

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

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MICHAEL MCMAHON and KRISTIN  
KIEFER

Plaintiffs

v.

KARCHIK HOMES; KARCHIK  
HOMES, LLC; KARCHIK HOMES, LLC  
CONSTRUCTION, INC. and RONALD  
A. KARCHIK, (a.k.a. Ronald Karchik),  
Individually

Defendants

SUPERIOR COURT OF  
NEW JERSEY  
DOCKET NO.: A-003081-24

ON APPEAL FROM:

SUPERIOR COURT OF  
NEW JERSEY - LAW DIVISION  
OCEAN COUNTY

DOCKET NO.: OCN-L-1968-22

CIVIL ACTION

Sat Below:

Hon. Valter H. Must, J.S.C.

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MEMORANDUM OF LAW ON BEHALF OF  
PLAINTIFFS/APPELLANTS  
MICHAEL MCMAHON AND KRISTIN KIEFER  
IN SUPPORT OF APPEAL

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## OPINION BELOW

Plaintiffs. Michael McMahon and Kristin Kiefer, (hereinafter, collectively, “Plaintiffs”), submit this brief in support of their Appeal of the trial court’s Order dated April 11, 2025 granting Defendants’ Motion for a new trial. (1a). On June 11, 2025, pursuant to the directive issued by the Appellate Division on June 2, 2025, the trial court issued its written statement of findings. (3a). The opinion of the Superior Court of New Jersey, Law Division, Ocean County is not reported.

## PRELIMINARY STATEMENT

In its statement of reasons provided on June 11, 2025, the Court’s decision underscores that it substituted its own determination for that of the jury’s when it stated: “*In the Courts mind*, the amount of damages would be the same. . . Also, *the Court can perceive* no rational basis for the difference between the consumer fraud damages and the common law fraud damages.” (4a). At oral argument, with respect to Juror #1, no clear and convincing evidence of juror misconduct was produced. Instead, the Court stated: “Secondly, something, in my view, happened in that jury room that I can’t explain. So it – so this additional ingredient to this entire pot, so to speak – .” (T23:21-24). Counsel reiterated: “there is – there is a absolutely no evidence of juror misconduct. There’s no indication that this particular juror spoke with anyone and, you know, the speculation, it just simply does – doesn’t meet the clear and convincing standard that’s been enunciated by –

by all of the cases.” (T25:4-9).

At oral arguments, the court also questioned the basis for consumer fraud damages in the amount of \$200,000. Counsel argued that there is a rational basis and explained what that basis was. (T26:22-25 to T27:1-9). In response, the court stated: “No. I’m saying let’s say the jurors did say that, would that be a proper jury verdict?” (T27:17).

A jury’s verdict is sacrosanct and should not be set aside unless there is clear and convincing evidence of mistake or error. Here, commencing February 10, 2025, a six (6) day trial occurred. At the conclusion of the trial, the jury returned a verdict in the amount of \$650,000. The verdict was 7-0. (46a). With the requisite trebling of the consumer fraud damages, the total verdict was \$950,000 broken down as follows:

Breach of Contract:	\$100,000
Consumer Fraud:	\$200,000 trebled to \$600,000
Common Law Fraud:	\$250,000.

(46a-47a).

The verdict was unanimous. (46a-47a).

After the conclusion of trial, Defendants engaged new counsel who moved for a new trial arguing that the jury’s verdict was tainted by juror misconduct and also moved for a new trial on the basis that the verdict was unreasonable. (54a-

60a). Opposition and a reply brief were filed. (131a and 155a).

At trial, after the jury was seated, Juror # 1 came forward and informed the court that, overnight, it occurred to him that a former co-worker had informed him that approximately 4 years earlier he was having a house built and it was taking too long. There was no discussion between Juror # 1 and the former co-worker, only a single statement of fact. There was no further discussion of the construction of the house. Juror # 1 did encounter the co-worker at a Christmas party, but there was no discussion of the house at the party. The court voir dired the juror and concluded that the juror could be fair and impartial. Defendants presented no clear and convincing evidence of juror misconduct or that the jury had made an error. Simply put, the defendants were dissatisfied with the verdict and asked the court to substitute its own determination for that of the jury.

Plaintiffs opposed defendants' motion arguing that there was no juror misconduct and the jury was not tainted. (132a- 134a). Plaintiffs further argued that the court may not substitute its own determination of the jury's decision simply because the court would have reached a different conclusion. (131a).

In granting the motion for a new trial, the Court cited no clear and convincing evidence of juror misconduct. Instead, the Court speculated as to what the jury decided and substituted its own determination for that of the jury.

At oral argument, the Court speculated that perhaps the jury was influenced

by Juror #1. (T34:7-10). The Court also repeatedly stated that the jury did not like the defendant Ronald Karchik and wanted to punish him. (T12:9; T30:23; T34:1). In other words, the Court failed to appreciate that one of the salutary purposes of the Consumer Fraud Act is punishment. The Court's decision is an error of law to which no deference is owed.

Here, the Trial Court erred where there is no clear and convincing evidence of misconduct or error on the part of the jury. Simply put, Defendants failed to show that there has been a miscarriage of justice. The Defendants were merely unhappy with the jury's verdict. Further, the Court mistakenly substituted its own judgment for that of the jury. For those reasons, this Court should grant Plaintiff's appeal and reverse the Court's Order granting a new trial.

### **PROCEDURAL HISTORY**

On or about June 9, 2022, Defendant Ronald A Karchik, filed an improper Notice of Unpaid Balance and Right to File Lien which he purported was a Construction Lien Claim in the Ocean County Clerk's Office appertaining to the Plaintiff's real property known as Block 105, Lot 1.02 in Ocean Township (Waretown), NJ. (162a). Defendant never filed a Construction lien. Only a Notice of Unpaid Balance and Right to File Lien was recorded. The Notice of Unpaid Balance was filed under Instrument Number 2022067225, OR Bk 19063 PG 31 and recorded on June 10, 2022. (162a). The Notice of Unpaid Balance

contained a lien claim amount of \$329,100.00. (163a). Defendant failed to comply with the requirements of the Construction Lien Law (CLL) which requires strict compliance.

On September 6, 2022, plaintiffs filed suit against defendants alleging the following:

- Count One: Breach of Contract
- Count Two: Benefit of the Bargain
- Count Three: Misrepresentation
- Count Four: Consumer Fraud
- Count Five: Common Law Fraud
- Count Six: Slander of Title
- Count Seven: Tortious Interference
- Count Eight: Attorneys' Fees and Expenses

(5a).

On November 3, 2022, defendants filed their Answer to the Complaint with a Counterclaim and a Third Party Complaint against MJ Lyons Corporation.

(20a). On November 21, 2022, plaintiffs filed their answer to the counterclaim.

(35a). On April 12, 2023, MJ Lyons filed its answer to the third party complaint with a counterclaim against defendants. (39a). On May 2, 2023, defendants filed their answer to the counterclaim asserted by MJ Lyons. (42a).

On December 9, 2022, defendants Karchik Homes, Karchik Homes, LLC, Karchik Homes LLC Construction, Inc. Karchik Ronald A., and Karchik Ronald prepared its first Notice of *Lis Pendens*. (167a). Said *Lis Pendens* was recorded

under Instrument No. 2022127257, OR BK 19250 PG 472 on December 14, 2022. (167a). The *Lis Pendens* gave notice of the commencement and pendency of a lawsuit regarding the subject property and also sought “damages for the breach of such Contract.” (168a). The lawsuit identified in the Notice of *Lis Pendens* is the subject lawsuit seeking only money damages for breach of contract. (5a and 168a). That *Lis Pendens* was improperly recorded as it only sought money damages.

On February 16, 2023, counsel for plaintiff directed a letter to counsel for defendant wherein a request was made that the Construction Lien and Notices of *Lis Pendens* filed by defendants be discharged. (169a).

On February 22, 2023, defendants Karchik Homes, Karchik Homes, LLC, Karchik Homes LLC Construction, Inc. Karchik Ronald A., and Karchik Ronald prepared a second Notice of *Lis Pendens* against the property which is the subject of this litigation. (170a). Said *Lis Pendens* was recorded on March 8, 2023 under Instrument No. 20230177217, OR BK 19318 PG 154 and also seeks damages for breach of Contract. (170a). Like the first Notice of *Lis Pendens*, this Notice is also for the subject lawsuit seeking only money damages for breach of contract. (5a and 170a). That *Lis Pendens* was also improperly recorded as it, too, only sought money damages.

On or about April 26, 2023, plaintiffs moved to have an improperly filed Notice of Unpaid Balance and Right to File Lien discharged and declared

unenforceable pursuant to N.J.S.A. 2A:44A-1 et seq. and to have two improperly filed Notices of Lis Pendens discharged. (172a). Thereafter, on April 28, 2023, defendant finally discharged the construction lien. (174a). On May 2, 2023, defendants finally discharged the two (2) Lis Pendens. (176a and 179a).

On December 12, 2023, defendants filed their first Motion for Partial Summary Judgment seeking dismissal of the claims of Consumer Fraud against Defendants, including Ronald Karchik, Individually. (182a). Defendants also sought dismissal of the claim of Slander of Title. (183a). Said motion was denied on January 19, 2023. (184a).

With trial scheduled for September 16, 2024, defendants filed a motion in limine seeking dismissal of Count 4 of Plaintiff's Complaint alleging Consumer Fraud). (186a). That motion was not decided and trial was adjourned.

On September 18, 2024, defendants again moved for Partial Summary Judgment. (187a). On October 7, 2024, plaintiffs filed opposition and also cross-moved for the imposition of a constructive trust on real property owned by defendants which real property defendants had transferred in violation of the fraudulent conveyance act. (189a). On October 29, 2024, the court denied both motions. (191a and 193a).

Commencing February 10, 2025, a six day trial was conducted. During trial, the court dismissed Plaintiff's claims against Ronald Karchik, Individually.

No motion was filed and no order was entered.

At trial, although plaintiff had estimates supporting their claim of damages, the court barred plaintiffs from putting on that evidence of damages by four different witnesses, including a siding contractor, a painter, a material supplier representative and an architect. Again, no motion was filed and no order was entered.

At the conclusion of trial, a unanimous jury found Karchik Homes, LLC liable for Breach of Contract, Consumer Fraud and Common Law Fraud and returned a verdict of \$650,000. With the trebling of the consumer fraud damages of \$200,000, the total verdict was \$950,000. (45a). The verdict is broken down as follows:

Breach of Contract:	\$100,000
Consumer Fraud:	\$200,000
Common Law Fraud:	\$250,000.

(46a-47a).

The court, thereafter, at Plaintiff's request, instructed that plaintiff submit a brief on the issue of Slander of Title.<sup>1</sup> The Court also provided plaintiff with the

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<sup>1</sup> Defendants asserted that the claim for Slander of Title had been dismissed from the case. Plaintiff asserted that it had not been dismissed.

opportunity to move for reconsideration on the issue of individual liability of Ronald Karchik.

On March 6, 2025, Plaintiffs filed their Order for Judgment which included a Request for Reasonable Attorneys' Fees. The Order for Judgment was never signed. On March 7, 2025, Defendants moved for a new trial. (48a). On March 10, 2025, Plaintiffs also moved for reconsideration of the Court's dismissal of individual claims of consumer fraud against Ronald Karchik, slander of title and for a constructive trust. (195a). Opposition and a reply brief were filed. (249a and 270a).

On April 11, 2025, the court heard oral arguments on the motions. At the conclusion of oral arguments, the court granted defendants' motion for a new trial. (1a). The Court's decision was not based on any evidence, let alone clear and convincing evidence and simply based on speculation. The Court granted defendants' motion for a new trial stating, that there was no evidence of damages and because of the alleged issue with juror #1, the verdict was rendered suspect. The court also granted plaintiffs request to reinstate the individual claims of consumer fraud against Ronald Karchik and the claims of slander of title. (307a).

#### **STATEMENT OF FACTS**

Plaintiffs Michael McMahon and Kristin Kiefer are owners of property known as 142 Admiral Way, Ocean Township (Waretown), NJ. (5a). Defendant

Karchik Homes, LLC, which also refers to itself as Karchik Homes, LLC Construction, Inc. is the builder of residential dwellings in the State of New Jersey. Defendant Ronald A. Karchik, a.k.a. Ronald Karchik, is the President of Karchik Homes. (5a).

On or about September 7, 2020, Plaintiffs entered into a Construction Contract with Karchik Homes, LLC for the construction of a home to be built on 142 Admiral Way, Waretown, NJ. (88a-97a). The contract amount was \$649,900.00. (95a). Under the terms of the contract, the construction was to be completed on or about 6 months from the start date of construction. (94a). As the result of poor workmanship, deviations from standards and/or contract provisions, substantial delays to the completion of the work, including 17 months to perform construction, and misrepresentations made by the defendant as to work or materials supplied, defendants were terminated from the project by or about June 8, 2022.

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW.

The standard of review on appeal “is the same as that governing the trial judge whether there was a miscarriage of justice under the law.” Hayes v. Delamotte, 231 N.J. 373, 385-386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521-22 (2011)). Rule 2:10-1 specifies that “miscarriage of justice under the law” is the standard when the issue in the motion

for new trial was “whether a jury verdict was against the weight of the evidence.” A “miscarriage of justice” can arise when there is a “manifest lack of inherently credible evidence to support the finding,” when there has been an “obvious overlooking or under-valuation of crucial evidence,” or when the case culminates in “a clearly unjust result.” Risko, supra, 206 N.J. at 521-522, quoting, Lindenmuth v. Holden, 296 N.J.Super. 42, 48 (App.Div. 1996).

However, “a jury verdict, from the weight of evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice.” Carrino v. Novotny, 78 N.J. 355, 360 (1979) (citing Baxter v. Fairmont Food Co., 74 N.J. 588 (1977)). See also, Risko, supra, “A jury verdict is entitled to considerable deference and ‘should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.” Id. at 521. “[T]he trial court may not disturb a damages award entered by a jury unless it is so grossly excessive or so grossly inadequate ‘that it shocks the judicial conscience.’” Oriente v. Jennings, 239 N.J. 569, 595 (2019).

‘A jury verdict is entitled to considerable deference and ‘should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record

and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.’ ” Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977) ). A trial court therefore grants a motion for a new trial only ‘if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.’ Crawn v. Campo, 136 N.J. 494, 511-12, (1994) (quoting R. 4:49–1(a)).

Hayes, supra, 231 N.J. at 385-386.

In He v. Miller, 207 N.J. 230 (2011), the Court explained:

Like our cautionary language concerning new trial motions in general, it is not the role of the courts, either at the trial or appellate level, to sit as the decisive juror or substitute their notions of justice for those expressed by the jury. See Dolson [v. Anastasia], 55 N.J. 2], at 6 [(1969)] (cautioning that “judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror”).

He, supra, 207 N.J. at 252.

In Cuevas v. Wentworth, 226 N.J. 480 (2016), the Supreme Court decided the denial of a motion for remittitur. The court explained that “even a seemingly high award should not be disturbed; only if the award is one no rational jury could have returned, one so grossly excessive, so wide of the mark and pervaded by a sense of wrongness that it shocks the judicial conscience.” Id. at 500. The Court cautioned that “[t]he standard is not whether a damages award shocks the judge's personal conscience, but whether it shocks the judicial conscience.” Id. at 486.

“A high verdict, does not mean it was excessive. Jastram v. Kruse, 197 N.J. 216, 235 (2008).

The Court in Cuevas further stated:

A jury's verdict, including an award of damages, is cloaked with a ‘presumption of correctness.’ Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977). *The presumption of correctness that attaches to a damages award is not overcome unless a defendant can establish, ‘clearly and convincingly,’ that the award is ‘a miscarriage of justice.’* Id. at 596 (quoting R. 4:49-1(a)). In deciding whether to grant a new trial or remittitur based on a purportedly excessive damages award, the court must give ‘due regard to the opportunity of the jury to pass upon the credibility of the witnesses.’ He, supra, 207 N.J. 230, 248 (2011) (quoting R. 4:49-1). A ‘judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a ... decisive juror.’ Baxter, supra, 74 N.J. at 598 (quoting Dolson v. Anastasia, 55 N.J. 2, 6 (1969)). [emphasis added].

Cuevas, supra, 226 N.J. at 501.

Importantly, the court stated:

Because a jury’s award of damages is presumed to be correct, when considering a remittitur motion, *a court must view ‘the evidence in the light most favorable to the plaintiff.’* Johnson [v. Scaccetti], 192 N.J. 256] at 281 [(2007)] (quoting Taweel v. Starn's Shoprite Supermarket, 58 N.J. 227, 236, (1971), overruled on other grounds by Fertile, [v. St. Michael’s Med. Ctr.], 169 N.J. 481 (2001)]

B.

The standard for reviewing a damages award that is claimed to be excessive is the same for trial and appellate courts, with one exception—an appellate court must pay some deference to a trial judge's ‘feel of the case.’ Id. at 282, (quoting Baxter, supra, 74 N.J. at 600 ). That is so because ‘*[i]t is the judge who sees the jurors* wince,

weep, snicker, avert their eyes, or shake their heads in disbelief,' Jastram, [v. Kruse, 197 N.J. 216] at 230, [(2008)], *who may know 'whether the jury's verdict was motivated by improper influences,'* He, *supra*, 207 N.J. at 250 (quoting Pellicer v. St. Barnabas Hosp., 200 N.J. 22 (2009) ), and who may be privy to observations that could not have been made by the jury. He, *supra*, 207 N.J. at 255. *Under the guise of 'feel of the case,' however, a trial judge cannot overthrow the jury's credibility determinations and findings of fact and then substitute her own. Ultimately, the jury's 'feel of the case' controls the outcome of the issues in dispute.* A judge's 'feel of the case' based on observing a party or a witness in the courtroom is entitled to minimal weight if the jury had the same opportunity to make similar observations. Baxter, *supra*, 74 N.J. at 600. [emphasis added].

Cuevas, *supra*, 226 N.J. at 501-502.

Analyzing whether a verdict is against the weight of the evidence

calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury. *Of course, the judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror.* [emphasis added].

Id. at 6.

“[T]he trial judge must . . . canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict.” Ibid. (quoting Kulbacki v. Sobchinsky, 38 N.J. 435, 445 (1962)). A motion for a new trial considers “not only tangible factors relative to the proofs

as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain, so-called 'demeanor evidence,' and the intangible 'feel of the case' which he has gained by presiding over the trial."

Ibid.

Here, in vacating the jury's verdict, the Court concluded that the jury "hate[d] the defendant" and that he should be punished for what he did. (T34:3). The Court also stated, without any evidence, that juror no. 1 may have influenced the other jurors. (T34:7-10).

The record is completely devoid of any clear and convincing mistake made by the jury. The record is also completely devoid of any evidence that the jury was motivated by improper influences. There absolutely no evidence of jury taint or misconduct. The record, however, is replete with the Court's references to the jury's dislike and hatred for the defendant, which the Court seemingly agreed with as the Court stated:

I have no doubt that this jury did not like Mr. Karchik. I have no doubt about that. ***And they had good reason not to like him, because frankly, some of his testimony just didn't add up.*** So I have no doubt that they thought he had violated the Consumer Fraud Act and that he was – that what he had done translates into common law fraud. [emphasis added].

(T30:23-25 to T31:1-4).

The Court had the opportunity to simply reduce the verdict. Instead, without any evidence of misconduct or mistake, the Court vacated the entire verdict and ordered a new trial. That is a miscarriage of justice.

**II. THE COURT ERRED IN GRANTING A NEW TRIAL WHERE THERE WAS NO JUROR MISCONDUCT AND DEFENDANTS HAD THE OPPORTUNITY TO QUESTION THE JUROR. (Argued Below: T5:16; T20:17-25 to T25:1-10; Court’s Decision: T34:7-14 ).**

The Court improperly granted a new trial where there is no clear and convincing evidence of juror misconduct. The Court in Dolson described the process which must be undertaken by the trial court in determining whether or not a new trial should be granted. There, the court stated that the trial court must engage in “a process of evidence evaluation.” Id. at 6. Such a process “calls for a high degree of conscientious effort and diligent scrutiny.” Ibid. The judge may not substitute his own judgment for that of the jury merely because he would have reached a different conclusion. Ibid. “The object is to correct clear error or mistake by the jury.” Ibid. The trial judge takes into account “not only tangible factors relative to the proofs, as shown by the record, but also *appropriate matters of credibility* . . . which he has gained by presiding over the trial” Ibid.

The whole process is well summed up in the dissenting opinion in Kulbacki [v. Sobchinsky, 38 N.J. 435 (1962)]: ‘the question is whether the result strikes the judicial mind as a miscarriage of justice,’ 38 N.J., at 459. This is the standard intended to be conveyed by R. 4:49-1(a), although expressed negatively and somewhat redundantly: ‘The trial judge shall not, however, set aside the verdict of a jury as

against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.’ The rule might be more precisely stated as ‘the trial judge shall grant the motion, if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly appears that there was a miscarriage of justice under the law.’

Dolson, 55 N.J. at 6-7.

Defendants were not deprived of a fair trial where the judge questioned Juror #1 and there is no evidence of jury taint. “A new trial is not necessary in every instance where it appears an individual juror has been exposed to outside influence.” State v. R.D. 169 N.J. 551, 559 (2001). “Due process does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.” R.D., supra, 169 N.J. at 559 quoting Smith v. Philips, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed. 2d 78, 86 (1982). “Ultimately, the trial court is in the best position to determine whether the jury has been tainted.” R.D., supra, 169 N.J. at 559.

In R.D., the court rejected the defense’s argument that the defendant was deprived of a fair trial because the trial court failed to voir dire all jurors on being informed by one juror that he knew extraneous information about a witness finding that a voir dire of the remaining jurors was not required. In R.D., a jury was

empaneled. After the jury was empaneled, the judge made opening remarks which included, “don’t discuss the case with your fellow jurors. Don’t have conversation about the evidence or the trial with your fellow jurors.” Ibid.

Following the judge’s opening remarks, trial commenced with three witnesses testifying on behalf of the State. At the conclusion of the last witness’ testimony, but before the jury was excused, juror number 2 informed the judge that he/she needed to see the judge. Juror number 2 informed the court that he belatedly realized that he knew the victim’s mother. Id. at 555. Juror number 2, thereafter, described how he knew the victim’s mother. Ibid. He asked the juror if the juror had discussed the matter with any other juror. Id. at 556. The juror responded, “No.” Ibid. The juror was excused after the court spoke with both attorneys. Ibid. Trial continued on the next day. Ibid. At the conclusion of trial, the defendant was convicted. Ibid.

The Supreme Court explained that the “court is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted there.” Id. at 557. The trial court must then determine whether the trial may proceed after excusing the tainted juror or jurors, or whether a mistrial is necessary. Ibid. The decision to grant a new trial based on jury taint resides in the discretion of the trial court. Ibid.

Here, there is no evidence of juror misconduct or jury taint. After the jury was empaneled, a juror disclosed that a “*CO-WORKER,*” *NOT A FRIEND,* as misrepresented by defendants in their brief and Certification, had stated to him that the co-worker’s friend was dissatisfied about how long it was taking to complete a house. (152a-153a). The judge did question the juror on the record as required. (152a-153a). Defense counsel also had the opportunity to ask questions. (153a). The co-worker was not friends with Plaintiff McMahon’s friend. (153a). The individual who made the comment to Juror #1 was a former co-worker and Juror #1 had retired 4 years ago. (153a). There was no extensive discussion. It was a *single statement.* The statement was *not recent.* The single statement made to the Juror was made *over 4 years ago.* (153a). There were no subsequent discussions. (153a). Further, there is no evidence that Juror #1 discussed this with any other juror and defendants did not present any evidence that Juror #1 had discussed this statement with the other jurors—only mere speculation. Most importantly, Juror #1 was asked if he could be fair and impartial. (153a). He stated that he could. (153a).

At oral argument, the court stated that when juror no. 1 reported to the court that he had a conversation with a coworker about difficulties he was having in building a home, the court “brought him in, asked him questions, and at that time this Court concluded that he could remain as a juror, that he retained his ability to

be fair and impartial.” (T5:20-25 to T6:1-3). Nowhere during oral arguments was any evidence, let alone clear and convincing evidence, of juror misconduct produced.

Following the trial, defendant Karchik retained new counsel who was not present during the trial, but who, at oral arguments, argued without providing any supporting evidence of any kind whatsoever that juror no. 1 had a conversation which was “clearly potential prejudice” and “clearly violated the right to any impartial jury.” (T21:3-8). Counsel for defendant concluded, again without any supporting evidence: “And I don’t know how you can argue that at a minimum it could not have unconsciously affected juror number 1’s deliberation” and that “it impacted on the right to an impartial and an unprejudiced, and a juror that’s free from outside influences.” (T21:25 to T22:8-10).

Counsel for Plaintiffs argued:

MS. PLAIA: Your Honor, if I may be heard?

THE COURT: Yes. Go ahead.

MS. PLAIA: I’d like to start on addressing counsel’s last argument first. The Supreme Court in State v. R.D. has already said a new trial is not necessary in every instance where it appears an individual juror has been exposed to outside influence. Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. And, Your Honor, this is a

situation where this was not a friend, as indicated by the defendants. Your Honor correctly –

(T22:19-25 to T23:1-8).

The Court responded, in part:

THE COURT: You don't have to recite the facts. But here's – here's -- I understand the law and with respect to this there are a couple of things that concern me here. If that's all they had, then it wouldn't give me pause, because we – we covered that, you know, and there's no perfect jury. And to tell you the truth, I have no doubt that defense could have excused – if he had said that during the course of our voir dire sidebar, yeah, I had a guy come up to me, a friend, who said that the builder was dragging his feet and he was very – he would have been gone like that. No question about that.

Secondly, something, *IN MY VIEW*, happened in that jury room *THAT I CAN'T EXPLAIN*. So it – so this additional ingredient to this entire pot, so to speak, [emphasis added].

(T23:9-23).

Counsel responded:

MS. PLAIA: Thank you, Your Honor. As I was indicating, there is – there is absolutely no evidence of juror misconduct. There's no indication that this particular juror spoke with anyone and, you know, the speculation, it just simply does not – meet the clear and convincing standard that's been enunciated by – by all of the cases. It has – it says it —

(T25:3-10).

At the conclusion of oral arguments, the Court decided that based on what

the court described as an “anomalous verdict” that there may been influence on the jury, stating:

Secondly, I’m – I’m concerned by what effect this – leaving this juror on there may have done to influence this, what appears on its face, to be an anomalous verdict. And I have no doubt that if this had come out first during the voir dire, he would have been gone. And maybe what this Court should have done in hindsight is to excuse him and continue with six jurors, but the Court didn’t do that.

(T34:7-14).

Absolutely no evidence of juror misconduct was ever produced. The only basis on which the determination of juror misconduct was made is speculation. That is error. There is no evidence that juror no. 1 spoke with the other jurors about his one time conversation occurring over 4 years ago. There is no evidence that juror no. 1 was influenced by that conversation occurring over 4 years ago. There is simply no evidence that the defendant was deprived of a fair trial because of juror no. 1.

It should not escape the Court’s attention that the jury never asked questions of the Court. If the jury is confused about an issue in the trial or the jury instructions, there is a mechanism in place by which the jury can submit interrogatories asking for clarification and they were so instructed by the Court. Yet, not one question was asked by the jury. In the absence of any evidence of juror misconduct or jury taint, there is no basis for a new trial.

**III. THE COURT ERRED IN GRANTING A NEW TRIAL WHEN IT SUBSTITUTED ITS OWN DETERMINATION FOR THAT OF THE JURY. (Court's Written Decision: June 11, 2025, 4a; Argued Below: T8:8-23; T9:17-24; T12:15-25; T14:17-25; Court's Decision T34:1-21)**

The Court erred in granting defendants' motion for a new trial where the Court substituted its own determination for that of the jury. In granting defendants' motion, the court, at oral argument, improperly speculated that perhaps the jury was tainted by Juror # 1 who had disclosed to the court that he had previously been the recipient of a single statement that the house was taking too long to build. (T34:7-14). Defendants offered no evidence that juror no. 1 tainted the jury and the Court cited no evidence of jury taint. The Court merely speculated that: "[S]omething, in my view, happened in that jury room that I can't explain." (T23:21-22). "I'm concerned by what effect this – leaving this juror on there may have done to influence this, what appears on its face, to be an anomalous verdict." (T34:7-10). "But where is the extra 150 on top of the contract damages? There was no proof or anything to support that difference. That's the problem I'm – I'm struggling with." (T12:19-22).

In its written decision, the Court acknowledged that "there was adequate evidence in the record from which the jury could find a breach of contract and the resulting damages." (4a). But discounted the jury's determination of consumer fraud damages stating: "In the Courts mind, the amount of damages would be the

same” and also stating: “the Court can perceive of no rational basis for the difference between the consumer fraud damages and the common law fraud damages.” (4a). It should be noted that at oral argument, the Court acknowledged a basis for damages. (T8:20-23; T9:22-24).

The Court also repeatedly stated that the jury did not like the individual defendant Ronald Karchik. (T12:9; T34:1-3). The Court appears to not have appreciated that one of the public policy purposes of the consumer fraud act is punishment and deterrence.

In Cox v. Sears Roebuck & Company, 138 N.J. 2, 21 (1994), the Court criticized the Appellate Division’s position that because plaintiffs had not performed repairs that they suffered no loss stating: “However, that interpretation of N.J.S.A. 56:8-19 runs contrary to the Act’s clearly **REMEDIAL** purpose.” Cox, 138 N.J. at 22. The Supreme Court expressly stated that the purpose of the Act is punishment: “[T]he Act also **PUNISHES** the wrongdoer by awarding a victim treble damages, attorneys’ fees, filing fees, and costs. In that sense, the Act serves as a **DETERRENT**.” Id. at 21. The Court further stated: “The fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial hardship.” Id. at 25.

In Cox, plaintiff engaged defendant Sears regarding a kitchen renovation. After becoming dissatisfied with the work, plaintiff engaged counsel who sued for

breach of contract and violations of the Consumer Fraud Act. Following trial, the jury returned a verdict in plaintiff's favor on both the breach of contract and Consumer Fraud act claims. Id. at 9. The jury found that defendant had not substantially performed its obligations under the contract and that that failure was the proximate cause of damages to plaintiff. Id. at 10. It also concluded that the defendant had violated the CFA. Ibid. Defendant moved for JNOV. After the court initially denied the motion, defendant renewed the motion and plaintiff cross moved for costs and attorneys' fees. Ibid. The court then granted defendant's motion for judgment notwithstanding the verdict and entered a "no cause of action" in defendant's favor. Ibid. The court concluded that plaintiff had failed to prove an ascertainable damage or loss as the result of defendant's substantial performance under its contract or the violation of the CFA. Ibid.

The Supreme Court rejected the trial court's findings on the measure of damages. The trial court had found that the benefit of plaintiff's bargain was to have defendant renovate the kitchen according to the contract specifications. Id. at 11. Although plaintiff had not paid any money to defendant, he would have had to spend additional sums to complete and repair the renovations. Ibid. The trial court concluded that because "the amount paid plus the amount needed to put the kitchen in the required condition is 'less than the contract price,' and because the proper measure of damages is the 'benefit of the bargain,' 'it follows that plaintiff had not

been damaged by defendant's breach.” Ibid. Like the trial court in the subject case, the trial court in Cox incorrectly believed plaintiff had not proven consumer fraud nor contract damages and could not recover under either theory. Ibid. The Supreme Court also rejected the Appellate Division's conclusion that “the jury award of ‘compensatory damages’ of \$6,830 to plaintiff properly put him in as good a position as he would have enjoyed had performance been rendered as promised.” Id. at 12.

After finding numerous instances of violations of the CFA, the Supreme Court turned its attention to the issue of damages. Id. at 21. The Court stated that “In an ordinary breach of contract case, the function of damages is simply to make the injured party whole, and courts do not assess penalties against the breaching party.” Ibid. However, *the goals of the CFA are different and serve as a deterrent.* Ibid. “Therefore, in determining whether plaintiff has established a loss under the Act, we are guided by but not bound to strict contract principles.” Ibid. After determining that defendant had violated the CFA, “the next question was whether plaintiff had suffered an ascertainable loss.” Id. at 22.

The Supreme Court **REJECTED** the Appellate Division's suggestion that “because plaintiff did not spend money to repair or finish the work, he incurred no loss.” Ibid. “*That interpretation of N.J.S.A. 56:8-19 runs contrary to the Act's clearly remedial purpose.*” Ibid. The Court then stated: “Traditionally, to

demonstrate a loss, a victim must simply supply an estimate of damages, calculated within a reasonable degree of certainty. *The victim is not required to actually spend the money for the repairs before becoming entitled to press a claim.* See Id. at 22-23.

In Cox, there was testimony specifically addressed to the cost of repairs and the trial court found that plaintiff had adequately demonstrated those costs. The Court also found that plaintiff did not gain a kitchen. Cox, supra, 138 N.J. at 22. Prior to the renovations, he had a normal, safe kitchen. Ibid. “*The injured party should not be deprived of damages measured by the cost of curing defects, merely on the ground that he chooses to use the building in its defective character.*” Id. at 22-23 quoting 5 Corbin on Contracts sec. 1091 (Corbin ed. 1964).

Here, the Court conceded that an additional \$85,000 was paid by the plaintiffs. (T8:20-23; T9:22-24). Counsel for plaintiffs argued that damages came from the testimony of the defendant, Ronald Karchik.

MR. NOVAK: Judge, the evidence came largely from the defendant himself with his – with his – his numbers in his notice of unpaid balance. Judge, if you take – because don’t forget, there was extras. There was a lot of things that my clients contracted for, were charged for, and my clients finished the house to the point where it’s livable, but they never got what they bargained for.

THE COURT: But I get that, but the difference is –

MR. NOVAK: The jury heard the evidence.

(T10:21-25 to T11:1-6).

In response to the Court's questions with respect to the consumer fraud damages, Ms. Plaia offered that the jury heard testimony from defendant Karchik with respect to the contract amount versus the amount he indicated was the cost to build on the construction permit application.

MS. PLAIA: My belief is, you know, and – is that there was – that there was testimony given by Mr. Karchik – excuse me – that he was asked about the discrepancy between the contract costs of the – of construction, which was – and I'm going to round off. It was \$650,00. And then but on the permit application, he indicated that the cost of construction was only \$450,000. That's exactly \$200,000. So it – I mean, nobody was in the jury – in the room with the jurors when they made decisions, but it just seemed that there is a basis for the jurors to have come up with a \$200,000 number for the violation of the Consumer Fraud Act.

THE COURT: So the argument is that because Mr. Karchik reported to the powers that be that the cost of the project would be \$200,000 less than what he actually charged them, that that somehow is a logical basis for damages, actual damages?

MS. PLAIA: Your Honor, again, no one was in the room with the jury, but –

THE COURT: No. I'm saying let's say the jurors did say that, would that be a proper jury verdict?

(T26:22-25 to T27:1-19).

Plaintiffs testified as to the facts forming the basis for their claim of consumer fraud. Said testimony included, but was not limited to:

1. The house was supposed to be completed within 6 months. However, after 17 months, the house was still not completed.
2. Defendants were required to use stainless steel nails for the siding and paid an upcharge for the nails. However, the nails rusted and are stained.
3. Plaintiffs wanted a 32 inch tub, but defendants provided a 30 inch tub.
4. Plaintiffs were given an allowance for the front door in the contract. Plaintiffs wanted a door manufactured by Therma-Tru (an upgraded door) which was an additional \$1,200. The door selected by plaintiffs was not available. So, plaintiffs decided to go with the original specified door which was not an upcharge. Karchik still charged plaintiffs \$1,200 even though plaintiffs did not get the upgraded door.
5. Plans called for pilings under the exterior stairs and deck. Karchik did not install pilings. Instead, he poured concrete. When confronted, Karchik acknowledged that the plans called for pilings. Pilings were installed only after Karchik was caught. The plans were expressly incorporated into the contract.
6. Defendant was required to install 5 roof top drains, but only installed 3.

(153a-154a).

The above list is by way of example only and is by no means meant to be construed as exhaustive of the testimony given by plaintiffs and which testimony forms the basis for a finding of consumer fraud. Karchik was asked at trial about the cost to construct the house under the contract. The contract calls for the cost of

construction to be \$649,900. (154a; 88a and 95a). However, Karchik completed an application for a permit where he informed the Construction Office that the cost of construction was only \$450,000. (154a). When asked about the discrepancy at trial, Karchik responded that “there had to be something for him.” (154a).

Clearly, the \$200,000 discrepancy between the contract and the application for a permit forms the basis for the jury’s determination of damages for consumer fraud. The jury also awarded \$100,000 for breach of contract and another \$250,000 for common law fraud.

According to Defendants and without any authority, argued that damages should be limited to contract damages. Ostensibly, defendants are substituting their opinion on the quantum of damages. There is a sufficient basis for the finding of damages incurred by the plaintiffs as a result of the conduct of the defendants. Indeed, the Court acknowledged that the jury did not like the defendant and wanted to punish him, repeatedly stating that the jury did not like the defendant.

THE COURT: I have no doubt that this jury did not like Mr. Karchik. I have no doubt about that. And they had good reason not to like him, because frankly, some of his testimony just didn’t add up. So I have no doubt that they thought he had violated the Consumer Fraud Act and that he was – that what he had done translates into common law fraud.

...

(T30:23-25 to T31:1-4).

Mr. Karchik promised to give them something that he didn't give them . . .

(T32:13-14).

But in this jury verdict, frankly, there's no question that the message they sent is, we hate Mr. Karchik and he should be punished for what he did.

(T34:1-3).

Despite acknowledging that the jury did not like the defendant. Despite acknowledging that there may have been a basis for the \$100,000 contract damages and despite the fact that there was testimony as to the \$200,000 award for consumer fraud damages, the court rejected the jury's determination finding that it had no logical basis, stating: "But there's no logical reason that I can find that equates the – jury verdict in terms of the fraud and the contract damages." (T34:3-6).

The Court improperly substituted its own determination of damages for the jury's verdict. This the Court cannot do. In Baxter, supra, the Supreme Court affirmed the Appellate Division's ruling which vacated a trial court's remittitur as to damages and reinstated the jury's verdict fixing damages at \$300,000. Id. at 594. The Court stated: In affirming the Appellate Division, the Court was critical of the trial court and stated:

In essence, it is that a trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the

injury and resulting disability shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust. Sweeney v. Pruyne, 67 N.J. 314, 315 (1975). Put in in another way, the judge cannot validly intrude unless ‘it clearly and convincingly

appears that there was a miscarriage of justice under the law.’

Id. at 596.

The Court further stated:

[A] trial judge, before acting in derogation of the jury’s fixing of damages, must be convinced, and that very clearly, of something like this: ‘This verdict is terribly wrong—having canvassed the record I reach this conclusion because of substantive factors in the totality of the evidence [e.g., the incredible testimony offered by a party, the overwhelming weight of the evidence with respect to a certain fact, the failure of a party to produce any countervailing medical or other expert testimony, etc.]—and I must therefore determine that it is so much against the weight of the evidence as to be manifestly a miscarriage of justice.’

Id. at 598-599.

A trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injuries and resulting disabilities shown as to shock his conscious and to convince him that to sustain the award would be manifestly unjust. In making its overview, a court must accept the . . . evidence in the most favorable light to the plaintiffs; it must accept the conclusion that the jury believed the plaintiffs’ injury claims and the testimony of their supporting witness, and if, tested on such bases, the verdict (even if generous) has reasonable support in the record, the jury’s evaluation should be regarded as final.

Id. at 600.

A basis for the verdict can be found in the record. It is not so shocking as to be manifestly unjust. As previously argued, at oral arguments, the Court

repeatedly stated that “the jury did not like the defendant” and “wanted to punish him.” The public policy undergirding the consumer fraud act is punishment and deterrence. By substituting its own determination in place of that of the jury, the Court not only usurped the jury’s role, it upended the entire public policy behind the consumer fraud act. The Court should not intrude upon the province of the jury.

### CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that the Court’s Order granting a new trial be reversed and that the jury’s verdict be re-instated.

Respectfully submitted,

*/s/ John J. Novak*  
John J. Novak, Esq.

Dated: July 26, 2025  
cc: All counsel of record  
Clients

MICHAEL MCMAHON and  
KRISTIN KIEFER,

Plaintiffs/Appellants,

v.

KARCKIK HOMES; KARCHIK  
HOMES, LLC; KARCHIK HOMES,  
LLC CONSTRUCTION, INC. and  
RONALD A. KARCHIK, (a/k/a  
Ronald Karchik), Individually,

Defendants/Respondents.

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-003081-24

ON APPEAL FROM:  
SUPERIOR COURT OF NEW  
JERSEY  
LAW DIVISION  
OCEAN COUNTY  
DOCKET NO. OCN-L-1968-22

Civil Action

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**BRIEF ON BEHALF OF RESPONDENTS RONALD A. KARCHIK AND  
KARCHIK HOMES, LLC IN OPPOSITION TO APPELLANTS'  
INTERLOCUTORY APPEAL**

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**PRELIMINARY STATEMENT**

Defendants/Respondent Karchik Homes, LLC and Ronald A. Karchik (“Respondents”) respectfully submit this Brief in opposition to Plaintiffs/Appellants’ Michael McMahon and Kristin Kiefer (“Appellants”) interlocutory appeal of the trial court’s Order dated April 11, 2025 granting Respondents’ motion for a new trial. The trial court, after presiding over a lengthy jury trial and carefully weighing the record, properly granted Respondents’ motion for a new trial due to juror misconduct, the deprivation of Respondents’ right to exercise peremptory challenges, and the lack of competent evidence supporting the jury’s verdict.

New Jersey law jealously guards the right to a fair trial by an impartial jury. Under New Jersey law, juror misconduct that compromises the fairness of a trial can be grounds for declaring a new trial. Juror #1 disclosed, **after being sworn in**, that he had a personal relationship with Appellant McMahon through a mutual friend and had discussed the construction project with that individual. This omission of critical information deprived Respondents of the opportunity to exercise one of their three remaining peremptory challenges, striking at the core of their right to an unbiased jury. The trial court, recognizing the taint and the inflated verdict it produced, correctly found that allowing the jury’s determination to stand would constitute a miscarriage of justice.

Additionally, the jury's nearly million-dollar award lacked evidentiary support. Appellants presented no expert testimony or credible evidence establishing their alleged damages, leaving the verdict unmoored from the contract terms and applicable legal standards. The trial court properly concluded that such an award "shocked the conscience" and could not stand.

Further, the jury was improperly permitted to consider claims under the Consumer Fraud Act despite clear statutory language exempting registered new home builders such as Respondents from its reach. The trial court also recognized that Appellants' tort claims were barred by the economic loss doctrine. By preventing the jury from hearing these defenses, the proceedings were further skewed against Respondents.

In light of these multiple, fundamental errors, the trial court properly exercised its discretion in granting a new trial. The Appellate Division should therefore affirm the trial court's ruling and deny Appellants' request for interlocutory review.

## PROCEDURAL HISTORY

The trial of this matter commenced on February 10, 2025. On February 20, 2025, the jury returned a verdict in the amount of \$950,000 against Defendant/Respondents Karchik Homes, LLC and Ronald Karchik individually (“Respondents”). Pa5. The verdict included \$100,000 in contract damages, \$250,000 for fraud, and \$200,000 under the Consumer Fraud Act (trebled pursuant to statute) in favor of Plaintiffs/Appellants, Michael McMahon and Kristin Keifer (“Appellants”). (Pa46.)

On March 7, 2024, Respondents moved for a new trial on several grounds, including jury misconduct and their inability to exercise a peremptory challenge. Pa48. Respondents’ motion was based upon (1) the jury verdict being a miscarriage of justice; (2) Respondents’ inability to exercise one of their remaining peremptory challenges to dismiss a juror who shared a mutual friend with Appellant McMahon and had discussed this very project with that mutual friend prior to the trial; (3) Respondents’ inability to present evidence to the jury that the Consumer Fraud Act does not apply to registered new home builders; (4) the Economic Loss Doctrine barred Appellants’ tort claims for a contractual dispute; (5) Appellants’ failure to present evidence to support the jury’s damage award; and (6) Appellants’ failure to support their claims for common law fraud. Ibid. The trial court held oral argument

on Respondents' motion on April 11, 2025. 1T<sup>1</sup>. On April 17, 2025, the trial court granted Respondent's motion seeking a new trial. Pa1. Appellants filed a motion for reconsideration of the trial court's dismissal of the claims against Respondent Ronald A. Karchik, personally. Pa195. On April 11, 2025 the trial court entered an Order granting Appellant's motion for reconsideration, reinstating the claims against Respondent Ronald A. Karchik, personally. Pa307.

### **RESPONDENTS' STATEMENT OF FACTS**

On or about April 8, 2013, Respondent Ronald Karchik formed Karchik Homes, LLC and is listed as the managing member on the Certificate of Formation. Da5; Da7. Subsequent to the filing of the Certification of Formation, Respondent Karchik obtained a builder's license from the State of New Jersey under the New Home Warranty Program and has continued to be registered in good standing. Da5; Da8.

On or about September 7, 2020, Respondent Karchik Homes, LLC entered a Construction Contract with Appellants Michael McMahon and Kristin Kiefer for construction of a new home to be constructed on 142 Admiral Way, Waretown, New Jersey. The Contract lists Appellants as the buyers and Respondent Karchik Homes, LLC as the contractor. Da10.

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<sup>1</sup> "1T" refers to the motion transcript dated April 11, 2025.

Appellants made four (4) payments to Respondent Karchik Homes. On September 13, 2020 Appellants paid \$1,000 to Respondent Karchik Homes. Appellants made a second payment to Respondent Karchik Homes in the amount of \$50,000. On February 27, 2021, Appellants issued a check to Respondent Karchik Homes in the amount of \$150,000.00. On July 5, 202, Appellants issued a check to Respondent Karchik Homes in the amount of \$200,000. All checks were deposited into the business account of Respondent Karchik Homes, LLC.

## **LEGAL ARGUMENT**

### **POINT I**

#### **STANDARD OF REVIEW (NOT RAISED BELOW)**

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The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge – whether there was a miscarriage of justice under the law. Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)), see also, Twp. of Manalapan v. Gentile, 242 N.J. 295, 304 (2020). “[A] ‘miscarriage of justice’ can arise when there is a ‘manifest lack of inherently credible evidence to support the funding,’ when there has been an ‘obvious overlooking or under-valuation of crucial evidence,’ or when the case culminates in ‘a clearly unjust result.’” Hayes, *supra* at 386, *quoting*, Risko, *supra* at 521-522.

“A jury verdict is entitled to considerable deference and ‘should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.’” Hayes, *supra* at 385-386, *quoting*, Risko, *supra* at 521. In evaluating the trial court’s decision to grant or deny a new trial, “an appellate court must give ‘due deference’ to the trial court’s ‘feel of the case,’” however, a trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” Hayes, *supra* at 386.

Here, the trial court presided over a jury trial which lasted several days, giving the trial judge ample opportunity to weight the evidence presented by Appellants (or lack thereof) and to get the “feel of the case” which the trial judge articulated during the hearing on Respondents’ motion for a new trial, “I have no doubt that this jury did not like Mr. Karchik. I have no doubt about that.” 1T30:23-24. The trial court continued regarding Appellants’ lack of proofs to support the jury verdict:

But in this jury verdict, frankly, there’s no question that the message they sent is, we hate Mr. Karchik and he should be punished for what he did. But there’s no logical reason that I can find that equates . . . the jury verdict in terms of the fraud and the contract damages.

1T34:1-6.

Based on established case law, this Appellate Division should defer to the trial court’s “feel of the case” which, as reflected during the trial judge’s comments and

rulings during oral argument, was that the jury had no basis for the nearly million-dollar verdict and to allow the verdict to remain would constitute a miscarriage of justice, especially in light of the Respondent's arguments related to their right to a fair and impartial jury being infringed upon.

Therefore, the Appellate Division should affirm the trial court's grant of Respondent's motion seeking a new trial.

**POINT II**

**IT IS UNDISPUTED THAT RESPONDENTS WERE  
DEPRIVED OF USING THEIR REMAINING  
PEREMPTORY CHALLENGES THUS  
WARRANTING A NEW TRIAL  
(PA56)**

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Appellants' arguments ignore Respondents' right to a fair trial by an unbiased jury and attempt to place a greater burden upon Respondents than is required by law. It is important to note at the outset that Respondents possessed three (3) unused peremptory challenges at the time Juror #1 was admitted to the jury; had Juror #1 accurately responded to the court's questioning Respondents' counsel would have exercised one of the three remaining peremptory challenges remaining. Pa72. Contrary to Appellants' arguments, "clear and convincing evidence" (Pb at 16) is **not** required to demonstrate a party was deprived of its right to an unbiased jury.

Under New Jersey law, juror misconduct that compromises the fairness of a trial can be grounds for declaring a new trial. Juror #1 disclosed, **after being sworn in**, that he had a personal relationship with Appellant McMahon through a mutual friend and had discussed the construction project with that individual. This critical information was not disclosed during *voir dire*, thus depriving Respondents of the opportunity to use one of their three (3) remaining peremptory challenges.

The fundamental right of trial by a fair and impartial jury is jealously guarded by the courts. Wright v. Bernstein, 23 N.J. 284, 295 (1957). “The jury is an integral part of the court for the administration of justice, and on elementary principles its verdict must be obedient to the court’s charge based solely on legal evidence produced before it and **entirely free from the taint of extraneous considerations and influences.**” Ibid. [emphasis added]. The New Jersey Supreme Court held, “The parties to the action are entitled to have each of the jurors who hears the case **impartial, unprejudiced and free from improper influences.**” Ibid. [emphasis added].

Securing and preserving an impartial jury goes to the very essence of a fair trial. Catando v. Sheraton Post Inn, 249 N.J. Super. 253, 259 (App. Div. 1991), *citing*, State v. Williams, 93 N.J. 39, 60 (1983). The Appellate Division stated that while mostly criminal cases involve claims of jury bias, “**A civil litigant is also entitled to an unbiased jury . . .** and to responsive jury selection processes. “The

right to be tried by a fair and impartial jury is a fundamental one, to be jealously guarded.” Catando, *supra* at 259, *citing*, Wright, *supra* at 294-95 [emphasis added].

Jurors are obligated to disclose any relationships or interactions that could affect their impartiality and failure to do so may constitute juror misconduct. In State v. Pierce, *unpub.*, Docket No. A-5617-03T (App. Div. 2005) (Da1), the court emphasized the necessity of thoroughly investigating any potential juror misconduct, especially when it involves undisclosed relationships with trial participants. The court gave specific instruction to the trial judge, stating; “At a minimum, juror *voir dire* must be conducted on the record and in the presence of counsel, who must be afforded a meaningful opportunity to be heard on the matter.” Da57. The Appellate Division stated that if there's potential juror misconduct, an exacting probe of the involved jurors is required to determine the basis for any relief. Ibid.

As certified by Respondents’ trial counsel, Richard R. Mazzei, Esq., when the trial court initially conducted a *voir dire* examination of the jury, “When asked whether they knew any of the parties, **none of the prospective jurors answered in the affirmative.**” Pa88 [emphasis added]. Attorney Mazzei also certified:

. . . [T]he day after the jury was empaneled, Juror #1; who was later named the jury foreman; divulged he had a mutual personal friend with the Plaintiff Michael McMahon. In fact, Juror #1 informed the Court that prior to the trial, Juror #1 had discussed the Plaintiffs’ project with that mutual friend and had been informed by the

mutual friend of Plaintiff McMahon's dissatisfaction with the amount of time it was taking for the house to be completed.

Pa72.

Critically, Attorney Mazzei further certified:

Both counsel for third-party defendant, MJ Lyons Corporation, and I objected to allowing Juror #1 remain on the jury. However, this request was denied by the Court . . . When the jury was empaneled, I had three (3) peremptory challenges remaining, as did counsel for third-party defendant. Had Juror #1 responded to the Court's question of whether he knew any of the parties in the affirmative, **I would have used one of my peremptory challenges to remove him from the jury.**

Pa72 [emphasis added].

While the trial court's questioning of Juror #1 was conducted in the presence of counsel, it was after the trial had already begun and Respondents were no longer able to exercise their peremptory challenge to prevent Juror #1 from being seated on the jury. Further, counsel for both Respondent and Third-Party Defendants objected to Juror #1 being allowed to sit on the jury. Pa72. Had Juror #1 answered accurately during the court's initial *voir dire*, Respondents' trial counsel would have exercised one of the three (3) remaining peremptory challenges. Ibid. The trial court recognized this fact: "I have no doubt that defense counsel would have excused – if he had said that during the course of our *voir dire* sidebar, yeah, I had this guy come up to me, a friend, who said that the builder was dragging his feet . . . he would have been gone like that. No question about that." 1T23:15-20.

The right to peremptory challenges “is an incident of that [fair] trial.” See, Wright, *supra* at 293. The right to peremptory challenges is granted by N.J.S.A. 2B:23-13; N.J.S.A. 2B:23-10 further allows examination of jurors by counsel without using a challenge in order to determine whether or not to interpose a peremptory challenge or a challenge for cause. The New Jersey Supreme Court held:

The right to a peremptory challenge granted by the statute does not require that the questioning should establish a sufficient ground for a challenge for good cause . . . a peremptory challenge can rest on a good reason, a bad reason, or no reason at all. The right of challenge, particularly the right of peremptory challenge, has been recognized in this State as a **right of rejection**, rather than of selection.

See, Wright, *supra* at 293-94 [emphasis added].

Based thereon, the trial court had more than sufficient basis to grant Respondents’ motion seeking a new trial and its decision was not based upon unbridled speculation as argued by Appellants. Rather, the trial court based its ruling upon Respondents’ inability to exercise one of their three (3) remaining peremptory challenges to prevent a person with a mutual friend with Appellant McMahon from sitting on the jury.

In addition, the right to a fair trial includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters. State of New Jersey v. R.D., 169 N.J. 551, 555 (2001). Jurors are instructed not to discuss the case with anyone, including friends

or fellow jurors, before deliberations begin; engaging in such discussions can lead to bias and affect the trial's fairness. The New Jersey Supreme Court held:

Of particular significance here is that aspect of **impartiality** mandating that the jury's verdict be based on evidence received in open court, **not from outside sources**. As expressed by Justice Holmes, the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and **not by any outside influence**, whether of private talk or public print. We recently noted the longstanding nature of this Court's commitment to the preservation of the jury's independence from extraneous – even judicial – influences. The Court has consistently required trial courts to protect both the jurors and their deliberations from illegitimate influences that threaten to taint the verdict.

R.D., *supra* at 556 [emphasis added].

In the current matter, the trial court recognized the “outside source” was the mutual friend of Juror #1 and Appellant McMahon, who received information before the trial as to the Appellants' dissatisfaction with the amount of time the project was taking to complete. Contrary to Appellants' arguments, Respondent Karchik certified to the trial court that the conversations between Juror #1 and Appellant McMahon's mutual friend occurred in December 2024, immediately prior to trial:

Contrary to Plaintiffs' arguments, the conversations Juror #1 had with the mutual friend of Plaintiff McMahon occurred in December 2024, **immediately prior to the trial**; not four (4) years prior as alleged by Plaintiffs.

Pa157 [emphasis added].

At the time the concern was raised to the trial court, it was incumbent for the court to *voir dire* not only the juror, but the remaining jurors as well, to determine whether the taint was spread to others. See, R.D., *supra* at 577, quoting, State v. Williams, 93 N.J. 39, 60 (1983) (“The court has an independent duty to act swiftly and decisively to overcome the potential bias of a jury from outside sources.”). As this was not done, the trial court recognized the taint to the jury, which was clearly evidenced by the exorbitant jury award. The trial court stated, “[S]omething, in my view, happened in that jury room that I can’t explain.” 1T23:21-22.

Appellants’ arguments that the trial court based its decision upon mere speculation were contradicted by the Supreme Court of New Jersey’s ruling:

The decision to grant a new trial based on jury taint resides in the discretion of the trial court, but as we stated . . . if the irregular matter **has that tendency on the face of it, a new trial should be granted** without further inquiry as to its actual effect. **The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so.**

R.D., *supra* at 556 [internal citations omitted] [emphasis added].

In the current matter, that Juror #1 had a mutual friend with Appellant McMahan and had a recent conversation with that mutual friend, making Juror #1 already aware of Appellants’ dissatisfaction as told from Appellants’ perspective undoubtedly had the capacity to taint Juror #1 and, potentially, other members of the jury against Respondents.

It is completely probable that Juror #1 had formed an opinion as to Respondents' liability to Appellants prior to the trial commencing based on his recent conversation with the mutual friend. The trial court recognized this fact during the hearing:

Every party has a right to an impartial jury. And when juror number 1 was exposed to extraneous and clearly potential prejudicial information related to the subject matter of this litigation, the plaintiff's dissatisfaction with the amount of time that it was taking to complete the project, **that clearly violated the right to an impartial jury.**

1T21:1-8 [emphasis added].

Appellants attempt to hold Respondents to a heightened standard by arguing Respondent failed to provide "clear and convincing" (Pb16) of any juror misconduct, however that is not the applicable standard. As the trial judge recognized:

[T]he standard on that is not whether it did taint, **but whether the information had a tendency to taint.** And no one can reasonably argue a juror getting extraneous and prejudicial information about the defendant outside this courtroom doesn't have the . . . potential and the tendency on its face to prejudice the defendant. And what I think is very compelling here, as a 36-years experience trying cases, is the fact that the defendant attorney, and he certified to this, had three peremptory challenged remaining.

1T21:2-19 [emphasis added].

Thus, the trial court ordering a new trial met the necessary standard. Appellants' reliance upon R.D. is ironic, given Respondents' reliance upon that very case in support of their successful motion for a new trial. As Appellants admit the

New Jersey Supreme Court held, “Ultimately, **the trial court is in the best position to determine whether the jury has been tainted.**” Pb17, citing State v. R.D., 169 N.J. 551, 559 (2001) [emphasis added]. This contradicts Appellants’ hyperbolic arguments that the trial court “substituted its own determination for that of the jury.” Pb at 23; 31.

As the trial court ruled, Respondents were deprived of their right to an unbiased jury. Given the juror’s undisclosed relationship with Appellant McMahon and his premature discussions about the case, there was a substantial risk that Juror #1’s impartiality was compromised. Had Respondents been made aware that Juror #1 had a mutual friend with Appellant McMahon prior to the jury being empaneled, Respondents’ counsel would have used one of the remaining peremptory challenges to remove Juror #1 from the jury. Further, the trial court’s refusal to conduct a full investigation, to include interviewing the remaining jurors to determine whether the jury was tainted against Respondents, contributed to the need for a new trial as ordered by the trial court.

**POINT III**

**APPELLANTS FAILED TO PRODUCE ANY  
EXPERT EVIDENCE AT TRIAL TO SUPPORT  
THE JURY’S DAMAGE AWARD  
(PA54; PA66)**

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While repeatedly arguing the trial court had no basis to reduce or alter the jury’s damages award, Appellants remain unable to justify such an award based on the meager evidence presented by Appellants in support of their damage claim. Therefore, trial court correctly granted Respondents’ motion for a new trial.

The total price of the Contract between Plaintiffs and Defendant Karchik Homes, LLC was \$649,900. Pa88. Appellants made four (4) payments to Defendant Karchik Homes, LLC. On September 13, 2020 Plaintiffs paid \$1,000 to Karchik Homes, LLC. Plaintiffs made a second payment to Karchik Homes in the amount of \$50,000. On February 27, 2021, Plaintiffs issued a check to Karchik Homes, LLC in the amount of \$150,000.00. On July 5, 202, Plaintiffs issued a check to Karchik Homes, LLC in the amount of \$200,000. All checks were deposited into the business account of Karchik Homes, LLC. Pa52. These payments totaled \$401,000. However, the jury award against Defendants was not based upon any competent credible evidence as to Plaintiffs’ actual damages.

A trial court’s obligation on a motion for a new trial involves “[a] process of evidence evaluation; ‘weighing.’” Kita v. Borough of Lindenwold, 305 N.J. Super. 43, 49 (App. Div. 1997), citing, Dolson v. Anastasia, 55 N.J. 2, 6 (1969). “The

object is to correct clear error or mistake by the jury.” Ibid. The court is to take into account, not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury’s as shown by the record, but also appropriate matters of credibility, generally peculiarity within the jury’s domain, and the intangible “feel of the case” which it has gained by presiding over the trial. Ibid.

Appellants entered into a contract with Respondent Karchik Homes, LLC for the construction of their new home at a contract price of \$649,900. Pa88. Appellants paid Respondent Karchik Homes, LLC a total of \$401,000, after which they terminated Respondents’ services and hired a replacement contractor who completed the job for a total of \$280,000. The jury, however, awarded Respondent damages that are excessive, unsupported by evidence, and contrary to the law.

The proper measure of damages in this case should be limited to the difference between the contract price of \$649,900 and the amount already paid to Respondent, which amounts to \$248,900. In this case, Appellants presented no credible evidence as to the actual scope of work completed by the replacement contractor for the \$280,000 they paid. Without establishing the specific scope of work that was necessary to complete the construction, Appellants’ claims are fundamentally flawed. The trial court recognized this during oral argument:

During oral argument, Respondent argued:

So what the plaintiffs had to show which they didn't, is that the scope of work undertaken by the replacement contractor was the same scope of work that remained unfinished under the Karchik contract. That's a basic requirement in these type of commercial cases. And that this replacement contractor didn't do more work that wasn't within the Karchik scope of work. So the economic damages here weren't even in the hundreds. They were a maximum of \$31,900.

1T19:23-20:6

The failure to establish the exact scope of work performed by the replacement contractor is fatal to their claim for damages. Even with the Court allowing Appellants to proceed beyond their failure to establish the scope of work (which it should not have), the damages awarded should not have exceeded \$31,100. This is the amount by which the replacement contractor's cost of \$280,000 exceeds the balance owed to Respondent under the original contract. However, Appellants also admitted that they requested Respondent to perform extra or additional work beyond the original contract, work for which Respondent was not compensated. As such, the award did not take into account the value of the extra work that was requested and performed but not compensated. Thus, even under the best-case scenario for Appellants, the maximum allowable damages should be reduced by \$31,100, which accounts for the unquantified value of the additional work requested by the Appellants.

As the trial court recognized:

But you have to put a dollar to that [CFA damages] and those dollars are exactly the same as would have been in a contract . . . I wondered where they [the jury] got the \$100,000 from because . . . **no experts testified in this trial.** That the only evidence there was that could put a dollar figure on the damages was [Appellant] testifying, and it was the wife who testified because the husband didn't keep the books. The wife said we had to pay an additional \$85,000 on top of what we would have otherwise have paid to Mr. Karchik to finish this house. **That's the only testimony that translated to dollars.**

1T8:8-23 [emphasis added].

In the current matter, the jury award was not to be based on subjective damages, i.e. “determining an award that properly compensates an accident victim for pain and suffering or the victim of racial discrimination for emotional distress.” See, Cuevas v. Wentworth Group, 226 N.J. 480, 491 (2016). Rather, any damage award to Appellants in this matter should have been based upon actual numbers contained in the Contract between the parties and any proofs provided by Appellants as to the cost of completion. As correctly recognized by the trial court, Appellants fell well short of providing evidence of these damages. Based on the proofs adduced at trial, the jury's award truly “shocks the conscience” and required a new trial; the trial court therefore correctly granted Respondents' motion for a new trial.

While a jury's verdict is “cloaked” with a “presumption of correctness,” (see, Baxter v. Fairmount Food Co., 74 N.J. 588, 598 (1977)), that presumption can be overcome if the defendant can establish “clearly and convincingly” that the award is a “miscarriage of justice.” Id. at 596. As the trial court ruled, Respondent has met

that high standard. Appellants produced no credible evidence at trial to support their damage claims. Appellants merely stated the amount is allegedly cost them to complete the construction of the house without providing evidence as to how much construction remained to complete the house, how much of the house was in fact completed, or the value of the services provided by Respondents.

Based thereon, the jury's award of damages in this case is not only excessive but also unsupported by the evidence, particularly given the lack of proof regarding the scope of work completed by the replacement contractor. Accordingly, a new trial was warranted to correct this fundamental error in the damages award and the trial court's order should be affirmed.

**POINT IV**

**THE CONSUMER FRAUD ACT DOES NOT  
APPLY TO RESPONDENTS WHICH THE JURY  
WAS NOT PERMITTED TO HEAR EVIDENCE ON  
(PA60)**

Just as with Appellant's brief in support of its motion seeking interlocutory appeal, Appellants spend significant time rehashing their arguments that the Consumer Fraud Act "**PUNISHES**" (Pb26 [emphasis in original]) wrongdoers; these arguments were irrelevant to the trial court's analysis of whether a new trial was warranted. When granting the new trial, the trial court also partially granted

Appellants' motion for reconsideration, reinstating Appellants' claims against Respondent Ronald Karchik personally. Pa307.

Of the jury's total award of \$950,000 to Appellants, the jury awarded \$200,000 in damages to Appellants as compensation for damages resulting from Respondents' alleged violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8 et seq. Pa46. Pursuant to statute, the \$200,000 was trebled. Ibid. This award was a miscarriage of justice in the face of the statutory language excepting Respondents from application of the CFA. The trial court wrote:

The Court finds that there was adequate evidence in the record from which the jury could find a breach of contract and the resulting damages. There was no evidence which can explain the difference between the contract damages and the fraud damages. In the Court's mind, the amount of damages would be the same. In other words, the \$100,000 found to be the measure of contract damages would be the ascertainable loss flowing from the consumer fraud and the common law fraud. Also, the Court can perceive of no rational basis for the difference between the consumer fraud damages and the common law fraud damages.

*Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994), requires that there be ascertainable loss flowing from the violation of the consumer fraud act. The evidence adduced at trial does not support the jury's award of significant additional damages of consumer fraud and common law fraud.

Pa4.

Based there, the trial court ruled that the jury's award was a "miscarriage of justice under the law warranting a new trial pursuant to R. 4:49-1(a)." Ibid. For this reason, the granting of Respondents' motion for a new trial should be affirmed.

The Fourth Count of Appellants' Complaint against Respondents is for breach of the New Jersey Consumer Fraud Act. Pa14. In support of the claim, Appellants lodge numerous subjective complaints regarding the construction project. However, the statutory language of the CFA renders the statute inapplicable to Respondents.

The CFA "provides a remedy for any consumer who has suffered an ascertainable loss of moneys or property as a result of an unlawful commercial practice and allows him or her to recover treble damages, costs and attorneys fees." Heyert v. Taddese, 431 N.J. Super. 388, 411 (App. Div. 2013) [internal citations omitted]. The CFA states in part:

The action, use of employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

N.J.S.A. 56:8-2.

To state a CFA claim, a plaintiff must allege (1) unlawful conduct; (2) ascertainable loss; and (3) a causal relationship between the unlawful conduct and

the ascertainable loss. D’Agostino v. Maldonado, 216 N.J. 168, 184 (2013), *quoting*, Bosland v. Warnick Dodge, Inc., 197 N.J. 543, 557 (2009).

“The standard of conduct that the term “unconscionable” implies is lack of good faith, honesty in fact and observance of fair dealing.” Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994), *quoting*, Kugler v. Romain, 58 N.J. 522, 544 (1971) [internal quotations omitted]. Unlawful conduct is defined by the Act as “any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission.” N.J.S.A. 56:8-2.

A claim under the CFA cannot be solely based on a breach of contract: “Breach of contract is not per se unfair or unconscionable . . . and a breach of warranty alone does not violate a consumer protection statute.” Cox, *supra* at 18, *quoting*, D’Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 25 (App. Div. 1985). The New Jersey Supreme Court reasoned:

Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys’ fees and costs, **the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach.** DiNicola v. Watchung Furniture’s Country Manor, 232 N.J. Super. 69, 72 (App. Div.) (finding that breach of warranty in supplying defective furniture and denying that

defect existed was not unconscionable), *cert. denied*, 117 N.J. 126 (1989); D’Ercole Sales, *supra* at 31 (holding that breach of warranty for malfunctioning tow truck and refusal to repair was not unconscionable practice).

Cox, *supra* at 18 [emphasis added].

However, on May 13, 2004, the Senate and General Assembly of the State of New Jersey passed an amendment to the Consumer Fraud Act. Under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8 et seq., Section 56:8-140 – Inapplicability of Consumer Fraud Action specifically states:

56:8-140 Inapplicability of act.

5. The provisions of this act shall not apply to:
  - a. Any person required to register pursuant to "The New Home Warranty and Builders' Registration Act" . . .

See, N.J.S.A. 56:8-140(5)(a).

On or about April 3, 2013, Karchik Homes, LLC was formed and remains in good standing. Pa79; Pa82; Pa84. Karchik Homes, LLC is also registered as a new home builder with the State of New Jersey and under the New Home Warranty Program and has continued to be registered through today, verification number NJ143491. Pa86.

The Court’s role is to determine and effectuate the legislature’s intent. State ex rel. KO, 217 N.J. 83, 91 (2013). The first step is to consider the statute’s plain language. Town of Kearny v. Brandt, 214 N.J. 76, 98 (2013). The statute’s plain language should be given its ordinary meaning and be construed in a common-sense manner. See, KO, *supra* at 91. A court must examine the legislation sensibly in the

context of the overall scheme in which the legislature intended the provision to operate. Ibid.

Courts are further guided by the bedrock assumption that the legislature did not use any unnecessary or meaningless language. Jersey Cent. Power & Light v. Melcarutil Co., 212 N.J. 576, 587 (2013). As was demonstrated to the court, Respondents are registered builders in the State of New Jersey and enrolled as a new home builder as well as under the New Home Warranty Program. Pa86. Preventing Respondent from presenting evidence to the jury related to the new home warranty remedy was an error which caused manifest injustice to Respondents, thus warranting a new trial. Appellants argued that since they did not receive a certificate of occupancy, they were prevented from seeking a remedy under the new home warranty program. However, this is a self-fulfilling prophecy as Appellants were responsible for preventing Respondents from completing the home.

Based thereon, a new trial was warranted and the trial court's order granting Respondent's motion for a new trial should be affirmed based upon the plain statutory language of N.J.S.A. 56:8-140(5)(a).

**A. The Economic Loss Doctrine Prevented Appellants from Seeking Tort Claims for a Contractual Dispute**

The First Count of Appellants' Complaint is a claim for breach of contract. Pa12. In addition to the bar on Appellants' Consumer Fraud Act claims, Appellants are barred from seeking damages for their additional tort claims (Third Count

Misrepresentation; Fourth Count Consumer Fraud Act; Fifth Count Common Law Fraud; Sixth Count Slander of Title; Seventh Count Tortious Interference; and Eighth Count Attorney Fees and Expenses) based on the economic loss doctrine. In addition, all counts of Appellants' Complaint seek punitive damages; by seeking to recover punitive damages these claims are tantamount to intentional tort claims which are barred by the economic loss doctrine. Therefore, a new trial was warranted.

“Under New Jersey law, the economic loss doctrine defines the boundary between the overlapping theories of tort law and contract law by barring recovery of purely economic losses in tort.” Travelers Indemnity Co. v. Damman & Co., 594 F.3d 238, 244 (3d Cir. 2010). “Economic losses can take the form of either direct or consequential damages.” Spring Motors Distrib. v. Ford Motor Co., 98 N.J. 555, 566 (1985). “The purpose of the rule is to strike an equitable balance between countervailing public policies that exist in tort or contract law.” Damman, *supra* at 244. The New Jersey Supreme Court has observed that “the purpose of a tort duty of care is to protect society’s interest in freedom from harm, i.e., the duty arises from policy considerations formed **without reference to any agreement between the parties**” whereas “[a] contractual duty, by comparison, arises from society’s interest in the performance of promises.” Spring Motors, *supra* at 579 [emphasis added].

Regarding this dilemma of applying contract or tort law, “New Jersey court have consistently held that contract law is better suited to resolve disputes where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities and that could have been the subject of their negotiations.” Damman, *supra* at 248. Under the economic loss doctrine, “a plaintiff cannot sue in tort to recover for purely monetary loss – as opposed to physical injury or property damage – cause by the defendant.” International Flavors & Fragrances v. McCormick & Co., Inc., 575 F.Supp.2d 654, 656 (D.N.J. 2008). New Jersey courts have applied the economic loss doctrine to preclude plaintiffs from suing in tort when their claims arise from the breach of a contract and involve economic damages. Wasserstien v. Kovatch, 261 N.J. Super. 277, 286 (App. Div. 1993), Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 310 (2002). “This Court’s analysis reflects an effort to identify the demarcation line between contract and tort remedies . . .” Dean v. Barrett Homes, Inc., 204 N.J. 286 (2010).

The United States District Court for the District of New Jersey examined the application of the economic loss doctrine to bar fraud claims in cases involving frustrated economic expectations. While recognizing that, “New Jersey federal and state decisions have held that fraud claims may co-exist with a contract-based cause of action,” the Court held, “[t]he pattern that has emerged in New Jersey decisional law is that claims for fraud in the performance of a contract, **as opposed to fraud in**

**the inducement of a contract**, are not cognizable under New Jersey law.” See, Bracco Diagnostics, Inc. v. Bergen Brunswig Drug, 226 F.Supp.2d 557, 563-64 (2002) [emphasis added].

In Bracco, the plaintiff marketer of health care products, brought claims against defendant wholesaler for breach of contract as well as for common law fraud and violation of the New Jersey Consumer Fraud Act. The plaintiff alleged the defendant improperly took unearned “chargebacks” connected to the sale of the plaintiff’s products, as well as purchases the plaintiff’s products from third parties in violation of the agreement between plaintiff and defendant. The Court barred the CFA claim, stating, “The New Jersey Supreme Court’s reasoning in Spring Motors, though not explicitly addressing fraud claims, leads . . . to the conclusion that, as between commercial parties New Jersey will not countenance claims for fraud other than fraud in the inducement.” Bracco, *supra* at 562.

In the present matter, the jury was not instructed as to the economic loss doctrine and therefore a new trial was warranted.

**CONCLUSION**

For the foregoing reasons, Appellants' interlocutory appeal should be denied and the trial court's ruling affirmed.

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I.D. No. 011711990

Dated: August 28, 2025

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

---

MICHAEL MCMAHON and KRISTIN  
KIEFER

Plaintiffs

v.

KARCHIK HOMES; KARCHIK  
HOMES, LLC; KARCHIK HOMES, LLC  
CONSTRUCTION, INC. and RONALD  
A. KARCHIK, (a.k.a. Ronald Karchik),  
Individually

Defendants

SUPERIOR COURT OF  
NEW JERSEY  
DOCKET NO.: A-003081-24

ON APPEAL FROM:

SUPERIOR COURT OF  
NEW JERSEY - LAW DIVISION  
OCEAN COUNTY

DOCKET NO.: OCN-L-1968-22

CIVIL ACTION

Sat Below:

Hon. Valter H. Must, J.S.C.

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MEMORANDUM OF LAW ON BEHALF OF  
PLAINTIFFS/APPELLANTS  
MICHAEL MCMAHON AND KRISTIN KIEFER  
IN REPLY TO RESPONDENTS' OPPOSITION TO APPEAL

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## PRELIMINARY STATEMENT

Respondents did not file a cross appeal seeking reversal of the trial court's decision on the applicability of the Consumer Fraud Act to defendants.

Accordingly, Appellants object. The Order of June 2, 2025 provides: "Either party may file an amended notice of appeal or cross-appeal, as appropriate within ten days of the written statement of reasons." Respondents never filed a cross appeal. Cf Burbridge v. Paschal, 239 N.J.Super. 139, 151-152 (App.Div. 1990) (stating: "[W]e have held that a party, in order to attack the actions below which were adverse to him, must pursue a cross-appeal.")

## LEGAL ARGUMENT

### I. RESPONDENTS WERE NOT DENIED A FAIR OR IMPARTIAL JURY.

#### A. There is No Evidence of Juror Misconduct.

There is no evidence of juror misconduct and Respondents were not denied a fair and impartial jury. Respondents' reliance on Wright v. Bernstein, 23 N.J. 284 (1957) is misplaced. Unlike the defendant in Wright, supra, here, Juror no. 1 came forward immediately to bring to the attention of the court the fact that a *co-worker, not a friend*, a co-worker had a friend who had commented that his house was taking longer than he thought. It should be noted that Juror no. 1 did not state that the co-worker was a mutual friend with plaintiff.

Wright, supra, involved a motor vehicle accident. In Wright, the juror was

asked if any juror or a close family member had been involved in an accident in which a lawsuit arose. Id. at 290. In fact, the juror in Wright, supra, had a mother who was involved in a slip and fall case which was being tried in the same courthouse where Wright's case was being tried. Id. at 291. Indeed, that juror's mother's case was called while the jury on which the juror in question sat was deliberating. Ibid. That juror never mentioned that his mother had an accident case. Id. at 292. Counsel for the defendant immediately moved for a mistrial which was denied. Ibid. Following the verdict, the juror was questioned improperly, *in camera*, by the trial judge. Ibid. The juror stated that he understood the question as referring to a motor vehicle accident and not to accidents in general. Ibid. According to the juror, his mother's case never entered his mind. Ibid.

Moreover, in the subject case, there was no knowledge of the case which tainted either Juror no. 1 and no evidence that Juror no. 1 spoke with the other jurors. The Supreme Court has long recognized that some familiarity with a case, in the absence of any evidence that a juror had formed an opinion does not warrant excusal of a juror. See State v. Marshall, 123 N.J. 1, 76-77 (1991).

In Marshall, defendant was tried and convicted of conspiracy to murder his wife and also as an accomplice who procured the commission of the murder. The case was transferred from Ocean County to Atlantic County. On appeal, defendant

argued that due to extensive local media coverage, defendant's right to a trial before an impartial jury had been prejudiced. The Court examined whether defendant received a fair trial in Atlantic County. *Id.* at 76. The Court noted that there was no evidence in the record to suggest that the publicity in Atlantic County was so great as to justify a finding of presumed prejudice. *Ibid.* Defendant argued, *inter alia*, that "the court should have excused any juror who had read, heard about, or had an opinion concerning the case, and that the failure to exclude such jurors constitute[d] reversible error" *Id.* at 77. The Supreme Court disagreed. *Ibid.* In rejecting the defendant's argument and stated:

Jurors who have formed an opinion on the guilt or innocence of a defendant must be excused. *State v. Williams, supra*, 93 N.J. [39] at 61 [(1983)]. None of the impanelled or deliberating jurors had expressed such an opinion, however. Moreover, *simply because some of the impanelled jurors indicated that they had some familiarity with the case does not warrant their automatic excusal. We have long recognized that impanelled jurors need not be ignorant of the facts of the case.*

*Marshall*, 123 N.J. at 76, 77 (1991); citing, *State v. Sugar*, 84 N.J. 1, 23 (1985); accord, *State v. Koedatch*, 112, N.J. 225, 268 (1988).

"Pervasive pretrial publicity does not preclude the likelihood of an impartial jury." *Marshall*, 123 N.J. at 77 citing, *State v. Biegenwald*, 106 N.J. 13, 35 (1987).

The Court found that there was "no indication that any juror was so tainted by pretrial publicity as to affect the deliberative process." *Id.* at 78. The Court emphasized that:

[A]ny deliberating juror who indicated exposure to pretrial publicity also disclaimed any detailed knowledge about the case. No seated juror had formed any opinion about defendant's guilty and each stated that his or her minimal knowledge of the case would have no effect during deliberations.

Id. at 78.

This is consistent with the Supreme Court's findings in State v. R.D. 169 N.J. 551, 559 (2001). "Due process does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." R.D., supra, 169 N.J. at 559 quoting Smith v. Philips, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed. 2d 78, 86 (1982). "

Here, there is no indication that Juror no. 1 had any detailed information with respect to the case. There is no indication that Juror no. 1 had formed any opinion with respect to liability. Indeed, when Juror no. 1 brought the issue to the attention of the court, he was asked if he could be fair and impartial and responded that he could. (152a-153a). There is no presumed prejudice. See, Marshall, supra, 123 N.J. at 76. There is no indication that Juror no. 1 spoke with other jurors about the case. Simply put, Respondents have not produced any evidence that Juror no. 1 had formed an opinion about liability and that he had tainted the jury.

Respondents continue to misrepresent the relationship between Juror no. 1 and plaintiff. It should not escape the court's attention that the trial judge never

found that Juror no. 1 and the plaintiff had a relationship. Nowhere in the motion transcript or in the trial courts Statement of Reasons does the trial judge state that Juror no.1 and Plaintiff had a mutual friend. The trial judge never states that the co-worker was friends with both Juror no. 1 and plaintiff.

Respondents do not identify anything other than their own self-serving Certifications in support of their claim that Juror no. 1 and the plaintiff had a mutual friend. Importantly, counsel who now represents the defendant was not the attorney of record who defended the trial and was not present during voir dire or when the juror came forward. Juror no. 1 and Plaintiff had NO relationship either direct or indirect. Juror no. 1 and plaintiff did not have a mutual friend as incorrectly asserted by Respondents. Where not even the trial judge supports Respondents' assertion that Juror no. 1 and plaintiff had a mutual friend, Respondents should not be permitted to misrepresent the relationship between Juror no. 1 and the plaintiff in the absence of any corroborating evidence, including, trial transcripts of the voir dire of the juror.

Counsel for Respondents, Richard Mazzei, Esq., was present when Juror no.1 came forward and was questioned by the trial court. Juror no.1 never worked with, met with, spoke with or otherwise ever had any contact whatsoever with plaintiff Michael McMahon until this trial in Judge Must's courtroom. Importantly, unlike the juror in Wright, supra, Juror no. 1 in the subject case, came

forward, was questioned by the court and by counsel for Respondents. Juror no. 1 was asked if he could be impartial and stated that he could be. There is no juror misconduct and Respondents offer nothing other than their own self-serving Certification and speculation based on based on fantastical suppositions, conjecture, intuition or divination. Respondents argue, without offering any evidence that Juror no.1 somehow tainted the jury because years earlier the juror was told by a co-worker that the co-worker's friend was having a house built that took longer than he thought. It should be noted that in its brief, Respondents assert that Juror no. 1 had "premature discussions about the case." (Rb15). That is an astounding assertion made, *for the first time*, in this appeal. It is not found in the Certification signed by the trial Counsel Richard Mazzei, Esq. (See 71a). Indeed, nowhere in Mr. Mazzei's Certification does he even hint that Juror no. 1 discussed the case with other jurors. There is simply no evidence that Juror no. 1 had an inappropriate discussion with other jurors.

According to Respondents, the conversation took place in December 2024. (Rb12). However, that argument defies logic. It should be noted that trial started on February 10, 2025, which was 2 months after December 2024. By December 2024, Appellants were living in the house. Appellants performed enough work on the house such that they, themselves, were able to obtain a Certification of Occupancy (CO). It should be noted that while a CO was issued, there still

remains work which was never completed. The house was not completed in accordance with the contract or the specifications. By December 2024, the parties had been involved in litigation over 2 years. By December 2024, the parties were preparing for a trial. The statement made by the co-worker to Juror no. 1 occurred years earlier. Juror no. 1 stated that the conversation took place before he had retired. He had been retired for years. (152a-153a). What happened in December 2024 was a *company* Christmas Party at which Juror no. 1 and the co-worker attended, but no statements were made about the house. (152a-153a). It should not escape the Court's attention that Respondents only reference one interaction between Juror no.1 and the co-worker when, in fact, there were two. Specifically, the first instance occurring years earlier when Juror no. 1 had retired. The second instance was the company Christmas party in December 2024 where there was no communication between the co-workers about the house. Respondents fail to address the second interaction and when the second interaction occurred. The timeline as given by Respondents lack credibility.

**B. The Trial Court is not Required to Voir Dire Remaining Jurors.**

There is no *per se* rule obligating the trial court to voir dire remaining jurors. Respondents cite State v. R.D., 169 N.J. 551 (2001) and incorrectly argues that "it was incumbent for the court to voir dire not only the juror, but the remaining jurors as well." (Pb13). The Supreme Court in R.D. expressly stated there is no *per se*

rule, stating:

An appropriate voir dire of a juror allegedly in possession of extraneous information mid-trial should inquire into the specific nature of the extraneous information, and whether the juror intentionally or inadvertently has imparted any of that information to other jurors. *Depending on the juror's answers to searching questions by the court, the court must then determine whether it is necessary to voir dire individually other jurors to ensure the impartiality of the jury. That determination should be explained on the record to facilitate appellate review under the abuse of discretion standard.*

**BUT THE DECISION TO VOIR DIRE INDIVIDUALLY THE OTHER MEMBERS OF THE JURY BEST REMAINS A MATTER FOR THE SOUND DISCRETION OF THE TRIAL COURT. NO PER SE RULE SHOULD OBTAIN.**

The court may learn through its questioning of the excused juror that circumstances made it impossible for that juror to impart impermissible information to the other jurors even unintentionally. Although the court should not simply accept the juror's word that no extraneous information was imparted to the others, the court's own thorough inquiry of the juror should answer the question whether additional voir dire is necessary to assure that impermissible tainting of the other jurors did not occur. *In some instances, the court may find that it would be more harmful to voir dire the remaining jurors because, in asking questions, inappropriate information could be imparted.*

R.D., *supra*, 169 N.J. at 560-561.

Thus, the trial court did not err in *not* conducting a voir dire of the remaining jurors. There is no evidence that Juror no. 1 was biased. There is no evidence that Respondents were denied a fair and impartial jury.

## II. APPELLANTS PRODUCED EVIDENCE OF DAMAGES.

As correctly stated by the Respondents: “a jury’s verdict is cloaked with a ‘presumption of correctness’ which can only be overcome ‘if the defendant can

establish “clearly and convincingly” that the award is a miscarriage of justice.” Respondents are impermissibly seeking to limit Appellants’ damages to contract damages when, in fact, no motion was filed prior to trial seeking to limit Appellants’ claims to contract damages. According to Respondents, “the proper measure of damages in this case should be limited to the difference between the contract price of \$649,900 and the amount already paid to Respondents which amounts to \$248,900.” (Rb17). Ostensibly, Respondents are substituting their opinion for that of the jury. In fact, plaintiffs did give testimony with respect to their claim of damages.

While a CO, obtained by the plaintiffs themselves—not defendants, which enabled the plaintiffs to move in and occupy the house was obtained, the house was never completed in accordance with the contract or the specifications. There still remains work to be performed in order that the house be completed in accordance with the contract and the specifications. Plaintiff Kristin Kiefer gave substantial **UNREFUTED** testimony with respect to Respondents’ failure to complete construction and the work which remained. Both plaintiffs gave testimony about the poor workmanship, deviations from products and/or materials specified in the contract. Ms. Kiefer was the “keeper of the books.” Ms. Kiefer gave testimony with respect to the costs they incurred to bring the project to a point where they could obtain a CO. Ms. Kiefer gave testimony about the work which

still remains. Ms. Kiefer testified about plaintiff's increased interest expenses due to not being able to convert the construction loan to a conventional mortgage when Respondents improperly filed Notices of Lis Pendens and the Notice of Unpaid Balance. Ms. Kiefer gave testimony about the costs they incurred when they had to obtain a Builder's Risk Policy as the result of defendants' actions.

Further, defendant Ronald Karchik also gave testimony about the work Respondents' performed. Said testimony included but was not limited to the work and materials which were not in accordance with the contract, the work which remained when Respondents left the project, improper substitution of products and materials by the Respondents, improper charges for products and materials made by the Respondents, damages came in through the testimony of the defendant Ronald Karchik.

Moreover, plaintiff is not required to spend the money to repair or finish the work. In Cox v. Sears Roebuck & Company, 138 N.J. 2 (1994), the Supreme Court ***REJECTED*** the Appellate Division's suggestion that "because plaintiff did not spend money to repair or finish the work, he incurred no loss." Ibid. ***The victim is not required to actually spend the money for the repairs before becoming entitled to press a claim.*** See Id. at 22-23. There was substantial testimony by both Plaintiffs and Defendants with respect to damages.

### III. THE CONSUMER FRAUD ACT APPLIES TO RESPONDENTS.

The Supreme Court has already concluded that N.J.S.A. 56:8-140 does not provide an exemption for claims of consumer fraud against new home builders. Czar, Inc. v. Heath, 398 N.J.Super. 133 (App.Div.) aff'd, 198 N.J. 195, 208-209 (2009). N.J.S.A. 56:8-140 was passed in 2004. However, in 2007, the Appellate Division in Czar, Inc. addressed the issue of newly constructed homes and the New Home Warranty Program and stated that “*Nothing in the New Home Act shall affect other rights or remedies available to an owner.*” Id. at 139-140. The Court further stated:

In addition, we note that, while a new home builder's acts may not be within the definition of "home improvement" and, therefore, not within the unlawful practices set forth in the home improvement practices regulations, N.J.A.C. 13:45A-16.2, *a builder of a new home may still be subject to the Act. Our courts have held that the Act is applicable to the sale of newly constructed homes. Gennari [v. Weichert Co. Realtors], supra, 148 N.J. [582] at 613 [1997]; DiIorio v. Structural Stone & Brick, 368 N.J. Super. 134, 143 (App. Div. 2004); New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 501 (App. Div. 1995).*

*Therefore, even if we were to conclude that plaintiff was a new home builder and excluded from the definition of home improvement in N.J.A.C. 13:45A-16.1A, and consequently did not fall within the unlawful practices set forth in N.J.A.C. 13:45A-16.2, that would not exempt the builder of a new home from being subject to the provisions of the Act. It would only exempt it from falling within the definition of unlawful practices in N.J.A.C. 13:45A-16.2. That regulation specifically points out that it does not limit "any other practices which may be unlawful" under the Act. N.J.A.C. 13:45A-16.2(a).*

Czar, Inc., 398 N.J.Super. at 140.

The Supreme Court also did not provide a broad exemption for claims under the Consumer Fraud Act to builders of new homes. The Supreme Court stated:

Finally, and in the alternative, *the Appellate Division concluded that even if plaintiff were considered to be engaged in new home construction, that separate statutory scheme included a reservation of, and an election of, remedies, see N.J.S.A. 46:3B-9, which, in its view, would preserve a CFA cause of action as an alternative form of relief. Czar, Inc., supra*, 398 N.J.Super. at 140. [emphasis added].

Czar, Inc. 198 N.J. at 199.

N.J.S.A. 46:3B-9 states:

46:3B-9. Availability of any legal remedy to owner; election of remedy

Nothing contained herein shall affect other rights and remedies available to the owner. The owner shall have the opportunity to pursue any remedy legally available to the owner. However, initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from all other remedies. Nothing contained herein shall be deemed to limit the owner's right of appeal as applicable to the remedy elected.

N.J.S.A. 46:3B-9.

In affirming the Appellate Division, the Supreme Court reviewed the “interplay” between the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, the Contractor’s Registration Act, N.J.S.A. 56:8-136 to -152 and the New Home Warranty and Builder’s Registration Act, N.J.S.A. 46:3B-1 to -20 and stated:

Answering the deceptively simple question raised, that is, *whether*

*plaintiff was engaged in new home construction or was performing home improvements, requires that we analyze the interplay between the CFA, N.J.S.A. 56:8-1 to -20, the Contractor's Registration Act, N.J.S.A. 56:8-136 to -152, the regulations adopted pursuant to the Contractor's Registration Act, N.J.A.C. 13:45A-16.1 to -17.14, the New Home Warranty and Builders' Registration Act, N.J.S.A. 46:3B-1 to -20, and the regulations promulgated to implement that statute, N.J.A.C. 5:25-1.1 to -5.5. [emphasis added].*

Id. at 201.

The Court concluded that “There is, however, no basis on which to conclude that the Legislature intended that its exemption from registration for contractors covered by the New Home Warranty Act would create a broad exemption from the requirements it was imposing on home improvement contractors in its CFA amendments.” Id. at 208. Not only does the CFA apply to Karchik Homes, it also applies to Ronald Karchik, Individually. In 2011, the Supreme Court in Allen v. V & A Brothers, Inc., 414 N.J.Super. 152 (App.Div.) aff'd, 208 N.J. 114 (2011) affirmed the Appellate Division’s finding that *individual liability can be imposed on officers and employees for violations of the CFA.* Allen, 208 N.J. at 131-132.

Further, here, under N.J.A.C. 5:25-3.1, Appellants were ineligible for a new home warranty as a CO was not obtained by defendants. Under the New Home Warranty Act, a homeowner is eligible for a New Home Warranty if a CO has been issued. Defendants did not get the CO. Defendants assert that plaintiffs were

prevented from seeking a remedy under the new home warranty program as a result of their own conduct which, according to defendants was a “self-fulfilling prophecy.” (Rb25). Respondents conveniently ignore their own conduct which was in violation of the CFA in the first instance. Defendants exposed themselves to claims of violations of the CFA. Defendants should not be permitted to violate the CFA and then claim that it is not subject to the CFA and then argue that plaintiff’s actions prevented Karchik from completing the project. The CFA is a broad remedial statute which aims to protect consumers.

**IV. THE ECONOMIC LOSS DOCTRINE DOES NOT APPLY WHERE THERE IS AN INDEPENDENT DUTY.**

Prior to trial Respondents never raised the issue of the Economic Loss Doctrine and never asked for a jury instruction on the Economic Loss Doctrine. The Consumer Fraud Act creates an independent duty of care thereby precluding application of the Economic Loss Doctrine. The Economic Loss Doctrine does not apply where there is an independent duty of care such as a duty of care found under the Consumer Fraud Act. In Saltiel v. GSI Consultants, Inc., 170 N.J. 297 (2002), the Court stated: “*Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law.* [emphasis added]. Id. at 316, citing, New Mea Construction, 203 N.J.Super. at 493-494.

An independent duty of care was found in Furst v. Einstein Moomjy, Inc., 182 N.J. 1 (2004), where the Court found a duty of care under the New Jersey Administrative Code, N.J.A.C. 13:45A-5.1(a) which provides that failure to comply with (a) above shall constitute a deceptive practice under the Consumer Fraud Act. Similarly, in Romano v. Galaxy Toyota, 399 N.J.Super. 470 (App.Div. 2008), an independent duty of care was found for violations of the CFA under the Federal Odometer Law (FOL), 49 U.S.C.A. § 32701 to § 32711.

Here, Defendants owe an independent duty of care to Plaintiffs under the Consumer Fraud Act. Accordingly, the Economic Loss Doctrine does not apply.

### CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the trial court's order of a new trial and deny Respondents' request for review of the decision permitting claims of Consumer Fraud where no cross appeal was filed.

Respectfully submitted,  
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