certified statement in response to interrogatories that representatives of Fralinger may have trespassed onto Plaintiffs' property in connection with the preparation of those plans.

In connection with its cross-appeal, Fralinger seeks modification of the trial court's ruling wherein the trial court awarded Fralinger $30,000.00 in fees despite Fralinger's request for nearly $90,000.00. Fralinger argues that the trial court erred by failing to properly consider the fee factors enumerated under R.P.C. 1.5(a). Fralinger's argument lacks merit. The trial court properly considered the matter before it, including the factors enumerated under R.P.C. 1.5(a). The trial court

reviewed the time records submitted by Fralinger in juxtaposition with the procedural history of the case. The court's review of those records revealed the unreasonable and duplicative nature of the time spent on the file. As such, the trial court reduced the fee award accordingly. Moreover, R. 1:4-8 imposes a temporal limitation on any fee award, and a reasonable award may only be awarded from the point when it becomes clear that the action is frivolous. Thus, the trial court was not permitted to award fees dating back to the date of the frivolous litigation letter, since at that point in time, only limited discovery had been exchanged, and Plaintiffs had been given the trial court's blessing to proceed.

With respect to CCIA's opposition, CCIA consistently misrepresents the facts in the matter and calls the Appellate Division's attention to irrelevant facts in a concerted effort to shift focus away from the actual issues in this appeal. Simply put, the issue is whether or not there has been a taking. The Appellate Division should not be distracted by the superfluous subterfuge presented by the CCIA.

For these reasons and the reasons to follow, the cross-appeal of Fralinger should be denied, the rulings at issue raised by Plaintiffs should be reversed, and this matter should be remanded to the trial court for further proceedings.

PROCEDURAL HISTORY

Plaintiffs incorporate by reference the procedural history Plaintiffs set forth in Plaintiffs' initial Appellate briefing.

STATEMENT OF FACTS

Plaintiffs incorporate by reference the factual history Plaintiffs set forth in Plaintiffs' initial Appellate briefing. For the purpose of this opposition and reply, Plaintiffs supplement the facts only to call the Appellate Division's attention to misstatements of fact by the Defendants or facts which are in dispute.

ADDITIONAL FACTUAL BACKGROUND AS TO FRALINGER

Fralinger states that Plaintiffs' claims in this matter arise from environmental remediation performed on Plaintiffs' property. (Fralinger Brief at page 8). While environmental remediation performed on the property was certainly one issue raised by the Plaintiffs, environmental remediation was only a portion of the overall claims alleged by Plaintiffs. Plaintiffs had suffered damages at the hand of various entities and/or individuals. At the time the Complaint was filed, the scope of these unauthorized entries and activities was not fully known and required the full and fair benefit of discovery. (Pa000001-Pa000013).

Fralinger states that despite Plaintiffs' reservations pertaining to remediation services, Plaintiffs "consented to other remediation services on the Property." (Fralinger Brief at page 9). However, Plaintiffs' permission was under the threats that Plaintiffs' business would be shut down and based upon the representation that

the disturbance to the business would be minimal. (Pa000619; Pa000777 at ¶ 19-20; Pa000333, page 80, line 2 to line 15; Pa000339, page 103, line 3 to line 14; Pa000371, page 232, line 4 to line 22). Mr. Joarder also certified that he would not have permitted access had the actual scope of the ASDS work been accurately and fairly represented. (Pa000778-Pa000779 at ¶ 21-30).

Fralinger states that Plaintiffs "did nothing to develop their purported common knowledge negligence or trespass claims against Fralinger." (Fralinger Brief at page 16). This belies the truth and factual record in this matter. Plaintiffs served interrogatories and deposed two witnesses in this matter. In Fralinger's response to interrogatories, Fralinger **acknowledged** that a representative of Fralinger *may have* trespassed on Plaintiffs' Property in connection with the preparation of site plans (Pa000108). Fralinger and the trial court both fixated on the fact that Plaintiffs did not depose a representative of Fralinger, but litigants are not required to depose every possible potential witness. In this matter, because there were numerous defendants, Plaintiffs elected not to depose a representative of Fralinger and elected to elicit testimony pertaining to the site plan from representatives of Marathon Engineering and the CCIA, while maintaining the right to call a representative of Fralinger at trial. Fralinger was permitted to file another motion for summary judgment at the conclusion of discovery. Fralinger exercised that right. (Pa000086). But failure to depose a representative of a defendant is not a basis for

the trial court to make a determination that the Plaintiffs had engaged in frivolous litigation, and certainly not a basis to enter an award for fees that included time before the conclusion of discovery. (Pa000637).

ADDITIONAL FACTUAL BACKGROUND AS TO CCIA

At several points in CCIA's recitation of the facts in its appellate brief, CCIA presents disputed facts as undisputed statements of material fact. For example, CCIA states that Velazquez "had many discussions where he had shown Joarder the plans, several discussions with respect to site, and he had explained to him exactly what we had anticipated doing, and he was fine with that." (CCIA's brief at page 12). These are disputed facts. No evidence has been provided in the trial court below that Joarder was aware that his property was considered part of the project, and Joarder specifically testified that he was not aware that his property was part of the project. (Pa000380; Pa000294, page 105, line 14 to line 21; Pa000322, pg. 36, line 2 to 6; Pa000323, pg. 40, line 13 to line 24; Pa000325, pg. 49, line 14 to line 19; Pa000326, pg. 52, line 15 to line 25). Virtually all of the testimony of Velasquez which has been cited by the CCIA are disputed facts. To the extent the CCIA relies upon these statements in support of its request that the Appellate Division uphold a ***summary judgment*** ruling, these disputed facts weigh heavily against the CCIA.

The CCIA further cites purported facts and evidence which are entirely irrelevant to the issues raised on appeal. (CCIA's Brief at page 13). For example, whether or not Plaintiffs obtained experts is entirely irrelevant to the narrow issue raised on appeal regarding whether or not there has been a taking. Whether the Plaintiffs were able to articulate their damages during a deposition of Plaintiffs' representative is entirely irrelevant to the issue as to whether or not there has been a taking. The CCIA further misstates that electrical bills were never provided during the course of discovery. Electrical bills were clearly provided during the course of discovery. CCIA's counsel was a recipient of this discovery. (Pa000941).

CCIA further claims that Plaintiffs asserted new arguments during the motion for reconsideration. Specifically, whether or not consent provided by Plaintiffs for certain entries was "informed consent." CCIA's argument is absurd. At every stage of the proceeding, Plaintiffs argued that the Defendants had failed to adequately inform the Plaintiffs of the scope of the ASDS being installed on Plaintiffs' property, and that consent was given under threat that Plaintiffs' business would be shut down if he did not consent. (Pa000619; Pa000777 at ¶ 19-20; Pa000333, page 80, line 2 to line 15; Pa000339, page 103, line 3 to line 14; Pa000371, page 232, line 4 to line 22; Pa000777 at ¶ 16; Pa000333, pg. 80, line 9 to line 15; Pa000333, page 81, line 9 to line 14; Pa000353, page 158, line 18 to line 24).

CCIA states that Joarder consented to Fran the Radon's Man's proposed scope of work, but Fran the Radon's Man's proposed scope of work for the installation of the ASDS was never provided to the Plaintiffs in obtaining Plaintiffs' consent for the installation of the system, and no evidence, whatsoever, has been produced to the contrary. (Pa000370, page 229, line 8 to line 15; Pa000804).

CCIA's statement of facts is rife with factually inaccurate information which undermines CCIA's arguments.

REPLY BRIEF IN FURTHER SUPPORT OF REMAND AS TO FRALINGER ENGINEERING, P.A. AND CUMBERLAND COUNTY IMPROVEMENT AUTHORITY.

LEGAL ARGUMENT

POINT I

THE CCIA'S CLAIM THAT THE PLAINTIFFS BENEFITED FROM THE UNAUTHORIZED ACTIVITIES OF THE CCIA AND ITS AUTHORIZED AGENTS LACKS MERIT

CCIA's argument in opposition to reversal essentially boils down to purported claim that Plaintiffs' litigation claims were properly barred since Plaintiffs "benefited" from the unauthorized taking, excavation, and other activities that occurred on Plaintiffs' property without authorization or consent.

First and foremost, the claim that Plaintiffs obtained a benefit has never been adjudicated by the trial court below. While Plaintiffs acknowledge there has been some form of environmental remediation, the remediation, to date, remains ongoing, and the current status of the remediation is not entirely clear. The CCIA never supplied an expert report that its activities resulted in a net benefit to the Plaintiffs, and whatever benefit may have been conferred is entirely speculative.

Second, whether or not Plaintiffs may or may not have received a benefit is entirely irrelevant as to whether or not there was a taking. The issue as to whether there was a benefit goes to the issue of calculating just compensation. Once a determination of a taking has been made, an appraisal process would begin, wherein the just compensation due and owed to the Plaintiffs would be determined. The CCIA cannot have its way with the law and chooses to ignore the law that mandates the process for determining just compensation. The CCIA cannot simply choose to ignore the environmental remediation statute, which provides that notice and consent is required for entry, and if consent is not given, access can only be obtained through a legal process wherein the rights of the parties will be determined. Those rights include the right to exclude. Where the right to exclude may be overridden by a public policy, such as environmental remediation, there is a legal process designed to protect the property owner. That process ensures that

the Plaintiffs will be adequately protected by the conduct of the remediation entity. No such required process was followed here.

CCIA argues that "Plaintiffs acknowledged that the Authority's remediation efforts did in fact confer a benefit to the Property owner..." (CCIA's Brief page 19). No such admission was ever made by the Plaintiffs, and CCIA's argument is disingenuous and lacks candor. Plaintiffs have never admitted that a benefit was received, and the CCIA has never established that a benefit was received. Any such claim of benefit goes to the amount of just compensation, and not whether there has been a taking. See Borough of Harvey Cedars v. Karan, 214 N.J. 384, 413 (2013).

CCIA further claims that Plaintiffs asserted a new argument during the motion for reconsideration, specifically, whether or not consent provided by Plaintiffs for certain entries was "informed consent." At every stage of the proceeding, Plaintiffs argued that the Defendants had failed to adequately inform the Plaintiffs of the scope of the ASDS being installed on Plaintiffs' property, and that consent was obtained under threat that Plaintiffs' business would be shut down Joarder did not consent. This statement contradicts the record, and more importantly, is entirely irrelevant to the pending appeal.

What is relevant is that, with respect to several physical entries, none of which has been legitimately disputed, the CCIA through its agents took the Plaintiffs'

property without consent, installed various environmental testing and monitoring equipment, excavated a substantial portion of the Plaintiffs' property, and blocked the use of the parking lot for an extended period of time. One authorization does not provide authorization across the board, and the CCIA has offered no evidence to refute that these unauthorized entries and excavation were not permitted. The CCIA has took the Plaintiffs' property without just compensation, and the trial court erred in failing to conclude that there has been a taking.

POINT II

FRALINGER'S ARGUMENT THAT PLAINTIFFS' LITIGATION WAS FRIVOLOUS DUE TO THEIR "PRE-SUIT" KNOWLEDGE LACKS MERIT. (2T Hearing, 10/20/2023) (Pa000637) (Pa000926).

Pursuant to N.J.S.A. 2A:15-59.1(b), in order to find that a "complaint, counterclaim, cross-claim or defense" is frivolous, the judge must find on the basis of the "pleadings, discovery, or the evidence presented" that action was "commenced, used or continued in **bad faith**, solely for the purpose of harassment, delay or malicious injury" or that the "nonprevailing party **knew, or should have known**, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." See N.J.S.A. 2A:15-59.1(b).

"A claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999), citing Fagas v. Scott, 251 N.J. Super. 169, 189 (Law Div. 1991). "False allegations of fact will not justify a fee award unless they are made in bad faith, for the purpose of harassment, delay, or malicious injury." McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993). Even when a complaint is dismissed on a motion for summary judgment, that dismissal "does not predetermine that plaintiff 'commenced, used or continued' [its] complaint 'in bad faith, solely for the purpose of harassment, delay or malicious injury' in violation of N.J.S.A. 2A:15-59.1b(1)." Ibid. "[T]he burden of proving that the non-prevailing party acted in bad faith" is on the party who seeks fees and costs pursuant to N.J.S.A. 2A:15–59.1. Id. at 559; see Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. 401, 408 (App. Div. 2009). Simply put, ("[A]n award cannot be sustained if the 'plaintiff did not act in bad faith in asserting' or pursuing the claim." Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. at 408 (quoting McKeown-Brand, 132 N.J. at 549)); United Hearts, L.L.C., 407 N.J. Super. 379, 389 (App. Div. 2009). "The court must strictly interpret the frivolous litigation statute and Rule 1:4-8 against the applicant seeking attorney's fees and/or sanctions." Wolosky v. Fredon Twp.,

31 N.J. Tax 373, 390 (Tax Ct. 2019) (citing LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009)). Moreover, R. 1:4-8 "imposes a temporal limitation on any fee award, and a reasonable award may only be awarded from the point where it becomes clear that the action is frivolous." Schwartz, 199 N.J. at 65.

In Fralinger's brief, Fralinger alleges that Plaintiffs' "pre-suit" knowledge pertaining to Fralinger's modification of Site Plan 3 ("SP3") somehow rendered Plaintiffs' lawsuit against it frivolous. However, there is no material dispute or disagreement that, when Plaintiffs filed their lawsuit against several entities involved with the redevelopment project, Plaintiffs were not aware of the particular circumstances that caused the damages complained of in Plaintiffs' complaint to Plaintiffs' property. (Pa000001) (1T Hearing, page 10, line 6 to line 12; page 13, line 5 to line 13). Such is the nature of a trespass which involves damage to property when the owner is not present. Such is the purpose of discovery when not every material fact is known. In the present case, the Plaintiffs were not physically present to personally witness which contractors of the CCIA had entered upon, excavated, and caused other damages to Plaintiffs' property.

On June 22, 2022, Fralinger provided interrogatory responses and a response to Plaintiffs' first notice to produce. (Pa000102). In reliance upon Fralinger's own interrogatory responses, without any additional discovery or any depositions being conducted, Fralinger served a frivolous litigation letter on the Plaintiffs' attorneys on

June 29, 2022. (Pa000121). The frivolous litigation claim was based on three documents pertaining to the vacation of Church Lane, the approval of revised plans by the Bridgeton City Planner, Barbara Fegley, and an email from the city engineer approving those changed plans. (Pa000459-Pa000460 at ¶ 20-21; Pa000121). The documents were created in 2021. (Pa000121). Notably, none of the factual averments or documents referenced in the safe harbor letter refuted an allegation of trespass or denied and/or explained the reason why SP3 showed proposed project improvements to Plaintiffs' property. Thus, substantial factual inquiries were not addressed in Fralinger's letter. This is evidenced by the trial court decision, wherein the trial court denied Fralinger's first motion for summary judgment. (Pa000084). There were simply too many questions of material fact pertaining to Fralinger's involvement with the project for the trial court to grant summary judgment in favor of Fralinger.

However, despite the factual unknowns, from the outset, it was clear that the site plan prepared by Fralinger provided for substantial modifications to Plaintiffs' property. Fralinger further acknowledges and admits that Fralinger's site plan included the Plaintiffs' property as part of the redevelopment project, and that Fralinger's site plan did not change **until after** Plaintiffs had objected, and also after the excavation of Plaintiffs' parking lot. (Pa000435). This was more than a sufficient factual basis for Plaintiffs to pursue Fralinger.

Even more important to the Plaintiffs' decision to file a lawsuit naming Fralinger was that as of the date that Fralinger claims the site plan was changed, the damage had already been done. At the time of the filing of the Complaint, and at the time Plaintiffs were served with the frivolous litigation letter, Plaintiffs did not know who had caused the damage. Plaintiffs only learned this information in connection with depositions during discovery. Plaintiffs learned during discovery that Marathon Engineering ("Marathon") and Enterprise Network Resolution Contractors ("ENRC"), in reliance on Fralinger's site plan, assumed that Plaintiffs' property was part of the project, and therefore, physically invaded Plaintiffs' property and conducted environmental remediation and excavation activities without the written authorization or consent of Plaintiffs. (Pa000247, page 54, line 11 to pg. 55, line 8; Pa000828). Moreover, Fralinger does not dispute the statement in its own answers to interrogatories that a representative of Fralinger may have trespassed on Plaintiffs' property when Fralinger prepared its site plans. (Pa000102).

While these facts may not have ultimately led to a finding of liability against Fralinger, Fralinger was certainly a necessary and indispensable party defendant to the action, because party Defendant Marathon testified that they believed Plaintiffs' property was a part of the project based upon the creation and existence of that plan. Fralinger knew that the CCIA's agents and contractors would be

utilizing its plans and relying upon them. When the project plans show work to be done on the property that is not within the project and is not so highlighted, any reasonable person could tell that a mistake was made. That is not an esoteric concept.

Contrary to the arguments of Fralinger in opposition to Plaintiffs' appeal, the trial court did not dismiss any claims that were asserted against Fralinger in connection with the first motion for summary judgment other than professional negligence claims. Pursuant to the order granting partial summary judgment, common knowledge negligence and trespass claims survived. (Pa000084).) The Court only held that "professional" negligence claims could not be pursued. The trial court also reserved the issue regarding whether or not an expert was needed on duty of care until a later period in time. (1T Hearing, page 23, line 14 to line 23.) The trial court only rendered a ruling in this regard when it ruled on Fralinger's second motion for summary judgment. (Pa000426).

Fralinger further states that Plaintiffs consented to certain activities of Marathon and ENRC. Plaintiffs deny Plaintiffs had given consent for these activities, and the factual record clearly demonstrates that, at a minimum, there is a question of fact as what activities Plaintiffs has actually consented to and what activities were not consented to by Plaintiffs. Marathon engaged in several unauthorized entries onto Plaintiffs' property and, while there are some written

emails with respect to the installation of the ASDS and collection of air samples, there was absolutely no evidence that Plaintiffs were aware of or consented to the installation of temporary well points or the soil borings conducted by Marathon which occurred prior to the receipt of any correspondence from any of the Defendants. ENRC, likewise, conducted substantial excavation on Plaintiffs' property, and there is no evidence, whatsoever, that ENRC had Plaintiffs' consent for the excavation.

The common knowledge exception provides that expert testimony is not required to sustain a cause of action against any professional where a reasonable juror could determine that the conduct of a party was negligent without the need for expert assistance. Hubbard v. Reed, 168 N.J. 387, 390 (2001) (holding that an affidavit of merit is not required in "common knowledge" cases when an expert will not be called to testify "'that the care skill or knowledge ... [of the defendant] fell outside acceptable professional or occupational standards or treatment practices'") (citing N.J.S.A. 2A:53A-27)). When deciding whether expert testimony is necessary, a court properly considers "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982). Plaintiffs argued that Fralinger's creation of a plan that incorporated site improvements on Plaintiffs'

Property and to which other parties relied upon in entering Plaintiffs' property without authorization or consent was negligent and that an expert was not needed for a jury to find Fralinger's conduct was negligent. For reasons that remain unclear, the Court did not agree, but that finding is far from making Plaintiffs' argument frivolous.

Fralinger attempts to distinguish Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 467-68 (1999) in an attempt to argue that Fralinger, an engineer, could never be liable for negligence under the common knowledge exception. Estate of Chin is a medical malpractice action wherein the Defendant conceded that the failure to properly attach a hydroscope was negligent under the common knowledge exception to the rule requiring expert opinion. Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 470 (1999). However, the common knowledge exception simply provides that expert testimony is not required to sustain a cause of action against **any** professional where a reasonable juror could determine that the conduct of a party was negligent without the need for expert assistance. Hubbard v. Reed, 168 N.J. 387, 390 (2001) (holding that an affidavit of merit is not required in "common knowledge" cases when an expert will not be called to testify "'that the care skill or knowledge ... [of the defendant] fell outside acceptable professional or occupational standards or treatment practices'") (citing N.J.S.A. 2A:53A-27)). When deciding whether expert testimony is necessary, a

court properly considers "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982).

Plaintiffs argued that Fralinger's creation of a plan that incorporated site improvements on Plaintiffs' Property and to which other parties relied upon in entering Plaintiffs' property without authorization or consent was negligent and that an expert was not needed for a jury to find Fralinger's conduct was negligent. The Plaintiffs' property was shown on the plan as part of the project. It does not take an expert to tell that a mistake was made. Fralinger prepared the plan which erroneously showed the property was part of the project. This issue was properly the subject of this matter and would have properly been addressed by the Plaintiffs at trial. There, however, is no basis to conclude that the litigation was frivolous simply because Plaintiffs choose not to depose representatives of Fralinger.

Moreover, even if there were a basis to conclude that the litigation had **become** frivolous after the representatives of Marathon and ENRC had been deposed, R. 1:4-8 "imposes a temporal limitation on any fee award, and a reasonable award may only be awarded from the point where it becomes clear that the action is frivolous." LoBiondo v. Schwartz, 199 N.J. 62, 65 (2009). Thus, it was inappropriate for the court to impose frivolous litigation sanctions dating back

to the date of the safe harbor letter. At that point in time, no parties had been deposed about the unauthorized entries and excavation in connection with Fralinger's site plan.

PLAINTIFFS' OPPOSITION TO THE CROSS APPEAL OF FRALINGER ENGINEERING, PA.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REDUCING THE AWARD OF SANCTIONS BASED UPON THE UNREASONABLE AMOUNT OF TIME SPENT ON THE MATTER (Pa000637) (Pa000926).

Rule 4:42-9(a) provides that no fees for legal services are allowed unless permitted by rule or by statute. Pursuant to R. 1:4-8, a Defendant that successfully prevails in an action for frivolous litigation may be entitled to award of attorney's fees. The Rules of Professional Conduct ("RPC") provide a number of factors the court may considering in making a determination as to the reasonableness of an attorney's fees. RPC 1.5(a) provides following factors the court may consider:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.

In the matter below, after having granted frivolous litigation sanctions, the trial court requested an affidavit of legal services from Fralinger. (Pa000484). Thereafter, Fralinger submitted an affidavit of legal services in the amount of $89,072.19. (Pa000478). Plaintiffs objected to the affidavit of legal services on the grounds that the time spent on the matter was duplicative and excessive. (Pa000557). Thereafter, the trial court entered an order granting sanctions in favor of Fralinger in the amount of $30,000.00. (Pa000637). Fralinger sought reconsideration of the trial court's decision in the form of a cross-motion for reconsideration in response to Plaintiffs' motion for reconsideration. Fralinger again sought recovery of its entire billing amount of $89,072.19. (Pa000892). It is Plaintiffs' position that their claims against Fralinger were not frivolous.

In connection with this appeal, Fralinger cites case law regarding a trial court's obligation to determine the lodestar and the reasonableness of the attorney's hourly rate based upon the attorney's relative skill, experience, and reputation. Fralinger, however, ignores the relevant inquiries related to

unnecessary costs and expenses and unreasonable time allocated to a specific matter. This is a key factor since Plaintiffs **did not** dispute the reasonableness of the hourly rate of Fralinger's attorneys. Plaintiffs only disputed the unreasonable amount of time spent on the matter and duplicative work with respect to several aspects of Fralinger's attorneys' efforts.

Where, as here, there is explicit legal authority for the court to award counsel fees, the court calculates the award of counsel fees by determining the "lodestar", i.e., a reasonable hourly charge multiplied by the number of hours expended. Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995). "In determining the lodestar, the court should compare the hourly rate of the attorney to the rates charged for similar services of attorneys in the community with 'comparable skill, experience, and reputation.'" In re Prob. of Will & Codicil of Macool, 416 N.J. at 313 (quoting Rendine, 141 N.J. at 337). The court must determine reasonable hourly billing rates that are "fair, realistic, and accurate." Rendine, 141 N.J. at 337. The prevailing party's counsel must provide "fairly definite information as to the hours devoted to various general activities ... and the hours spent by various classes of attorneys" as a basis for the court's lodestar calculation. Hansen v. Rite Aid Corp., 253 N.J. 191, 216 (2023). If, taking these factors into consideration, the judge "determines that the hours expended 'exceed those that competent counsel reasonably would have expended to achieve a comparable result, [he or she] may

exercise . . . discretion to exclude excessive hours from the lodestar calculation.'" Id. at 367 (quoting Rendine, 141 N.J. at 336). "[T]he focus of that determination is to ascertain what fee is reasonable, taking into account the hours expended, the lawyer's customary hourly rate, the success achieved, the risk of non-payment, and other material factors." Id. at 358-59 (citing Rendine, 141 N.J. at 334-45). The Court of Appeals for the Third Circuit stated that "[t]he district court should exclude hours that are not reasonably expended. Hours are not reasonably expended if they are **excessive, redundant, or otherwise unnecessary.**"[1] Rendine, 141 N.J. at 335 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir.1990) (citations omitted)).

Fralinger cites Hansen v. Rite Aid Corp., 253 N.J. 191, 221 (2023) and Grow Co., Inc. v. Chokshi, 424 N.J. Super 357, 365 (App. Div. 2012) in support of its appeal, but neither of those cases stands for the proposition that a court must assert a rigid and painstakingly detailed financial analysis to support a reduction in the hours billed. Fralinger fails to recognize that our jurisprudence does not require the trial court to apply a rigid financial analysis in support of its decision to reduce a fee application. See Rendine v. Pantzer, 276 N.J. Super. at 462. The amount of fees awarded is left to the sound discretion of the trial court, and the lodestar method is only a general guideline on how to calculate those fees. The trial

[1] Emphasis added.

court's "only concern is the amount of a reasonable fee, a conclusion that ultimately is discretion-bound and fact-sensitive and not particularly suitable of reduction to a few black-letter rules." Rendine, 276 N.J. Super. at 462.

In fact, the very case law cited by Fralinger does not support its position. As acknowledged by Fralinger, in Grow Co., Inc. v. Chokshi, the "thoroughness" of an attorney was used as a ground for the trial court's ***reduction*** in the fee award. The trial court concluded the trial could have been concluded earlier "but for defense counsel's 'thoroughness.'" Chokshi, 424 at 365. Thus, the trial court held that the fee should be reduced, essentially, because the defense attorney **spent too much time** defending the matter. Such is the case at hand. Fralinger's request for fees was excessive and sought duplicative fees for work already performed to a substantial degree.

While Plaintiffs strenuously dispute the appropriateness of any award for sanctions in this matter, a cursory review of the billing records submitted by Fralinger in support of an award for attorney's clearly demonstrate an unreasonable billing practice by Fralinger in defending this matter. (Pa000478). Based on the Certification of Joseph M. Tomaino, Esq., Fralinger's application for fees and costs failed to satisfy the reasonableness criteria because the time spent on matter and pleadings went well beyond "reasonable." Of particular significance, counsel's billing entries reflect time entries in the following sums: (1) 82.4 hours billed for

the second motion for summary judgment; (2) 74.6 hours billed for preparing for, attending, and memorializing the three depositions in this case; (3) 35.3 hours billed for the motion for sanctions; (4) 6.3 hours for "litigation management report" and "litigation report"; (5) 12 hours for paper discovery; and (6) .3 hours for "budget". There were also approximately 7.2 hours of entries which appeared to be double billed, without reason or explanation. All of this time was excessive, and virtually all of the time entries were attorney billed time. (Pa000557).

With regard to the 82.4 hours billed for the second motion for summary judgment, it should be noted that the second motion for summary judgment is substantially similar to the first motion for summary judgment that was previously prepared, filed and denied. (Pa000043; Pa000086). While Fralinger attempts to argue that the two motions are substantially different, a review of the two motions belies this fact. The only modifications of significance in connection with the second summary judgment motion is the 1) attachment and reference to Fralinger's interrogatory responses, 2) the attachment and reference to Fralinger's frivolous litigation letter, 3) the attachment and reference to deposition transcript of Plaintiffs' representative Salim Joarder (which is not even used in any material respect), 4) and the Certification from Fralinger's engineer pertaining to an engineering duty of care. The vast majority of the law, facts, and analysis of the second motion, however, were nearly identical to the first motion.

Certainly, Fralinger did not need to spend eighty-two (82) hours removing the argument pertaining to the failure to obtain an affidavit of merit, drafting a certification for its expert, and attaching interrogatories and a deposition transcript to a certification.

With regard to the 74.6 hours billed for preparing for, attending, and memorializing the three (3) depositions, this too was excessive. Mr. Tomaino's billing records reflect a substantial and unreasonable amount of time spent preparing for and attending these depositions, which were all virtual. The total time spent at depositions, as reflected by the transcripts, is as follows: (1) Gerry Velasquez started at 10:08 a.m. and concluded at 2:59 p.m.; (2) Salim Joarder started at 10:06 a.m. and concluded at 5:02 p.m.; (3) Robert Carter Day 1 started at 2:14 p.m. and concluded at 5:04 p.m., and Day 2 started at 9:36 a.m. and concluded at 1:36 p.m. (Pa000562; Pa000565; Pa000570). This is about fourteen (14) hours of deposition time total, yet the defense billed 74.6 hours on deposition related entries.

While Plaintiffs acknowledge that Plaintiffs sent Fralinger a deposition notice for a deposition scheduled for September 28, 2022, and that Fralinger likely had some legitimate preparation time, that deposition was cancelled on September 27, 2022. Yet, there are entries for deposition preparation the ***day after*** the deposition was cancelled. The Appellate Division should also note that the entries

comprising the 74.6 hours of time does not include review of deposition transcripts in preparing the defense's second motion for summary judgment; yet those entries were included in the calculation of the 82.4 hours billed for the second motion for summary judgment.

With regard to the 35.3 hours billed for the motion for sanctions, this time was likewise excessive and far beyond that which is reasonable. The majority of the arguments in the motion for sanctions were recycled from the motions for summary judgment. The only addition of significance in that motion was the law pertaining to frivolous litigation. (Pa000428).

With this information in hand, the trial court entered an order setting attorney's fees at $30,000.00. (Pa000637). In connection therewith, the trial court acknowledged that "[I]n all applications for attorney's fees, the factors set forth in RPC 1.5(a) are to be considered by the court, however, the overriding consideration is always 'reasonableness.'" The trial court noted that in the pending matter, none of the parties were "questioning the hourly rate charged or Fralinger's attorneys abilities or quality of work." Thus, the only issue or importance before the court was the reasonableness of the "hours expended through this billing period." (Pa000637).

In setting attorney's fees at $30,000.00, the trial court made a finding that the 82.4 hour billed on the second summary judgment motion "was very similar to

the first motion for summary judgment." Based upon the trial court's review of the other billing records in the amount of 74.6 hours for preparing and attending 3 depositions lasting approximately 14 hours, 35.3 hours for the motion for sanctions, and 6.3 hours for litigation reports to the carrier, almost all of which were attorney time, the "court sincerely question[ed] the reasonableness of the time expended and billed."

Thus, the trial court substantially and materially considered the billing records submitted before it and reduced the fee accordingly. For the foregoing reasons, Fralinger's cross-appeal should be denied.

CONCLUSION

For the foregoing reasons and based upon the above cited precedent, it is respectfully submitted that Fralinger's cross-appeal should be denied, and the following trial court orders,

1) the final Order, dated May 10, 2024;
2) the Oral Decision entered on October 20, 2023;
3) the Order entered on December 5, 2023, setting attorney's fees and costs;
4) the Order entered on March 6, 2024, wherein the court granted the CCIA summary judgment; and
5) the Order entered on March 6, 2024, wherein the court denied Plaintiffs' cross-motion for summary judgment.

should be reversed and remanded for further proceedings:

Respectfully submitted,

BATHGATE, WEGENER & WOLF, P.C.
Attorneys for Appellants

By: */s/ PETER H. WEGENER*
PETER H. WEGENER, ESQ.

Dated: October 15, 2024

608-610 MULLICA HILL ROAD, LLC AND MSJ ENTERPRISES, INC., Plaintiffs, v. CUMBERLAND COUNTY IMPROVEMENT AUTHORITY, a public body corporate and politic of the State of New Jersey; FRALINGER ENGINEERING, P.A.; MARATHON ENGINEERING and ENVIRONMENTAL SERVICES, INC.; ENTERPRISE NETWORK RESOLUTIONS CONTRACTING, LLC; FABBRI BUILDERS, INC.; and COMMUNITY HEALTH CARE, INC. d/b/a COMPLETE CARE HEALTH NETWORK, INC. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002975-23 CIVIL ACTION On Appeal From: Final Order of the Superior Court of New Jersey, Law Division, Cumberland County DOCKET NO. CUM-L-624-21 Sat Below: HON. JAMES R. SWIFT, J.S.C.

REPLY BRIEF OF RESPONDENT-CROSS APPELLANT FRALINGER ENGINEERING, P.A.

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PRELIMINARY STATEMENT

Plaintiffs-Appellants-Cross-Respondents 608-610 Mullica Hill Road, LLC and MSJ Enterprises, Inc. ("Plaintiffs") continue to mischaracterize the history of this matter in an attempt to portray their actions as anything but frivolous.

Most significantly, they continue to misstate the trial court's ruling on Fralinger Engineering, P.A. ("Fralinger")'s first motion for summary judgment, handed down on May 22, 2022. (Pa000465). This ruling did not allow Plaintiffs to bypass the Affidavit of Merit requirement and maintain whatever "common knowledge" claim they could invent after the close of discovery. Rather, as Judge Swift very clearly explained, "if there's an allegation here that Fralinger directed certain materials to be placed on the plaintiff's property during the course of construction," these claims could move forward absent an Affidavit of Merit. (Pa000446). Upon pushback from counsel for Fralinger, Judge Swift clarified that "if Fralinger directed contractors to place materials onto plaintiff's property during the construction stage or directed the…erection of the fencing, or…trespassed upon plaintiff's property knowingly," then Plaintiffs could pursue these claims absent an Affidavit of Merit. (Pa000468).

In reaching this conclusion, the trial judge referred to the preliminary site plans drafted by Fralinger, which proposed (1) the development of paved

parking spaces, and (2) a new location for dumpsters on the Property. (Pa000446). The plans did not direct any remediation activities. Reading Judge Swift's decision at oral argument in its entirety, it is obvious that the only reasonable interpretation of his holding is that Plaintiffs could only maintain a cause of action against Fralinger if they could show that Fralinger was actually responsible for directing the other parties to place construction materials onto the Property in connection with the parking lot improvements contemplated by the original site plans. Plaintiffs and their counsel, however, ***knew*** through its communications with CCIA and the remediation contractors that Fralinger had no involvement with the remediation activities performed before this lawsuit was filed.

Judge Swift never said that Plaintiffs could maintain "common knowledge" negligence claims against Fralinger – as he himself confirmed when granting Fralinger's motion for sanctions:

> I did not say that Plaintiff[s] could go forward on any type of professional negligence claims that required common knowledge or something like that. ***None of those claims really existed anyway***. Really what I was talking about, and I think I made clear at the time, was ***any trespass complaints or any other related type of complaints wherein Fralinger might have directed people…to enter on to Plaintiff[s]' property***, things like that.

(2T at 6:5-14) (emphasis added).

Rather than actually conduct the necessary discovery to pursue these potential claims articulated by the trial court, Plaintiffs chose to ignore Judge Swift's ruling. They then ignored Fralinger's responses to Interrogatories and frivolous litigation (safe harbor) letter, which not only advised that the plans had nothing to do with remediation, but also included evidence of Plaintiffs' and their own counsel's pre-suit knowledge that Fralinger changed the preliminary site plans in accordance with their wishes. Fralinger also advised Plaintiffs and their counsel that its plans were approved by an independent engineer and the city planner. Plaintiffs and their attorneys then exhibited bad faith by continuing with baseless litigation against Fralinger for the purpose of harassment and delay.

Plaintiffs needlessly kept Fralinger in the case for over a year, only to oppose Fralinger's second motion for summary judgment by arguing, for the first time, that Fralinger, a site civil engineer, needed to obtain Plaintiffs' consent before it drafted a preliminary site plan of the redevelopment project for the CCIA. This unsupported "common knowledge" claim against Fralinger, which completely lacks basis in both law and fact, was nothing more than a bad faith attempt to circumvent the Affidavit of Merit statute for a second time. Plaintiffs' actions can only be described as frivolous, for which Fralinger is entitled to the full amount of attorneys' fees requested.

LEGAL ARGUMENT

POINT I

PLAINTIFFS' SUIT AGAINST FRALINGER WAS FRIVOLOUS (2T Hearing, 10/20/2023) (Pa000637) (Pa000926)

A. PLAINTIFFS HAD PRE-SUIT KNOWLEDGE THAT FRALINGER MODIFIED THE SITE PLANS TO EXCLUDE THE PROPERTY FROM THE REDEVELOPMENT PROJECT

In their Complaint, filed on September 8, 2021, Plaintiffs brought the following allegations against Fralinger: (1) negligence, arising out of the design of the initial site plans, which "upon information and belief" included the soil erosion and sedimentation control fencing as well as the inclusion of the entire vacated Church Lane into the redevelopment project; and (2) trespass. (Pa000007-12).

With respect to the original site plans' inclusion of Plaintiffs' portion of Church Lane, Plaintiffs had pre-suit knowledge that these preliminary plans were modified before any work was carried out by any contractor. In an email dated February 9, 2021, Plaintiffs were informed that Fralinger had drafted new site plans which: (1) removed the proposed changes to Plaintiffs' Property; and (2) acknowledged that portion of Church Lane which, by ordinance, belonged to Plaintiffs. (Pa000435-36). ***This was seven months prior to the Complaint being filed***. Not only that, but Plaintiffs' counsel – the very same counsel representing Plaintiffs both in the court below and in the present appellate

proceedings – ***was also included on this email thread***. (Id.). Plaintiffs knew, prior to commencing this litigation, that they had no viable cause of action against Fralinger with respect to the actual design of the initial plans.

Plaintiffs repeatedly argue that the modification of the site plans is meaningless as "the damage had already been done" by the time the site plans were changed. ***This alleged work had nothing to do with Fralinger***. All of the work done on the Property prior to the site plans being modified – including the excavation of the parking lot – was done in connection with environmental remediation efforts. (Pa000243). And as Fralinger made clear to Plaintiffs in its responses to Interrogatories and in the safe harbor letter, ***it had nothing to do with any of the remediation efforts on the Property***. (Pa000102; Pa000121-22).

With respect to the remediation efforts, even if Plaintiffs now claim that consent was "coerced" or given without full knowledge of the extent of the remediation needed, they nevertheless consented as early as August 2017. (Pa000606). Whether this consent was uninformed or given under coercion is, again, not a harm that can be attributed to Fralinger.

B. EVEN IF PLAINTIFFS' LAWSUIT AGAINST FRALINGER WAS COMMENCED IN GOOD FAITH, IT WAS MAINTAINED IN BAD FAITH AFTER SERVICE OF FRALINGER'S SAFE HARBOR LETTER

Although the record does not support such a finding, even if this Court were to give Plaintiffs the benefit of the doubt with respect to whether the suit

against Fralinger was initiated in bad faith, no reasonable argument can be made that it was properly maintained following service of Fralinger's safe harbor letter.

Plaintiffs take issue with Fralinger filing its first summary judgment motion prior to the conduction of any meaningful discovery. They also appear to take issue with Fralinger serving its safe harbor letter so early in the litigation. And yet, despite these concerns, Plaintiffs did nothing to develop their remaining claims against Fralinger. They served a deposition notice on Fralinger, but then adjourned the deposition two days before it was to go forward and never rescheduled it. Plaintiffs requested no further documents or responses to supplemental interrogatories. Essentially, they did *nothing* to prosecute their claims against Fralinger after receiving the safe harbor letter.

Plaintiffs themselves concede that the only facts in favor of their trespass claim against Fralinger are: (1) a statement by a Marathon representative that he assumed the Property was part of the redevelopment project based upon a review of the preliminary site plans; and (2) Fralinger's concession, in its responses to Interrogatories, that it may have been on or near the Property at the time it drafted the original site plans. An examination of these facts, however, demonstrates that they cannot justify a "common knowledge" negligence or trespass claim.

First, whether Marathon assumed that the Property was part of the redevelopment project based on the preliminary site plans is not attributable to any alleged negligence on Fralinger's part. Fralinger did not provide the preliminary plans to Marathon and did not communicate with any Marathon representatives. (Pa000237 at 14:11-14). Moreover, as Judge Smith correctly commented: "[j]ust because [Marathon] relied upon that site plan and wrongly assumed that…[Plaintiffs'] property was involved in a project, that's got nothing to do with Fralinger…The site plan was out there and ***if somebody else wrongly relied upon it, that's not Fralinger's fault***." (4T at 31:11-17) (emphasis added). Indeed, there was no contractual or agency relationship between Fralinger and Marathon by which Plaintiffs could try to impose liability on Fralinger for any of Marathon's alleged misconduct. Plaintiffs assert this purported reliance argument in an attempt to justify their frivolous conduct, but at the end of the day, this claim does not relate to whether the design or preparation of Fralinger's preliminary plans was negligent.

Second, Plaintiffs' argument that Fralinger allegedly acknowledged that a representative *may* have trespassed on the Property is grossly taken out of context and immaterial. Fralinger responded in an Interrogatory that it "*does not recall* a physical entry onto Plaintiffs' Property related to this Project, but it is *possible* that a Fralinger employee was present on and/or in the area of the

Plaintiff[s'] Property or Church Lane to conduct survey work." (Pa000108) (emphasis added). This qualified response was given because Fralinger could not recall, one way or another, if any of its employees ever actually made entry onto the Property. Assuming that a Fralinger employee did step onto Plaintiffs' Property to conduct survey work, this would have occurred before any preliminary site plans were prepared and has nothing to do with the alleged trespass claims Plaintiffs improperly pursued. It does, however, underscore the attempts Plaintiffs will undergo to try and justify their bad faith.

Plaintiffs also attempt to excuse their lack of discovery as to Fralinger by contending that they are not required to depose every single potential witness prior to trial. Although this may be true, Plaintiffs' failure to conduct *any* discovery from Fralinger following oral argument on the first summary judgment motion and receipt of the safe harbor letter amounts to nothing more than continued harassment and delay in violation of the frivolous lawsuit rule and statute.

Finally, after discovery closed, Plaintiffs argued, for the first time, that Fralinger needed to obtain Plaintiffs' consent to prepare preliminary site plans for the redevelopment project. This baseless argument was made without any supporting evidence and actually would require expert testimony. Plaintiffs, however, never obtained an Affidavit of Merit, and the professional negligence

claims were already dismissed. In fact, the evidence showed that CCIA, *not Fralinger*, was responsible for obtaining Plaintiffs' consent with respect to the redevelopment project. (Pa000215 at 32:9-12). Plaintiffs' continued efforts to keep Fralinger in the case with its "need for consent" argument can only be interpreted as bad faith, frivolous litigation which resulted in unnecessary, but significant attorney's fees and costs.

The issue of whether a civil engineer needs the consent of neighboring properties when drafting a preliminary site plan ***is not common knowledge***, no matter how Plaintiffs try to justify it. In their opposing papers, Plaintiffs wrongly and unfairly characterize Fralinger's argument on this topic, claiming that Fralinger believes an engineer can never be liable for negligence under the common knowledge exception. This is untrue. There may be situations in which a civil engineer does something wrong and in which no expert testimony is required to establish a deviation from the standard of care. Fralinger never claimed otherwise. However, in this case, the standard of care as it relates to the preparation of preliminary site plans for this redevelopment project, and the issue of whether Fralinger needed Plaintiffs' consent when it drafted the preliminary site plans, are simply not issues of common knowledge.

The average layperson does not know the duties and responsibilities of a site civil engineer in the context of preparing preliminary site plans. The average

layperson does not know who, in the course of a large redevelopment project, is required to inform property owners of proposed improvements to their properties. These are issues that a civil engineer expert must speak to, and Plaintiffs' failure to obtain one in disregard of the Affidavit of Merit statute is simply another example of the frivolous manner in which they maintained this suit against Fralinger. The Affidavit of Merit statute was enacted to protect professionals from baseless claims and weed out frivolous lawsuits early in litigation – not after enduring expensive discovery in a multi-party lawsuit, and requiring two motions for summary judgment.

As Plaintiffs themselves acknowledge, even a claim brought in good faith can later become frivolous. See LoBiondo v. Schwartz, 199 N.J. 62 (2009). In this matter, Plaintiffs and their attorney knew or should have known before filing the Complaint that a claim against Fralinger had no merit. However, it became more evident that the lawsuit against Fralinger was frivolous upon Plaintiffs' receipt of the safe harbor letter, which noted that the site plans had been modified as per Plaintiffs' request and before Fralinger's proposed improvements to the Property could take place, and that Fralinger had nothing to do with any of the remediation efforts giving rise to Plaintiffs' alleged damages. This was the point in the litigation where Plaintiffs should have dismissed Fralinger from the lawsuit or, at the absolute very least, made some

sort of attempt to extract further discovery from Fralinger that might have supported their trespass claim. Rather than acknowledge the shortcomings in the prosecution of their claims against Fralinger, Plaintiffs instead continue, even on this appeal, to rehash the same bad faith arguments, needlessly prolonging this matter even further, resulting in Fralinger continuing to incur unnecessary litigation costs.

POINT II

FRALINGER IS ENTITLED TO ITS FULL FEE AWARD (4T Hearing, 5/7/2024) (Pa000637) (Pa000926)

Fralinger is entitled to its full fee award of $89,072.19 in light of Plaintiffs frivolous pursuit of this litigation. Sanctions calculated under the lodestar method should equal "the number of hours reasonably expended by the successful party's counsel in the litigation [by] a reasonable hourly rate." Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)).

Plaintiffs, in opposition to Fralinger's cross-appeal, concede that the hourly rate of Fralinger's counsel was reasonable, and instead only dispute the amount of time expended on the litigation. Plaintiffs' Opposition Brief at p. 22. "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." Rendine v. Pantzer, 141 N.J. 292, 335 (1995).

Neither Plaintiffs, nor the trial court, have been able to explain what a "reasonable" amount of hours expended on this multi-defendant litigation would total, despite this being an important step in calculating attorneys' fees under Rule of Professional Conduct 1.5(a). Attorney's fees were unnecessarily incurred due to Fralinger's participation in discovery, preparation for depositions, and motion practice in the face of unspecified common knowledge negligence and trespass claims.

Plaintiffs attempt to criticize the amount of time counsel spent on motion practice and depositions and purport to calculate "total" hours billed for certain work. However, Plaintiffs ignore that detailed time entries were submitted to justify every minute spent needlessly defending Fralinger from Plaintiffs' frivolous claims.

For example, Plaintiffs complain about the "total" time spent related to depositions, but this does not account for the volume of documents produced by Plaintiffs and co-defendants in this case, the time spent reviewing records for potential deposition exhibits, documents to prepare witnesses, consulting and preparing with the client, drafting deposition outlines, summarizing testimony and client/carrier reporting – all deposition expenses that go beyond merely attending a deposition. This work was specified in the time entries provided to the trial court.

Plaintiffs also take issue with Fralinger and its counsel preparing for a deposition the day after the deposition was postponed by Plaintiffs. Contrary to Plaintiffs' claim, at that time, the deposition was *adjourned* and not cancelled. This office and our client had previously made plans to prepare for the September 28th deposition on September 27th. Although the deposition was adjourned, given our client's busy schedule, we took the opportunity to keep our meeting as planned to prepare for a rescheduled deposition. Plaintiffs never

rescheduled the deposition. It is unfortunate that Fralinger has to endure responding to these misplaced criticisms from Plaintiffs regarding work that it was forced to conduct because of Plaintiffs' bad faith pursuit of its claims against Fralinger.

As for Fralinger's second motion for summary judgment, the time spent on this matter is all itemized in the billing entries. Plaintiffs' attempt to compare the first and second motions for summary judgment should be rejected. Fralinger did not have to address Plaintiffs' "need for consent" argument in the first summary judgment motion, which instead focused on Plaintiffs' failure to obtain an Affidavit of Merit. The motions were different and further, Fralinger unfortunately was not awarded fees relating to filing the first summary judgment motion since it was filed *before* the safe harbor letter was sent to Plaintiffs.

Fralinger produced all of the itemized invoices for billing associated with the defense of this frivolous lawsuit in its fee certification and stands by the time spent in defense of these baseless claims. Additionally, both the trial court and Plaintiffs failed to acknowledge the double-review process performed by both Joseph M. Tomaino, Esq., as well as Fralinger's insurance carrier. (Pa000478-79). This double-review process ensured that the services performed by Fralinger's counsel were fair and reasonable, as opposed to excessive or redundant, and it should have been considered in the calculation of Fralinger's

fee award. Fralinger's fee application disclosed that certain invoices were reduced by the carrier, and it only sought to recover fees from Plaintiffs that were actually paid by the carrier as opposed to the recovery of fees billed.

At the very least, Fralinger is entitled to a more thorough analysis of why its fee award was reduced to only $30,000. See Grow Co., Inc. v. Chokshi, 424 N.J. Super. 357, 365 (App. Div. 2012); Hansen v. Rite Aid Corp., 253 N.J. 191, 221 (2023). Absent a proper consideration of all factors listed under R.P.C. 1.5(a), as well as a proper explanation of what would constitute a reasonable number of hours expended on this litigation, the trial court's $30,000 award remains arbitrary, and it must be reconsidered or remanded for further analysis.

CONCLUSION

For the aforementioned reasons, as well as all those reasons laid out in its initial Brief, Fralinger respectfully requests that (1) Plaintiffs' appeal be denied; and (2) its cross-appeal for the full amount of attorneys' fees be granted or, alternatively, remanded for reconsideration.

Respectfully Submitted,

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/s/ Joseph M. Tomaino
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Dated: November 13, 2024