LINDA GUYDEN,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Appellant,	DOCKET NO.: A-003158-23
vs.	On Appeal From: SUPERIOR COURT OF NEW JERSEY
LEEDS, MORELLI & BROWN, LLP, STEVEN A. MORELLI, ESQ., and JEFFREY K. BROWN, ESQ.	LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-3571-10
Defendants-Respondents.	Sat Below: Hon. JOHN D. O'DWYER, P.J.CV.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT LINDA GUYDEN

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTORY STATEMENT

This is the latest chapter in Plaintiff-Appellant, Linda Guyden's (hereafter "Plaintiff-Appellant" or "Guyden") quest of more than two decades to have her employment discrimination claims heard by a jury of her peers in open Court. This is the fourth time this matter has been before this Court.

For purposes of this appeal as with the previous three (3), there can be no dispute as to the facts. Plaintiff-Appellant's former employer bribed her attorneys, the Defendants, with a $5 million secret payment to have those attorneys commit Plaintiff-Appellant's claims to confidential alternative dispute resolution ("ADR") process and to keep them away from a public courtroom and a jury. When Plaintiff-Appellant learned of her attorneys' dishonesty, she fired them and hired new counsel and filed suit in public court. Plaintiff-Appellant's employer then got what its bribe paid for, as the Defendants-Respondents submitted a certification indicating they had fully advised the client of the bribe, and the client had agreed to have her claims heard in ADR- falsehoods – but even if true, attorney-client privileged communications which Defendants had no right to reveal.

The former employer's Motion was granted, and Plaintiff-Appellant was required to arbitrate her claims rather than have them decided by a jury. Plaintiff-Appellant submitted an expert opinion indicating that Plaintiff-Appellant's claims were worth between $2.9 and $7 million if tried before a jury. While her employment claims were pending, Plaintiff-Appellant sued the Defendants-Respondents in this action for their fraud, breach of fiduciary duty and legal malpractice in committing her to ADR contrary to her wishes and in violation of the Rules of Professional Conduct and New Jersey's criminal statutes.

However, before an arbitrator, Plaintiff-Appellant's claims were found to be worth zero. When Plaintiff-Appellant opposed the confirmation of this arbitration award and was permitted some discovery regarding the fraud and bribe that resulted in the arbitration agreement, Plaintiff-Appellant agreed to settle for a compromised amount based upon the litigation catastrophe she had been sentenced to for ten years and to mitigate her damages and in the face of the risk that after fifteen years of litigating within the trap Defendants sprung on her she might receive nothing.

Now, this case has been dismissed for the fourth time. This time the dismissal is based upon the Courts' findings that the two (2) expert reports of

Plaintiff-Appellant which relied upon the numerous expert opinions issued in this case and a liability expert's forecast of damages were net opinions and/or damages reports. Justice demands that Plaintiff-Appellant be permitted to have her expert testify at trial and this matter be remanded for the trial on the merits that Plaintiff-Appellant has so assiduously and passionately sought in all of these years.

PROCEDURAL HISTORY

Plaintiff-Appellant commenced this action by filing a Complaint, *Gudyen v. Leeds, Morelli & Brown, et al.* on or about June 1, 2005 (Pa001). Plaintiff-Appellant's case was consolidated with several other suits containing similar allegations regarding the Leeds, Morelli & Brown ("LMB") and Prudential Insurance Company ("Prudential") by Order dated September 26, 2005. See *Lederman v. Prudential*, 385 N.J. Super. 307, 385 N.J. Super. 327 (App. Div. 2006); over 200 plaintiffs filed claims against LMB and Plaintiff's former employer, Prudential, directed at a commercial bribe conspiracy to defraud current and former employees of Prudential and deprive these employees of their attorney's loyalty.

Pursuant to the Order of the Chief Justice Stuart Rabner dated February 9, 2019, the consolidated cases were assigned for centralized

management to Bergen County (Pa220). By 2014, all but two of the plaintiffs accepted settlement offers; Guyden was among the two who declined the offer and sought to conduct discovery and to renew the crime fraud motion. The Court denied these requests and instead granted Defendants' leave to file a Motion for Summary Judgment.

On or about August 18, 2014, Defendants filed a Motion for Summary Judgment. Defendants' Motion was granted by Order dated April 8, 2015 (Pa083). Thereafter, Plaintiff-Appellant filed a Notice of Appeal on or about November 9, 2015. The Court after full briefing and motion practice granted Plaintiff-Appellant's appeal, reversed the grant of summary judgment and remanded in an Opinion dated June 11, 2018 (Pa312).

The Court again granted summary judgment in an Order and Opinion dated April 15, 2020. The Appellate Division reversed in an Opinion dated June 30, 2022, Docket No. A-0219-20 (Pa818).

Although this matter has quite been to the Appellate Division and Ms. Guyden’s lawsuit was filed in 2005, Ms. Guyden has not been deposed prior to the Court’s March 6, 2019 conference. Instead, Ms. Guyden’s deposition and that of her former attorney Christopher Watkins, Esquire were taken and said depositions were taken again after it was remanded to the Trial Court in 2022.

After the conclusion of fact discovery, Plaintiff served the expert report of Scott Piekarsky, Esquire (Pa374) which relied upon the factual restation in Plaintiff-Appellant's brief (Pa475-505) and the expert report of David Zatuchni, Esquire (Pa381), Milton C. Regan, Esquire (Pa511), Robyn M. Hill, Esquire (Pa567), John Leubsdorf, Esquire (Pa579), Michael P. Ambrosio, Esquire (Pa607), and Peter Van Schaick, Esquire (Pa634).

Defendants filed a Motion for Summary Judgement dated October 20, 2023 (Pa011) contending that Plaintiff-Appellant's expert report was a net opinion and that the opinion regarding damages of Mr. Zatuchni that had been served in 2014 (Pa381) – nine (9) years earlier, was barred regarding an Order entered into by Judge Martinotti years before because it was a "damages" expert report.

After the depositions of the Plaintiff-Appellant and two (2) Leeds, Morelli & Brown lawyers and two (2) lawyers for Prudential, Plaintiff served their expert report.

Defendants again moved for Summary Judgment contending that the expert report served by Plaintiff-Appellant of Scott Piekarsky, Esq., and David Zatuchni, Esq., were net opinions and/or barred by a 2010 and 2012 Case Management Order of Judge Brian Martinotti (Pa220-Pa227).

In so holding the Court held:

> The Court must assess whether the Plaintiffs expert report of Zatuchni and Piekarsky are barred as net opinions. It is imperative for the export reports not only to elucidate how a jury trial would have benefited the Plaintiff but also to demonstrate how arbitration adversely affected her. By way of example, arbitration could have negatively impacted the Plaintiff if she was deprived of relevant discovery, the opportunity to cross examine witnesses or even denied of her due process rights. This exercise included assessing whether the advice given to the Plaintiff regarding the choice of forum deviated from the standard of care, necessitating a showing that the arbitration agreement limited potential damages that she may have recovered through a jury trial. As a result, Plaintiff must establish that, but for the alleged misconduct, the outcome would have been different, underscoring the importance of scrutinizing the proceedings in arbitration. . . . . .
>
> Plaintiff contends that Piekarsky's report has a solid foundation as he relied on Plaintiff's counsel statement of facts, Plaintiff's counsel's letter to the Court (accusing LMB of misconduct in another matter wholly unrelated to Guyden in a New York based ADR) and Linda Guyden's Declaration drafted by successor counsel, in addition to the facts alleged in hearsay opinions of other non-testifying experts procured for litigation by Plaintiff's counsel including David Zatuchni. Plaintiff does not rebut the fact that Piekarsky merely concludes the Rules of Professional Conduct were violated by the advice to enter an ADR and acceptance of the fee advance but just repeats these conclusions and fails to explain how any unspecified violation of the Rules of Professional Conduct, in and of itself, constituted a basis for civil liability or established the standard of care. See Baxt v. Liloia, 155 N.J. 190 (1998) (holding that alleged violations of the

RPCs are not enough to establish legal malpractice). Further, Plaintiff in opposition ignored that Piekarsky dies not even attempt to identify which ethics rules were allegedly violated in this report, no less how they constituted a departure from the standard of care or proximately cause Guyden's loss. Instead, he states it is "obvious". See Piekarsky Report Exhibit "BB" at p. 4 (Pa374). Piekarsky's conclusions lack independent analysis and merely adopt the opinions of other experts without proper explanation.

Moreover, Zatuchni does not provide an explanation for why Guyden would have prevailed in court after losing on the merits in an eight-day arbitration, solely asserting that she would have. This omission raises questions about the basis for his assertion and why the Court would have rendered a different verdict. Consequently, Zatuchni's opinion, suggesting that Plaintiff was harmed by being placed into arbitration, is deemed a net opinion. This is because he does not clarify why the result would be different in front of a jury as opposed to an impartial arbitrator who heard nine days of testimony.

In consideration of these factors, the Court determines that the expert opinions provided by Piekarsky and Zatuchni are inadequate and in conflict with the established factual record. The Plaintiff fails to establish a prima facie claim of legal malpractice as she cannot furnish a valid expert opinion. The absence of expert opinions on damages, standard of care, and causation in malpractice claims is detrimental. The necessity of expert testimony to demonstrate proximately caused damages is vital component, and Guyden's failure to present such evidence justifies granting summary judgment in favor of the Defendants. Consequently, the Court deems it appropriate to approve the motion for summary judgment by sticking the expert opinions, and testimony.

Plaintiff contends in her opposition that the Zatuchni report, adopted by Piekarsky, is not damages report. See Opposing Letter Brief at pp.1 and 8. Plaintiff's claims is contradicted by the plain language of the report itself. The first paragraph of the Zatuchni report states that he was tasked with providing an opinion as to Guyden's "damages" and "the monetary value of [her] underlying case against Prudential." See Exhibit "CC" at p. 1.3 (Pa381). Further, the report contains subheadings titled "Guyden's Damages" and "Guyden's Punitive Damages Opinion". See id. at pp. 15 and 17. As a result, it is clear that Zatuchni purports to compute and quantify Guyden's alleged economic, personal hardship and punitive damages. Id.

Similarly, the Piekarsky Report opines on damages, in a conclusory fashion whilst reiterating arguments that were previously rules on by the Appellate division. The report reads as follows:

> As a result of my review, it is my opinion that the Leeds, Morelli and Browns Defendants violated New Jersey Rules of Professional Conduct (as noted by Professor Ambrosio and Professor Regan) entering in the two (2) May 5 agreements which bound Ms. Guyden to the ADR process. In my opinion the conduct of the Leeds, Morelli and Brown Defendants when accepting a nonrefundable five million dollar ($5,000,000.00) advanced retainer ($4,000,000 was nonrefundable) was a deviation from the standard of care governing attorneys practicing in this state in 1999 and by so doing and by failing to disclose that they had other business dealing with their adversary subsidiary and had stolen clients funds, a fact of which the adversary was aware, was egregious conduct which warrants an award to

> Ms. Guyden of compensato1y damages, proximately caused by the deviation from the standard of care and also an award of punitive damages and a forfeiture of all fees paid to the Defendants. (Pa377)

See Piekarsky Report Exhibit "BB" at p.3 (Pa374). Essentially, Piekarsky concludes that by counseling Plaintiff to enter the ADR Agreement, she "was proximately caused damages resulting in the lower amount she recovered as a result of settlement in the matter with Prudential after years of litigation. 11 See Piekarsky Report Exhibit "BB" at p. 5. Additionally, Piekarsky's opinion regarding LMB's breach fiduciary duty and a "presumption" of damages in reliance on the Second Circuit decision in Johnson v. Nextel Comm' ns, Inc., 660 F.3d 131 (2d Cir. 2011) ignores the explicit rulings of the Appellate Division in this action. The Appellate Division held that Johnson involved a very different ADR Agreement and fee arrangement, with different terms in another jurisdiction and was neither analogous nor controlling. See Exhibit "O" at * l l-12.8 The Appellate Division's endorsement of Judge Martinotti's rejection of Johnson v. Nextel as controlling, or even analogous authority binds this Court and precludes both Plaintiff and her expert's reliance upon it. See Khouda1y v. Salem Cnty Bd. of Soc. Servs, 281 N.J. Super. 571, 575 (App. Div. 1995) (stating that a patty may not "reargue the merits of what was decided in the first appeal" and was "precluded from relitigating" such issues on remand). Further Piekarsky concludes that "It]he measure of her damages is what she would've received from a Jury considering her claims of employment discrimination." Id. Lastly, he adopts Zatuchni's opinion as to the computation of Guyden's damages.

Plaintiffs position that these expert reports do not pertain to damages because they are not "CPAs" or

> "economics" opining on "present value" calculations is flawed. This claim not only ignores the plain language of these reports by suggests that Judge Martinotti did not understand the malpractice claims alleged against LMB when he precluded Plaintiffs from submitted late damages experts' reports.
>
> Plaintiff's criticism of LMB for not seeking to bar Zatuchni's report as a "damages expert" report in the nine years since his report was submitted in connection with prior motion practice, is very interesting as Plaintiff failed to identify Zatuchni as a testifying expert until December 7, 2023, in opposition to the instant motion. Prior to this, defendants had no legal grounds to move to strike his report as he was not identified as a testifying expert for trial. (Pa810-817).

Plaintiff-Appellant filed this Appeal thereafter (Pa848).

FACTS

Since 1999 Plaintiff-Appellant has been seeking to litigate her employment discrimination case before a jury. She had been prevented from doing so because of an Alternative Dispute Resolution ("ADR") Agreement that LMB purportedly had her sign after receiving a $5,000,000.00 bribe from Plaintiff-Appellant's former employer. To understand Plaintiff-Appellant's two-decade plus odyssey requires some background.

A. GUYDEN'S ATTORNEYS, DEFENDANTS/RESPONDENTS, LMB, CONSPIRE WITH HER EMPLOYER AND ACCEPT A BRIBE TO REQUIRE HER TO ARBITRATE HER CLAIMS

Plaintiff retained Leeds Morelli, the predecessor to LMB in March of 1999. Plaintiff signed a March 1999 retainer agreement in Newark, New Jersey

at a meeting (Pa052-Pa053). When Plaintiff signed this agreement she was understood that LMB was licensed to practice law in New Jersey and could bring a lawsuit regarding her claims. She subsequently learned that none of the attorneys at LMB were licensed to practice in New Jersey and could not file such a lawsuit.

Plaintiff was told by Defendant-Respondent, Jeffrey Brown, that she had one of the "very, very best cases" of any of the 359 clients in the group action. Specifically, Defendant Brown told Plaintiff, "You will have one of the very, very best cases out of all these cases.".

Defendants contend that Plaintiff signed an Agreement dated May 5, 1999, however, the May 5, 1999 Agreement Defendants proffer is not the agreement that Plaintiff was shown when she signed the signature page. The Agreement that Guyden was shown did not reference Prudential's internal Roads to Resolution program. Guyden subsequently asked Defendants on more than one occasion for a copy of Agreement, but her requests were ignored or denied. Guyden was completely of unaware of the contents of the second agreement or event that the second agreement existed.

1. THE TWO PARTS OF THE MAY 5, 1999 AGREEMENTS (Pa054-Pa077)

At the center of Defendants' conspiracy to defraud Plaintiff and breach their fiduciary duty in exchange for a $5 million bribe are two parts of an agreement dated May 5, 1999. These two parts of the agreement evidence a conspiracy between Prudential and Leeds-Morelli to compromise Plaintiffs' attorneys' loyalty to their clients in exchange for a five-million-dollar ($5,000,000.00) payment. One part is the Agreement for Alternative Dispute Resolution (hereinafter "AADR") which contains the arbitration provision enforced by the Federal District Court against Plaintiff (Pa054-Pa072). The second part is the Secret Fee Agreement (hereinafter "SFA") of the same date (Pa073-Pa077).

These two parts, by the terms of the SFA, constitute a single agreement; however, it is undisputed that Plaintiff did not know of the SFA. Indeed, the AADR explicitly provides that there is not and cannot be a second agreement. The SFA was drafted specifically to conceal its terms from Guyden, and, thus, she was unaware of this essential second part of the AADR and had no ability to learn of its terms.

(a) Defendant, Leeds-Morelli Advises Plaintiff to Execute the AADR

The first part of the agreement, the AADR, had three parties: 1) Prudential; 2) the 359 Prudential employees/clients of Leeds- Morelli, acting

through Leeds-Morelli purportedly as their Attorney-in-Fact; and 3) Leeds-Moreli as and for itself. Under this agreement, Plaintiff committed her claims to binding alternative dispute resolution in exchange for which Prudential agreed to pay the legal fees of her attorneys, Leeds -Morelli, who were retained on a contingency fee basis. The AADR is written so as to lead one to believe that Leeds-Morelli will receive compensation from Prudential based on the amount of the recovery received by the client at the time of recovery in accordance with the retainer agreement. Paragraph 5 describes the mechanism for payment of these contingent legal fees and does not hint at any "advance.".

Not only did the AADR purport to bind the 359 clients to this alternative dispute resolution, the law firm of Leeds-Morelli, as a party to the AADR, also made representations, warranties and covenants to Prudential, each of which was a material term of the agreement. Specifically, Leeds-Morelli promised Prudential that it would not represent any other clients or those similar to the 359 with claims against Prudential. Leeds -Morelli also warranted, represented and covenanted to Prudential as a material term of the AADR that it had advised each of its 359 clients that entering into the agreement was in his or her best interests and that it would "always advise anyone who was eligible to do so to utilize R to R prior to contemplating any other form of legal action involving

Prudential or any related entity". Finally, the firm was permitted to do any act permitted by its written agreement with a subsidiary of Prudential Insurance-Prudential Securities Inc. ("PSI"), dated February 13, 1998 as amended.

Leeds-Morelli further promised that it would not solicit anyone to consult with the firm or advertise regarding claims against Prudential. The firm also contracted not to assist other lawyers in maintaining or processing any matter involving Prudential or any entity related to Prudential "to any degree whatsoever in any manner whatsoever."

The AADR further provided that despite the fact it concerned claims of New Jersey citizens, employed by a New Jersey corporation, working in New Jersey, and asserting claims under New Jersey law, that it would be governed by the laws of the State of New York. The AADR also claimed that the parties (Prudential, Leeds-Morelli, and the 359 clients) to the agreement had relied upon the advice of his, her or its own attorneys, thus requiring Leeds & Morelli to wear three hats, party to the agreement, it's own attorney and its' clients' attorney. See Lederman v. Prudentia1, 385 N.J. Super. 324, 344 (App. Div. 2006) ("Raising the question of who the attorneys were actually representing: Plaintiff, Prudential, or themselves").

The agreement contained several other extraordinary provisions. For example, the ninth and tenth Whereas clauses mysteriously reference Leeds-Morelli' s difficulty in terms of resources and capital to represent the 359 clients with whom they had already purportedly signed retainer agreements.

The AADR also provided that Leeds-Morelli was acting as the Attorney-in-Fact for each of the Covered Claimants, but no documents have been produced sustaining this claim which is contradicted by Defendants themselves.

The AADR also provided that each party should complete everything the agreement required not later than December 31, 2000. Guyden would not receive any recovery because of the AADR until September of 2009, nearly nine years after this deadline.

What is most extraordinary about the AADR was what it omitted. There was no disclosure of any conflicts of interests by Leeds- Morelli to the clients. Entirely omitted from the AADR was the essential terms of the payment of the five million dollars ($5,000,000.00) by Prudential to Leeds-Morelli within 120 days of the Agreement; and four million dollars ($4,000,000.00) of which was non-refundable. Nowhere in the first agreement was it disclosed that Prudential was providing any advance payment to Leeds-Morelli.

Indeed, its only description of how Leeds-Morelli was to be compensated by Prudential was found at Paragraph 5 referencing the contingent fee retainer and 3(b), which indicated that Leeds-Morelli was to obtain its compensation as set forth in Paragraph 5.

Thus, Plaintiff did not and could not know that when Leeds- Morelli advised her that entering into the AADR was in her best interest pursuant to Paragraph 6(b), LMB was contractually obligated to Prudential to provide this advice to her and was receiving $5,000,000.00 in compensation for so advising Plaintiff.

(b) Prudential Conspires to Enter a Second Secret Agreement to Conceal the Essential Term of Prudential's Payment of Five Million Dollars to Leeds-Morelli

Instead of disclosing it in the AADR, this multi-million-dollar payment was the subject of a separate second part of the agreement which is also dated May 5, 1999 (Pa073-Pa077). The SFA was not referenced at all in the AADR, and, to the contrary, the AADR specifically represented that it was the entire, final, complete and exclusive statement of the understanding and terms of the agreement among the three parties in Paragraph 13 of the AADR.

Despite this unequivocal statement of completeness and integration in the AADR, Prudential and Leeds-Morelli admit that they secretly entered into the

SFA on the same date. The only apparent purpose for preparation of this separate, SFA on the same date as the AADR was to conceal it from the clients; Plaintiff first saw the SFA after she fired Defendants and filed her complaint with new counsel.

Only two of the three parties to the AADR (Prudential and LMB) were parties to the SFA. Plaintiffs and the 358 other clients were not parties to this agreement. The SFA announced that its purpose was to "make more explicit the means and methods where under Prudential will pay such attorneys' fees to the firm". The SFA then provided, consistent with the AADR and the client's retainer agreement, that Prudential was to pay one-third of any recovery achieved on behalf of the Covered Claimants to LMB. The agreement purported that Prudential was to advance these fees to LMB before they were earned "so as to facilitate the firm's timely and effective representation of the Covered Claimants". Upon execution of the contract, Prudential advanced the sum of $3,500,000.00 (three and a half million dollars) to LMB. Id., 11(c)(I).

Thus, on the date that LMB first spoke with Plaintiff about the AADR, her attorneys had been paid (without her knowledge) $3,500,000.00 (three and a half million dollars) to obtain Plaintiff's signature on the AADR. Upon completion of the first one hundred claims, but in no event later less than 120 days after

receiving the $3,500,000.00 Prudential was to advance another $1,500,000.00 (one and a half million dollars) to LMB. Id., 11(c)(ii). While the agreement labeled these payments as advances of "attorneys' fees," the agreement also provided that four million dollars of this payment was non-refundable and unrelated to any recovery on behalf of the clients and in no event would LMB be required to return $4 million of this $5 million advance. Id.

Thus, the SFA made explicit between the Defendants that, in exchange for signing the AADR and advising and committing Plaintiff to sign the AADR, Prudential paid to LMB $5,000,000.00 (five million dollars) within four months and $4,000,000.00 (four million dollars) of this bounty was guaranteed. Indeed, the agreement provided that "in no event shall the firm be required to return" this four million dollars. The SFA then (in contradiction of the AADR's declaration that same day that it was the "entire and final understanding," "a complete exclusive statement of their agreement," and that it was "fully integrated agreement") went on to set forth that "this agreement is to be read and construed as though it was part of the [AADR]". Thus, the SFA makes clear to its two signatories that it is part of the AADR, while the Plaintiff and the other clients are informed in the AADR that there is no and can be no SFA.

B. GUYDEN UNSUCCESSFULLY SEEKS TO ESCAPE THE CORRUPT AGREEMENT ENTERED INTO BY DEFENDANTS AND TRY HER CASE IN COURT

When Plaintiff found out about some of the details of LMB's bargain with Prudential, she sought to escape the corrupt agreements that would require her to arbitrate her claims rather than litigate them in court. Guyden's experiences indicate that Prudential got what it paid for when her it bribed her attorneys with $5 million.

Guyden became a client of LMB as result of their solicitation in February of 1999 to join a group action against Prudential by current and former employees of Prudential who had experienced discrimination. Other than her retainer and supposedly the May 5, 1999 Agreement, the relevant terms of which are set forth above, Plaintiff did not sign any other agreement with Leeds-Morelli concerning their representation of her, never mind signing an agreement that authorized Leeds-Morelli to act as her attorney- in-fact or waived her right to prosecute her claims in court.

Subsequently, Guyden learned that Leeds-Morelli had been secretly paid millions of dollars by Prudential. She learned this not from her attorneys but from another source. Guyden also began to experience retaliation and was subject to continued discrimination by Prudential. When she brought this

retaliation and continued discrimination to Leeds-Morelli's attention, they did nothing and Guyden became concerned about Leeds-Morelli's ability to represent her interests. Therefore, Guyden sought to retain new counsel in June of 2000 filed suit in Federal Court in September of 2000.

Prudential met the suit with a Motion to refer same to arbitration based upon the AADR. Prudential's Motion to Compel Arbitration was supported by the Affidavit of Defendant, Jeffrey Brown, Esq., Plaintiff's former attorney. In this Affidavit Brown lied to the Court and manufactured attorney-client privileged communications at Prudential's request. Not only did he improperly reveal supposed attorney-client privileged communications and commit perjury, Brown billed Prudential for preparing this Affidavit in order to force Plaintiff into arbitration. After she was forced into arbitration and saw her claims as compromised because of her failure to be able to prove same before a jury, upon the advice of counsel Plaintiff filed the instant action against LMB.

The Complaint in this action was filed on or about June 10, 2005. Fifteen (15) years ago, Plaintiff alleged in the lawsuit:

> "Because of Leeds-Morelli's deceptive and unethical actions Plaintiff has been forced to arbitrate her claims against Prudential in a lengthy and frustrating process. Plaintiff has been significantly prejudiced as a result of being forced to arbitrate her claims pursuant to the agreement Leeds-Morelli deceptively entered into with Prudential. Plaintiff has been precluded from conducting

> discovery in this arbitration and anticipates that she will receive an inferior result than that which she would have received if represented by competent and honest counsel before a judge and a jury."

C. PLAINTIFF'S CONCERNS REGARDING ARBITRATION ARE BORNE OUT AND SHE SETTLES TO MITIGATE HER DAMAGES AFTER THE ARBITRATOR FINDS IN FAVOR OF PRUDENTIAL

After Plaintiff lost in arbitration and was advised by her attorney that if she did not settle, she would have a long, tough road ahead of her, Plaintiff considered negotiating a settlement with Prudential. Plaintiff's attorney, Christopher Watkins, Esquire, advised Plaintiff that even if she won the Motion seeking to vacate the arbitration award and seeking discovery on the formation of the ADR Agreement and prevailed on Prudential's certain appeal of such a ruling, it could be more than five years before Plaintiff's claims would be heard by a jury. Plaintiff's attorney informed her that it is very difficult to get an arbitration award vacated and that the road ahead would require Plaintiff to win the Motion to vacate the arbitration award, then prevail on appeal against Prudential, and then return to Court which, again, could take more than five years at which point Plaintiff's claims could be stale. Again, Plaintiff retained Leeds-Morelli in 1999 and stopped working for Prudential in 2000.

Plaintiff was very uncomfortable settling and did so only because of certain factors. First, Plaintiff thought that the settlement was prudent given the

tough road that her attorney described ahead. Second, both Plaintiff's attorney and a mediator indicated to Plaintiff that she would still have her claims against Leeds -Morelli in the instant action for the way they compromised Plaintiff's case by putting Plaintiff in a posture where she had to fight against an unjust arbitration award and a fraudulently obtained arbitration agreement simply to try and get her day in court several years from 2009 when she retained Defendants in 1999. The settlement agreement that Plaintiff eventually signed carved out and preserved her right to continue with the instant claim against Leeds-Morelli, and Plaintiff relied upon same when settling. That agreement set forth that by entering into the relief Plaintiff was "not waiving any claims that [I] has asserted in the action entitled 'Guyden v. Leeds, Morelli & Brown' by settling." Plaintiff was forced to suffer a terrible ordeal simply to obtain an inadequate recovery for her injuries when faced with an uncertain and lengthy future in litigation which might obtain nothing fifteen years after LMB fraudulently placed her in the ADR process to which Plaintiff never agreed. Plaintiff has sought in this action to prove to a jury that LMB committed legal malpractice, breach of fiduciary duty and fraud by entering into this Agreement as a result of the commercial bribe and without Plaintiff's informed consent and

that she was entitled to an award of compensatory, treble and/or punitive damages and attorney's fees and costs.

D. SCOTT PIEKARSKY'S EXPERT REPORT

Scott Piekarsky is a distinguished member of the Bar who has been practicing in this state since 1987. He is a certified civil trial attorney and for years has been the presenter of the annual NJICLE Legal Malpractice Update Seminar (Pa376).

Mr. Piekarsky prior to issuing his September 28, 2023 opinion, reviewed the massive appellant's briefs in this matter and specifically incorporated the thirty (30) page recitation of facts as set forth in the Appellant's brief (Pa475-500)**,** the March 15, 2001 declaration of Linda Guyden (Pa506), the October 22, 2014 report of Milton C. Regan, Jr., Esq., the McDevitt Professor of Jurisprudence at Georgetown Law School and the co-author of *Legal Ethics and Corporate Practice* (Thompson/West 2005) plus dozens of other legal education publications and a former law clerk of U.S. Supreme Court Justice Ruth Bader Ginsburg (Pa511), the 20 page expert report of David Zatuchni, Esq. (Pa381), the expert report of Robyn M. Hill, who served as Chief Counsel of the Disciplinary Review Board of the New Jesey Supreme Court for 15 years (Pa567), the expert report of John Leubsdorf, Esq., professor at Rutgers Law

School and who has been teaching professional representation for 30 years (Pa579), the expert report of Michael Ambrosio, Esq., who has been teaching professional responsibility to the students of Seton Hall Law School for over 30 years (Pa607), the certification of the late Peter Van Schaick, Esq., as distinguished employment lawyer and counsel in the seminal case of Rendine v. Pantzer, 141 N.J. 292 (1995) (Pa634).

Mr. Piekarsky's report then set forth as a result of these review it was his opinion that the Leeds, Morelli and Brown Defendants violated New Jersey Rules of Professional Conduct (as noted by Professor Ambrosio and Professor Regan) entering in the two (2) May 5th agreements which bound Ms. Guyden to the ADR process. It was his opinion that the conduct of the Leeds, Morelli and Brown Defendants when accepting a nonrefundable five-million-dollar ($5,000,000.00) advanced retainer ($4,000,000.00 was nonrefundable) was a deviation from the standard of care governing attorneys practice in this state in 1999 and by so doing and by failing to disclose that they has other business dealing with their adversary subsidiary and had stolen clients funds, a fact of which the adversary was aware, was egregious conduct which warrants an award to Ms. Guyden of compensatory damages, proximately caused by the deviation

from the standard of care and also an award of punitive damages and a forfeiture of all fees paid to the Defendant (Pa377).

Mr. Piekarsky then sets forth citation to numerous cases, See St. Pius X House of Retreat v. Camden Diocese, 88 N.J. 572 (1982), Grunwald v. Bronkesh, 254 N.J. Super 530 (App. Div 1992), rev'd on other grounds, 131 N.J. 483 (1993), Lamb v. Barbour, 188 N.J. Super. 6,12 (App. Div 1982), Conklin v. Hannoch Weisman, 145 N.J.395, 416 (1996); Sommers v. McKinley, 287 N.J. Super. 1, 9-10(App. Div. 1996); Albright v. Burns, 206 N.J. Super. 625 (App. Div. 1986); Pivnik v. Best, 326 N.J. Super. 474 (App. Div. 1999)aff'd 165 N.J. 670(2000), Vort v. Hollander, 257 N.J. Super. 56, 61 (App. Div. 1992), Albright v. Burns, supra and Lovett v. Estate of Lovett, 250 N.J. Super. 79 (Ch. Div. 1991), Ziegelheim v. Apollo, 128 N.J. 250 (1992), Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 150 (App. Div.) cert. denied 113 N.J. 357(1988). Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 340(1980) as well as the aforementioned reports regarding the standard of care. After reviewing these items, Mr. Piekarsky sets forth his opinion:

> In connection with my review, analysis and opinions herein, I have examined numerous documents from the itemized below regarding Ms. Guyden's claims for legal malpractice contained in Plaintiffs Brief and the Appendix dated April 11, 2016. . . .

As a result of my review, it is my opinion that the Leeds, Morelli and Browns Defendants violated New Jersey Rules of Professional Conduct (as noted by Professor Ambrosio and Professor Regan) entering in the two (2) May 5th agreements which bound Ms. Guyden to the ADR process. In my opinion the conduct of the Leeds, Morelli and Brown Defendants when accepting a nonrefundable five million dollar ($5,000,000.00) advanced retainer ($4,000,000 was nonrefundable) was a deviation from the standard of care governing attorneys practicing in this state in 1999 and by so doing and by failing to disclose that they had other business dealing with their adversary subsidiary and had stolen clients funds, a fact of which the adversary was aware, was egregious conduct which warrants an award to Ms. Guyden of compensatory damages, proximately caused by the deviation from the standard of care and also an award of punitive damages and a forfeiture of all fees paid to the Defendants.

As said forth in length in the facts recited in the Plaintiff-Appellants Brief, Ms. Guyden was deceived to enter in agreement which bound her to an ADR by attorneys who were paid $5,000,000.00 to obtain her signature on such an agreement. To state the obvious this is a breach of standard of care and additionally as set forth in Ms. Hill's report the unauthorized practice of law. The Defendants conduct also violated numerous Rules of Professional Conduct and a fair reading of the agreements indicate that they were written for the benefit of Prudential, Leeds, Morelli and Brown and not Ms. Guyden. I wholly agree with and adopt the analysis and conclusion of Professor Regan in his October 22, 2014, report that entering into these agreements was a breach of LMB's fiduciary duty. The Second Circuit Court of Appeals in Johnson v. Nextel, 660 F. 3d 13 I (2nd Cir. 2011), noted that arrangements such as this created impermissible conflicts of interest that cannot be cured by client consent. The Defendants in this case

claim there was no conflict of interest and did not seek the clients' consent or disclose same.

In Johnson v. Nextel, 660 F. 3d 131 (2d Cir. 2011), supra, the Court considered the identical Defendant, LMB, and another company which entered into an arrangement less egregious than that contained in the two May 5, 1999 Agreements. In Johnson, the Court held that by soliciting a large number of plaintiffs and committing them to an alternative dispute resolution in exchange for a multi-million-dollar payment, the patties had, as a matter of law breached their fiduciary duty to their clients, which resulted in a presumption of damages. The Court held that it was the attorney's duty as counsel to "advise each client individually as to what was in his or her best interest taking into account all of the difference circumstances of each particular claim." Johnson v. Nextel, 660 F. 3d at 140, citing Ziegelheim v. Apollo, 128 N.J. 250, 260-261 (1992). As a matter of law, the Comi held that entering into such an arrangement, such as the two May 5th Agreements, LMB violated its duty to advise and represent each client individually, giving due consideration to different claims, different strengths of its claims and differing interests in one or more proper tribunals in which to assert those claims. Id. "As for damages, the nature of the DRSA itself creates a presumption of damages. Neither Nextel nor LMB would have entered into it unless each believed that it would profit more by that arrangement than by one in which a law firm vigorously represented claimants as individuals." So too here, Plaintiff is entitled to her day in Court to prove the amount of damages she would have obtained had she been advised to pursue her time-honored right to sue without interference with her attorney being bribed to commit her to ADR.

It is well-settled that parties engaged in the unauthorized practice of law are not entitled to charge a legal fee. Here, it is undisputed that Defendants

advised Plaintiff, someone whom they never previously represented, to execute certain agreements, including a retainer agreement and the ADR, when they were not authorized to practice law in this state. Defendants' retainer agreement indicated that they would file suit on Plaintiffs behalf, yet they were not licensed to do so. Under these circumstances, it cannot be questioned that the Defendants who appeared in Newark to meet with Plaintiff and sought to represent a New Jersey resident in an action under New Jersey law against her New Jersey employer, engaged in the unauthorized practice of law. Defendants should be required to disgorge all "fees" they were paid to represent Plaintiff, namely $5 million dollars.

It is well-settled that out-of-state attorneys can represent New Jersey parties in arbitration under certain conditions not available here; however, it is equally well-settled that when an attorney recommends arbitration as opposed to litigation as occurred in this case, legal advice has been conveyed, and that constitutes the unauthorized practice of law. This is particularly so, where, as here, LMB concedes that their clients executed a legally binding document on their recommendation. In In re Jackman, 165 N.J. 580, 585 (2000), the Appellate Division held that it is the unauthorized practice of law when "an attorney counsels a client through a transaction culminating in the client's execution of legally binding documents ... "

It is my opinion that by counseling Ms. Guyden to enter these agreements, Ms. Guyden was proximately caused damages resulting in the lower amount she recovered as a result of settlement in the matter with Prudential after years of litigation. The measure of her damages is what she would've received from a Jury considering her claims of employment discrimination. The expert opinions of Peter van Schaick, Esq., and David Zatuchni, Esq., experienced employment counsel who set forth that at the time the Defendants

> (hereinafter "LMB") entered into the May 5, 1999 agreements, independent, competent counsel would have been loath to commit clients to arbitration absent guarantees which LMB made no attempt to secure when dashing towards the $5,000,000.00 payment. Ms. Guyden was the victim of a conspiracy by which her decision as to whether or not to engage in arbitration was not obtained as a result of conferring with counsel who has her interests in mind when advising her whether or not to enter into arbitration. Instead, she was coerced into arbitration and to conceal from any subsequent counsel the true nature of the arrangement between the conspirators and thereby keep Plaintiff from a jury trial of her claims. Mr. Zatuchni values Ms. Guyden's claims.
>
> Furthermore, the breach of fiduciary duty by the Defendants, the unauthorized practice of law and the intentional unethical conduct of the Defendants entitle Ms. Guyden a disgorgement of fees and award of attorney fees and costs incurred in this action Saffer v. Willoughby, 143 N.J. 256 (1996). Packard-Bamberger v. Collier, 167 N.J. 427(2001) (Pa379-Pa380).

The Plaintiff's herein served the expert report of David Zatuchni over nine (9) years ago! Said report was never stricken or barred and is it not in a traditional sense "damages" expert report, rather, the report values Ms. Guyden's employment law claims within the case within a case framework. Despite having this report for over nine (9) years, despite the report being rendered before fact discovery was concluded, despite the fact the Defendants-Respondents never raised any claim that this report was barred on either of the

two (2) remands after reversal in the Appellate Division, Defendants-Respondents contended the report was time barred.

Second, Mr. Piekarsky's report is not a net opinion. Mr. Piekarsky's report is several hundred pages based upon the materials he relied upon and incorporates therein. Mr. Piekarsky's decision to spare metaphorical paper and ink in no way invalidates his opinion and under the Rules of Evidence he is expressly authorized to base his opinion on "another expert opinion". His succinct report does not state based on the conclusions but rather rests upon a wealth of cited case law and the Rules of Professional Conduct that entirely appropriate in support of his conclusions that opinion that Defendants breached their duty to Plaintiff and thereby precluded her from obtaining the recovery that she would have obtained had her attorneys adhered to the standard of care.

Mr. Piekarsky's report is based upon the facts and the law he gives the whys and wherefores for his conclusions, which are not controversial but rather in accord with the Second Circuit Court of Appeals regarding the conduct of the lawyers at issue here.

Ms. Guyden has waited over 20 years for her day in Court. Any perceived deficiencies in her expert report do not justify denying her day in Court and this

matter should be resolved on the merits as Ms. Guyden has waited so long in her quest for justice.

ARGUMENT

I. PIEKARSKY'S OPINION IS NOT A NET OPINION. (APPEALING THE ORDER DATED MAY 2, 2024 FOUND AT PA801)

This Court reviews Trial Court's grant of Summary Judgment de novo. Lederman, supra on a motion for summary judgment by an attorney in a legal malpractice case, the Court is required to credit the opinion of the Plaintiff's legal malpractice expert absent a finding that it is a net opinion. Ziegelheim v. Apollo, 128 N.J. 250 (1992); Davin, L.L.C. v. Daham, 329 N.J. Super. 54 (App. Div. 2000).

Pursuant to N.J.R.E. 703, an expert's opinion must be based on facts, data or **another expert opinion** either perceived by or known to the expert at or before trial. "Rosenberg v. Tavortath, 352 N.J. Super. 385, 401 (App. Div. 2020). Under the net opinion rule, an opinion lacking in such foundation consisting of bare conclusions, unsupported by factual evidence is inadmissible. Johnson v. Salem Corp., 97 N.J. 78 (1984). The Rule requires an expert "to give the why and wherefore" of his or her opinion, rather than a mere conclusion. Jimenez v. GNOC, Corp., 286 N.J. Super 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996).

In the context of legal malpractice, an expert must base their opinion on standards accepted by the legal community and not merely on the expert's personally held views. Stoekel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div.), certif. denied, 188 N.J. 489 (2006); Kaplan v. Skoloff & Wolf, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001). When an expert bases his opinion on factual evidence of record to which he applied accepted standard of care as reflected in the case law and the Rules of Professional Conduct, that expert's opinion is not a net opinion. Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64 (App. Div. 2007); Stoekel, supra. When an expert provides the whys and the wherefores, rather than the bare conclusions for his opinion, it is not considered a net opinion. Beadling v. William Boman Associates, 355 N.J. Super. 70 (App. Div. 2002), citing Jimenez, supra.

Piekarsky sets forth in his opinion and the data and factual basis which he relied upon (Pa475-647, 381-401); the data he relied upon was massive. An expert is permitted to reply upon the proffered facts that Ms. Guyden will prove at trial and form his opinion based on those facts. Mr. Piekarsky then applied the standard of care as defined by his own experience, case law, and the Rules of Professional Conduct to determine if Defendant breached the standard of care.

Piekarsky's report specifically references and incorporates and adopts the opinions of two legal ethics professors and former counsel for the Office of Attorney Ethics. His adoption of the Rules of the Professional Conduct cited by these professionals which explicitly prohibit the actions taken by Leeds, Morelli and Brown in this instance do not in any way resemble the prohibitions as set forth in Agha v. Feiner, 198 N.J 50 (2009), and Haze v. Deleamotte, 231 N.J. 373 (2018) for wholesale introduction of non-testifying expert opinions into evidence. Mr. Piekarsky cannot be compared to an expert adapting the reading of an MRI when the expert is not qualified MRIs.

An expert is entitled to credit the factual version presented by a litigant and it is for a jury to decide whether or not the facts relied upon were proven by a preponderance of the evidence. The net opinion rule is not a standard of perfection. The rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable. An expert's proposed testimony should not be excluded merely "because it fails to account for some particular condition or fact which the adversary considers relevant." Creanga, supra, 185 N.J. at 360 (quoting State v. Freeman, 223 N.J.Super. 92, 116, (App.Div.1988), certif. denied, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party

does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J.Super. 385, 402 (App.Div.2002) (citing Freeman, supra, 223 N.J.Super. at 115–16). Such omissions may be "a proper 'subject of exploration and cross-examination at a trial.' " Ibid. (quoting Rubanick v. Witco Chem. Corp., 242 N.J.Super. 36, 55 (App.Div.1990), modified on other grounds, 125 N.J. 421 (1991)); see also State v. Harvey, 151 N.J. 117, 277 (1997) (" '[A]n expert witness is always subject to searching cross-examination as to the basis of his opinion.' " (quoting State v. Martini, 131 N.J. 176, 264 (1993))).

Mr. Piekarsky has simply set forth that he agrees with these experts well-reasoned opinions adopts same as his own. Piekarsky could have taken a word processor and put these opinions in his opinion himself and it would make no difference to the finder fact or to the Defendants. It is not a net opinion. Rather it is tethered to the facts in the record.

II. DAIVD ZATUCHNI'S EXPERT REPORT IS NOT A DAMAGES REPORT. (APPEALING THE ORDER DATED MAY 2, 2024 FOUND AT PA801)

Zatuchni's report sets forth that he is going to give an opinion on whether the Defendants breached the standard of care, breached approximate caused damages and if so, what where the proximate caused damages. The Court can

take judicial notice of the fact that this is a traditional format of legal malpractice reports and hundreds of legal malpractice cases have been tried where a single lawyer expert testifies that the attorneys breach the standard of care, and if so what were the proximately caused damages.

Zatuchni sets forth in the beginning of his report:

> You asked me to review *Guyden v. Leeds, Morelli & Brown* ["LMB"] . . . give you my opinion as to whether Defendants conformed to, or deviated from, acceptable standards of care in the handling of Ms. Linda Guyden . . . claims against their former employer, Prudential Insurance Company ["Prudential"]. In addition, you asked that in the event that I find that such deviations were such a factor to Ms. Guyden's and Ms. Smith's damages. Finally, you asked that if deviations were such a factor, that I give you my opinion regarding the monetary value of Guyden's underlying case against Prudential. Below, I explain the basis for my opinions with respect to these questions. (Pa382)

The opinion indicates the advice to arbitrate Ms. Guyden's claims was a departure from the standard of care (Pa386). He then indicates what competent counsel would have done to prove Ms. Guyden's case (Pa398). He then indicates what Ms. Guyen's case would be worth had she been permitted to file her case in Essex County New Jersey (Pa399).

This is not a damages expert report. In the unlikely event that the Court gives any credence to the Defendant's claim that the report that was served upon them over nine years ago **and before the Plaintiff sat for two (2) days of**

depositions, should be barred as a damages report, even though it is the traditional legal malpractice liability report. The Court certainly had the power to revise those interlocutory orders to permit the finder of fact to consider Mr. Zatuchni's expert testimony.

Zatuchni is an attorney. He is not a CPA or an economist. He is an employment attorney who has offered an expert opinion about Ms. Guyden's employment case and the Defendants' breach of the standard of care in handling same. Attorneys who practice in a particular field are supposed to know the value of the range of awards of their client's cases. Ziegelheim v. Apollo, 128 N.J. 250 (1992).

Mr. Zatuchni does not provide computations present value or future earnings, or the like founded in the damages founded in the expert report. Rather, Mr. Zatuchni offers an opinion that the amount that Ms. Guyden was worth was well an excess in the amount she received in settlement in its compromised state after Leeds, Morelli and Brown took from her, the right to try her claims before a jury. Thus, if we are going to put Mr. Zatuchni's report into a category as a liability as expert as opposed to damages expert, he is clearly not a damages expert. See 539 Absecon Boulevard, L.L.C v. Shan Enterprises Ltd. Partnership, 406 N.J. Super. 242, 261 (App. Div. 2009), (damage expert CPA and forensic

accountant). What rationale could be behind precluding Mr. Zatuchni from testifying. His report has been in Defendants hands for over nine (9) years. He is available to be deposed. There is absolutely no basis to exclude this report.

Mr. Zatuchni sets forth that he, like Mr. Piekarsky, is adopting the report of Michael Ambrosio, Robyn Hill and Milton Regan.

Defendants' reliance upon prior orders of Judge Martinotti entered into when there were over 200 Plaintiffs in this matter and completely unreasonable and was never set forth at any of the numerous case management conferences after two (2) remands. Nor did the Defendants in the nine (9) years since they received Zatuchni's report seek to exclude same as a damages expert.

It is well established that "the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at *any time* prior to the entry of final judgment." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, (App.Div.1987), certif. denied, 110 N.J. 196, (1988) (emphasis added). See also Marconi Wireless Telegraph Co. of Am. v. United States, 320 U.S. 1 (1943) (finding trial court has "power at any time prior to entry of its final judgment ... to reconsider any portion of its decision and reopen any part of the case"). That power, which is rooted in the common law, see, e.g., Lyle v. Staten Island Terra–Cotta Lumber Co., 62 N.J.

Eq. 797 (E & A 1901), is broadly codified in *Rule* 4:42–2, which provides expansively that "any order ... which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." (Emphasis added); see also R. 1:7–4(b) ("Motions for reconsideration of interlocutory orders shall be determined pursuant to R. 4:42–2.").

That Rule, like the jurisprudence on which it is based, sets forth no restrictions on the exercise of the power to revise an interlocutory order. Thus, for example, the stringent constraints imposed on final judgments and orders under *Rule* 4:50–1 (grounds for relief from judgment) are wholly inapplicable to interlocutory orders. See Johnson, supra, 220 N.J.Super. at 257–64, 531 A.2d 1078 (tracing history of *Rule* 4:50–1 and declaring its "strict and exacting standards" do not apply to interlocutory orders); see also R. 4:49–2 (permitting reconsideration of final judgments or orders within 20 days of entry). Indeed, "[a] significant aspect of the interlocutory nature of an order is its amenability to the trial court's control until entry of final judgment without interposition of considerations appropriate to finality." Pressler & Verniero, *Current N.J. Court*

Rules, comment 3 on R. 4:42–2 (2011) (citing Ford v. Weisman, 188 N.J.Super. 614, 458 A.2d 142 (App.Div.1983)).

That paradigm echoes federal jurisprudence regarding Federal Rule of Civil Procedure 60(b), on which Rule 4:50–1 is modeled. See, e.g., City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, (9th Cir.2001) ("[A] district court's authority to rescind an interlocutory order over which it has jurisdiction is an inherent power rooted firmly in the common law and is not abridged by" Rule 60(b) which governs final judgments.);

Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265, 1269 (5th Cir.1986) (finding partial summary judgment "remain[ed] within the plenary power of the district court to revise or set aside in its sound discretion without any necessity to meet the requirements of Fed.R.Civ.P. 60(b)"); United States v. Jerry, 487 F.2d 600, 604 (3d Cir.1973) ("[T]he power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts until entry of final judgment and is not inconsistent with any of the Rules."); see also Hubbard v. State Farm Indem. Co., 213 W.Va. 542, 584 S.E.2d 176, 186 (2003) (holding trial court erred in viewing interlocutory order "under the limited authority granted it by [West Virginia] Rule 60(b)" rather than pursuant to "its inherent

power to revisit interlocutory orders"). Lombardi v Masso, 207 N.J. 517, 535 (2011).

In the unlikely event the Court should affirm the Trial Court's ruling that David Zatuchni, Esq.'s opinion is barred as a net opinion or a damages report, it should not end the inquiry. Plaintiff-Appellant can still prove her case based upon Mr. Piekarsky's report that Defendant-Respondent committed legal malpractice and the departure from the standard of care proximately cause Plaintiff-Appellant damages by proving a case within a case. At trial Plaintiff-Appellant shall introduce the testimony of Mr. Piekarsky regarding that Ms. Guyden was damaged because she was not allowed to present her employment claims to the Jury and Ms. Guyden would do what she is sought to do for over twenty (20) years – present her employment claims to a jury to determine what her damages are.

This Court should not permit the injustice committed by the Trial Court to stand, this matter should be reversed and remanded for the trial Ms. Guyden long sought.

CONCLUSION

This matter should be remanded for trial on the merits.

SIMON LAW GROUP, LLC,

Attorneys for Plaintiff-Appellant

By: /s/ Kenneth S. Thyne

Kenneth S. Thyne, Esq.

Dated: December 23, 2024

LINDA GUYDEN, Plaintiff/Appellant, v. LEEDS, MORELLI & BROWN LLP, STEVEN A. MORELLI, ESQ. and JEFFREY K. BROWN, ESQ., Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003158-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-3571-10 SAT BELOW: HON. JOHN D. O'DWYER, P.J.C.V.

BRIEF OF DEFENDANTS/RESPONDENTS, LEEDS, MORELLI & BROWN, P.C., STEVEN A. MORELLI, ESQ. and JEFFREY K. BROWN

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April 15, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

Defendants, Leeds, Morelli & Brown, P.C., Jeffrey K. Brown and Steven A. Morelli (collectively "LMB"), submit this brief in opposition to Plaintiff Linda Guyden's ("Plaintiff" or "Guyden") appeal from the Trial Court's May 2, 2024 order, striking the report of Plaintiff's experts, Scott Piekarsky, Esq. ("Piekarsky Report") and David Zatuchni ("Zatuchni Report"), and granting LMB summary judgment against Plaintiff.

Nature of Action

Guyden sued LMB, her former attorneys, based on LMB's advice in 1999 to resolve her employment discrimination claims against Prudential Insurance Company of America ("Prudential"), in an alternative dispute resolution ("ADR") process pursuant to a May 1999 agreement that included arbitration (the "ADR Agreement").

After entry into the ADR Agreement and before resolution of her claims, Guyden fired LMB in 2000, hired successor counsel, commenced an employment discrimination lawsuit against Prudential in Federal Court and was compelled to arbitrate her claims based on the ADR Agreement. She lost in arbitration on the merits, moved to vacate the arbitration award but settled with Prudential in 2009 before adjudicating that motion.

Guyden's sole remaining claim is legal malpractice, based on the theory

that LMB's 1999 advice to agree to arbitration proximately caused Guyden's allegedly inadequate post-arbitration settlement on successor counsel's advice.

Guyden has had a long history of violation of court orders, including prior orders directing the production of damages expert reports. Plaintiff's failure to timely produce damages expert reports pursuant to prior court orders resulted in the 2012 order precluding her submission of late damages expert reports and denial of her motion for reconsideration. (the "Preclusion Orders"). Guyden failed to appeal the Preclusion Orders when they came up for review on a prior appeal of a final summary judgment order rendered in 2015.

Thereafter, in 2023 Guyden made disclosure of the Piekarsky Report after the liability expert disclosure deadline. Months after that, Guyden made an eleventh-hour identification of Zatuchni as a trial expert, and designation of his report as trial expert report, and only in opposition to the underlying motion to strike and for summary judgment. Both expert reports purport to opine on liability and proximately caused damages. The Trial Court granted LMB's motion to Strike Expert Reports and for Summary Judgment on May 2, 2024.

Summary of Argument

The Trial Court properly struck the Piekarsky and Zatuchni Reports because they both opine on and/or purport to quantify Guyden's alleged proximately caused damages in violation of the Preclusion Orders. These Orders

cannot now be collaterally attacked because Guyden waived their review when she failed to appeal the Preclusion Orders when they came up for review on the prior appeal of the final 2015 Order granting summary judgment.

The striking of these reports should also be affirmed as they are net opinions, and are otherwise inadmissible as to both liability and damages because they: lack foundation in, and are contradicted by, the record; ignore critical documents including the discovery exchanged in arbitration and the arbitrator's decision; do not contain a fact-based, independent analysis establishing LMB's departure from any recognized standard of care in recommending post-dispute arbitration; contain no causation analysis establishing that Guyden's loss in arbitration, or the amount of her settlement was proximately caused by LMB's advice to agree to the arbitration forum; and improperly bootstrap the opinions of other hearsay, non-testifying litigation experts in contravention of *Agha v. Feiner*, 198 N.J. 50 (2009) and *Hayes v. Delamotte*, 231 N.J. 373 (2018).

Without proper expert evidence on LMB's departure from the standard of care and Guyden's proximately caused damages, Guyden's legal malpractice claim cannot be sustained. The May 2, 2024, order granting summary judgment should, therefore, be affirmed and this twenty-year meritless vendetta should finally come to an end.

COUNTERSTATEMENT OF FACTS

LMB's Brief Representation of Guyden

In March 1999, Guyden retained LMB to pursue a "negotiated settlement" of her employment discrimination claims against Prudential and only "if necessary" file suit thereafter. (Pa018¶10; Pa053¶1). On May 20, 1999, Guyden attended a meeting in LMB's World Trade Center office in New York City where she was advised by LMB to enter into an ADR Agreement that was also entered by over 300 other Prudential employees. Guyden executed the signature page of the ADR Agreement which provided for a three-step ADR process, including negotiation, mediation and, ultimately, arbitration. (Pa019¶13; Pa058-059; Pa072; Pa076¶4-Pa080; Pa138).

The ADR Agreement expressly disclosed that Prudential would pay claimants' legal fees, in the amount of one-third of each claimant's recovery – over and above such recovery. (Pa061¶5). Prudential's obligation to pay fees was further memorialized in a separate fee agreement (the "Fee Agreement") of May 1999, which provided for a $5 million fee advance to LMB for the representation of 359 claimants, $4 million of which was non-refundable. (Pa074¶1(a); Pa076¶1(d)). The Fee Agreement provided that the more LMB recovered for its clients the more fees it would earn. (Pa076¶1(d)). After participating in the ADR process and attempting to negotiate a settlement with

Prudential, Guyden became dissatisfied with LMB and the process and fired LMB in June 2000. (Pa021¶19; Pa141).

Guyden's Successor Counsel Commences Federal Action Against Prudential

In June 2000, Guyden retained successor counsel, from the Law Office of Michael H. Sussman, Christopher Watkins ("Watkins"). (Pa021; Pa181¶12(d); Pa182 ¶13(a)(d); Pa090). In September 2000, Watkins commenced suit against Prudential in the Federal Court on Guyden's behalf alleging claims of discrimination in pay, promotion and retaliation. (Pa090; Pa033¶19).

Prudential moved to compel arbitration based on the May 1999 ADR Agreement. (Pa033¶20). Guyden opposed the motion to compel arbitration, claiming she alone was shown a different agreement and was not advised about Prudential's advancement of fees to LMB, alleging fraud in the inducement of the ADR Agreement. (Pa080¶¶5,7; Pa132-133; Pa138-139). On August 30, 2001, the Hon. Alfred J. Lechner, Jr., U.S.D.J. granted Prudential's motion to compel arbitration and held that Guyden's participation in the initial stages of the ADR process indicated "she did, in fact, agree to process her claims, as provided for by the ADR Agreement" (Pa140; Pa079-080 ¶ 4), and that "Guyden acknowledge[ed] in a sworn declaration that she voluntarily signed what she knew to be an alternative dispute resolution agreement...." (Pa141). He further held that "there is no indication that Guyden an experienced businesswoman,

was coerced or defrauded into agreeing to the …ADR Agreement." (Pa143). This opinion was never reversed.

Guyden Loses in Arbitration While Represented by Successor Counsel

Guyden participated in an eight-day AAA employment discrimination arbitration before Arbitrator T. Andrew Brown, Esq. (Pa157). The Arbitrator rejected all of Guyden's discrimination claims on the merits in a 20-page decision. (Pa152-171). He held that Guyden failed to sustain even her *prima facie* burden on any of her claims. (Pa160-170).

As to her pay discrimination claim, Arbitrator Brown found that Guyden failed to establish (based on her own testimony) that her alleged white comparators were performing substantially equal work to her. (Pa160-161; Pa163-164). He held on a "full review of the record," that Guyden had not met her ultimate burden of proving that "the pay disparity…was the result of discrimination…" but that "Prudential offered legitimate and reasonable justification for the pay disparity." (Pa164).

As to the failure to promote, the Arbitrator found that Guyden "failed to offer sufficiently convincing proof that she was denied any of the positions due to racial discrimination" and that Prudential offered reasonable (non-pretextual) explanations for its promotional decisions. (Pa164-167).

As to her retaliation claim, Arbitrator Brown found that Guyden failed to

demonstrate that her internal complaints amounted to complaints of racial discrimination, observing that Guyden never attributed her employee evaluations to racial discrimination when communicating to Supervisors or Prudential's Human Resources Department. (Pa167-168). The Arbitrator held that "no alleged adverse employment action taken in response to the complaints can form the basis of an unlawful retaliation as a matter of law." (Pa168).

As to her retaliation claim predicated on the retention of LMB and her participation in the ADR process, he found that Guyden "failed…to offer sufficient proof to establish an adverse employment action as a result of a protected activity." (Pa168-169). Thus, Guyden's underlying claims "were determined to be worth zero." (Pa170; Pa183¶13(i)).

Guyden's Motion to Vacate Arbitration Award and Settlement with Prudential

In May 2007, Guyden attempted to vacate the arbitration award in Federal Court claiming, in part, that her entry into the ADR Agreement was fraudulently induced. (Pa091). The Federal Court allowed discovery in connection with Guyden's motion to vacate. (Pa091; Pa182¶13(e)).

Instead of pursuing such discovery, Guyden opted to settle with Prudential on the advice of successor counsel. (Pa182-183). Prudential paid a substantial sum of money to Guyden and Watkins' legal fees in settlement (Pa182¶13(g))

as reflected in a confidential Settlement Agreement. (Da0172).[1]

LMB had no role in Guyden's arbitration (including what discovery was sought or obtained), her loss in arbitration or her decision to settle.

Guyden's Complaint Against LMB in this Action

Guyden commenced this action against LMB on June 1, 2005, *before her arbitration had been conducted*. (Pa001-010). She alleged that LMB conspired with Prudential when they accepted advanced legal fees and trapped her into a corrupt ADR process in which she *expected* to obtain an inadequate recovery. (Pa004 ¶21). Guyden alleged claims of breach of fiduciary duty, fraud and negligence/legal malpractice. (Pa005-007). Guyden's breach of fiduciary duty and fraud claims have been dismissed, and the sole remaining claim is legal malpractice. (Pa315).

Issuance of the Preclusion Orders as To Damages Expert Reports

When this action was transferred from Essex County to Bergen County before Judge Martinotti for centralized case management on February 9, 2010, all Plaintiffs were already in violation of prior orders of the Hon. Sebastian

[1] The Settlement Agreement, reflecting Plaintiff's settlement with Prudential, and the legal fees paid to Watkins, is designated "Highly Restricted–Attorney Eyes Only" pursuant to the protective orders entered by Hon. Sebastian Lombardi and Hon. Walter Koprowski and Stipulation of Prudential. (Da0007-0039). The Settlement Agreement is therefore filed confidentially in the Defendant's Appendix (Da0172), along with other confidential documents or information covered by the protective orders. *See* LMB Appendix Volume II.

Lombardi which established a deadline of January 15, 2010, for the submission of damages expert reports. (Pa229-230). Judge Martinotti's initial Case Management Order ("CMO") made clear that "[a]ll previous Orders remain in full force and effect except as modified by this Order" notwithstanding the transfer to Bergen County. (Pa220; Pa231).

Defendants applied to the assigned Discovery Master to preclude Plaintiffs from submitting damages expert reports for failure to comply with the court-ordered damages expert disclosure deadline. (Pa250). On March 20, 2012, the Discovery Master issued a Report and Recommendation, holding that it was "not in dispute that Plaintiffs disregarded the January 15, 2010 deadline set forth in CMO # 8 by failing to serve their damages reports until partial service [by other Plaintiffs] in June, 2010." (Pa256; Pa233). He recommended that Defendants' applications be granted and that an order be entered limiting the Plaintiffs to using only those damages expert reports already served by other Plaintiffs, not including Guyden, for whom no damages expert reports were served. (Pa257; Pa234).

After Plaintiff filed objections, on August 28, 2012, Judge Martinotti issued an Order and Opinion adopting the Report and Recommendation in its entirety. (Pa225-248). Judge Martinotti found (and Plaintiff has never disputed), that "plaintiffs have offered no justifiable excuse for their failure to serve expert

reports as ordered by Judge Lombardi on numerous occasions" (Pa244) and that "[t]he January 15, 2010 deadline for service of expert damages reports was the subject of numerous orders." (Pa245-246).

The Court held that Plaintiffs failed to establish "good cause" for their "willfully disregard[ing] the court-ordered deadline for their damages reports". (Pa248). On September 17, 2012, Plaintiff's motion for reconsideration was also denied. (Pa262-297).

LMB Is Granted Summary Judgment in 2015 Dismissing All Claims

LMB moved for summary judgment against Guyden, and by Order and Decision read into the record on April 8, 2015, the motion was granted and all of Guyden's claims were dismissed resulting in a final judgment. (Pa083-115).

Among other things, Judge Martinotti explicitly rejected Guyden's argument that she need not prove damages proximately flowing from LMB's representation because such damages were presumed in the amount of the fees advanced, *allegedly* in reliance on the Second Circuit opinion regarding a pre-answer motion to dismiss in *Johnson v. Nextel Commc'ns, Inc*., 660 F.3d 131 (2d Cir. 2011). (Pa111-113). He held there was no presumption of damages as "[d]amages must be proven." (Pa112-113). Judge Martinotti rejected Plaintiff's reliance on *Johnson*, holding that such decision was neither controlling nor analogous as it had distinctions that rendered it inapplicable, including that the

fee arrangement and agreement in *Johnson* were completely distinguishable from the fee arrangement and agreement between LMB and Prudential in the case at bar. (Pa111-112).

Plaintiff's Failure to Appeal the Preclusion Orders and the 2018 Appellate Division Decision

The Plaintiff filed a Notice of Appeal and Case Information Statement appealing from the April 8, 2015 order granting summary judgment and eleven other interlocutory orders. (Pa301-310). Notably, Plaintiff did not appeal the Preclusion Orders when they came up for review from the final order. *Id*.

On June 11, 2018, the Appellate Division affirmed summary judgment in every respect, except reversed and remanded the legal malpractice claim, without prejudice, for further development of the record. (Pa318).

Critically, for purposes of the instant appeal, the Appellate Division held that on remand "Guyden must prove not only that lawyers at the Leeds firm breached their duties to her, but also that she would have obtained a larger recovery on her underlying discrimination claim against Prudential if those breaches had not occurred." (Pa316). The Appellate Division further held that "[a]ny verdict in her favor in the legal malpractice case would need to be molded accordingly to treat the settlement [with Prudential] as an offset." (Pa316 Fn4).

The Appellate Division expressly agreed with Judge Martinotti's decision that there is no New Jersey precedent supporting a presumption of damages for

Guyden in the amount of $5 million in legal fees that were advanced by Prudential to LMB for the anticipated representation of 359 claimants. (Pa317).

The Court also agreed with the Trial Court's conclusion that the Second Circuit decision in *Johnson v. Nextel*, 660 F. 3d 131, involving a different company, a different ADR agreement with different provisions and a different fee arrangement than in this matter, was neither analogous nor controlling authority. (Pa317 Fn6).

Plaintiff's Failure to Make Timely and Proper Liability Expert Disclosure

After another appeal and remand to this Court, the Hon. John D. O'Dwyer was assigned and entered three CMOs between December 2022 and May 2023. (Pa343-344; Pa345-347; Pa348-350). The first CMO made clear that the only expert disclosure Plaintiff could make was a "liability expert". (Pa343-344). Plaintiff defaulted on producing her liability expert report as per CMO dated May 12, 2023, requiring her expert report on July 30, 2023. (Pa348-350). Plaintiff's counsel sought to adjourn the deadline by motion to September 15, 2023, and then by letter to September 25, 2023, seeking different deadlines for production in each. (Pa351-365; Pa367-371). Each date came and went, and Plaintiff failed to produce her liability expert report(s). The Court ultimately entered CMO dated October 6, 2023, establishing September 25, 2023 (the last date requested by Plaintiff) as her last deadline for liability expert reports.

(Pa371-373). Plaintiff failed to produce her expert reports by that date as well.

Rather, on September 29, 2023, Plaintiff served the expert report of Scott B. Piekarsky, Esq. (Pa375-380). This report purports to opine on both liability and damages. His report consists of five pages, most of which contains the boilerplate recitation of the law governing legal malpractice. The actual opinion portion is only two pages of bare conclusions strung together with no independent analysis or support. Piekarsky relies solely on Plaintiff's counsel's Statement of Facts in a legal brief and Guyden's Declaration in Federal Court. He did not review or analyze the ADR Agreement or Fee Agreement about which he opines or any documents regarding Guyden's employment or her arbitration, including the arbitrator's decision. (Pa375-380).

Piekarsky simply concludes that LMB breached the standard of care and their fiduciary duty by recommending arbitration and/or violated unidentified ethics rules without defining any objective standard of care applicable to Guyden's case. He also proclaims that such conduct proximately caused Guyden's inadequate settlement with Prudential ten years later. (Pa380). His conclusion lacks any independent, fact-based analysis explaining the causal link between LMB's alleged ethical violations or advice to enter ADR and Guyden's loss in arbitration or her allegedly inadequate settlement thereafter.

Instead, his report bootstrapped 137 pages of hearsay expert opinions of

six other non-testifying litigation experts retained in the consolidated action, mostly for other Plaintiffs. Piekarsky's Report thereafter adopted these reports by asserting his "agreement" with them. (Pa376; Pa379-380).

Only one of these lawyers offered any opinion specific to Guyden's case or her alleged damages – David Zatuchni. (Pa382-401). Piekarsky wholly adopts Zatuchni's 2014 opinion that LMB's advice to arbitrate was a departure from the standard of care. (Pa380; Pa382-389). He also adopts wholesale Zatuchni's conclusion that Guyden would have recovered before a jury and Zatuchni's purported quantification of that hypothetical recovery as Piekarsky offered no such analysis of his own. (Pa380; Pa396-401).[2]

On December 7, 2023, long after the liability expert disclosure deadline lapsed, Plaintiff, for the first time, identified Zatuchni as a testifying trial expert and his 2014 report as a trial report and only in opposition to the Defendants' Motion to Strike Expert Reports and for Summary Judgment. (Pa472-473). His report purports to opine on both liability and damages. (Pa382-401).

The Zatuchni 2014 Report concludes that LMB breached the standard of care and Guyden sustained proximately caused damages (which he purports to quantify) based on LMB's 1999 advice, claiming "Competent Counsel Would

[2] Zatuchni had appeared as a lawyer for a co-plaintiff in the consolidated Prudential Action and had been sued as a third-party defendant in the instant action himself. (Pa382fn1).

Not Have Agreed to Arbitrate" Guyden's claim. (Pa384; Pa387). He references the EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997) ("EEOC Policy")[3] and the Final Report of the Dunlop Commission on the "Future of Worker-Management Relations", ("Dunlop Report")[4] in his opinion supposedly to support this conclusion. (Pa384-386). However, as discussed *infra*, these sources contradict it. These materials do not support any objective standard of care by the Plaintiff's bar rejecting post-dispute arbitration (like the one at issue here) but instead reflect a general endorsement of post-dispute agreements to arbitrate. (Pa385).

Further, although his opinion is based on the theory that Guyden was deprived of needed discovery because of the arbitration forum (Pa386), he never reviewed the proceedings in the arbitration to assess what discovery was permitted, sought or obtained in arbitration, what would have been available in court, or how any missing discovery changed the result in Guyden's post-arbitration settlement.

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[3] *See* EEOC Press Releases, Enforcement Guidance, Policy Documents, Management Directives And Memoranda, https://plus.lexis.com/api/permalink/2b38f1b7-5c2b-49e9-8924-aed189c883e7/?context=1530671 (last visited April 8, 2025) (Da0203-213).

[4] *See* The Final Report of the Dunlop Commission, Future of Worker Management Relations, https://ecommons.cornell.edu/server/api/core/bitstreams/3c6216ba-5b2d-471b-ac3e-05caf5aed933/content (last visited April 11, 2025) (Da0214-326).

His opinion contains no causation analysis whatsoever and does not explain why *the forum as opposed to the facts* of Guyden's case caused her damages or why Guyden would have won before a jury, although she lost before a neutral arbitrator after an eight-day arbitration. He did not read or refer to the arbitrator's decision. He too also bootstraps the hearsay opinions of other non-testifying litigation experts. (Pa383-384).

The Piekarsky and Zatuchni opinions were also incomplete lacking the information required by the Court Rules including Plaintiff's experts', publications, and the specific facts and data relied upon in their opinions. (Pa383). LMB demanded that Plaintiff serve amendments to her answers to LMB's interrogatories (Pa206 ¶¶52-53) and provide the missing information, but Plaintiff ignored this request and her obligations under Court Rule 4:17-4 and Rule 4:17-7. (Pa402-404).

The foregoing undisputed facts were set forth in the LMB's Statement of Undisputed Material Facts submitted to the Trial Court with LMB's Motion. (Da0196-0202).[5] Plaintiff failed to respond to LMB's Statement and omitted it from her Appendix on this appeal. It is now contained in Defendants' Appendix.

[5] It is noteworthy that large portions of the "Statement of Facts" in Plaintiff's brief on appeal contain no references to the record because it is instead argument, untethered to the record. (*See*, *e.g.*, Pbr13-22,30).

The Trial Court's May 2, 2024, Decision and Order

The Court granted summary judgment because Plaintiff could not sustain her malpractice claim without admissible expert evidence. The Piekarsky and Zatuchni Reports were struck as net opinions or as otherwise inadmissible because they: (1) lack foundation in the record; (2) ignore critical documents including the discovery and testimony in arbitration and the arbitrator's decision; (3) lack an independent fact-based analysis establishing that LMB's advice to arbitrate was the proximate cause of Guyden's alleged damages which explains why she would have won at trial before a jury when she lost before a neutral arbitrator; (4) improperly bootstrapped the hearsay reports of a litany of non-testifying litigation experts and adopted them in violation of controlling precedent and the Rules of Evidence; and (5) opined on Guyden's alleged proximately caused damages although barred by the Preclusion Orders which could not now be collaterally attacked as Plaintiff waived their review when she failed to appeal them in 2015. (Pa810-817).

PROCEDURAL HISTORY

The Plaintiff filed her complaint on June 1, 2005. (Pa001-010). On August 28, 2012. the Trial Court adopted the Discovery Master's Report and Recommendation precluding Plaintiff from submitting damages expert reports for violating prior Court orders. (Pa225-248). On January 3, 2013, Plaintiff's

motion for reconsideration of the preclusion order was denied (Pa262-297). On August 10, 2014, LMB moved for summary judgment, the motion was granted and a final order was issued on April 8, 2015. (Pa083-115). The Plaintiff appealed the order granting summary judgment and 11 other interlocutory orders which came up for review on appeal from the final order granting summary judgment. (Pa301-310). The Plaintiff did not appeal the Preclusion Orders.

On June 11, 2018, this Court affirmed summary judgment in every respect except reversed and remanded the dismissal of the legal malpractice claim, without prejudice. (Pa312-318). On February 28, 2023, Plaintiff amended the complaint to substitute the Estate of Lenard Leeds as defendant for Lenard Leeds who was deceased. (Pa028-039). The Estate was never served and never appeared. On October 20, 2023, LMB moved to strike expert reports, bar testimony and for summary judgment (Pa011-012) and the motion was granted on May 2, 2024. (Pa801-817).

On June 13, 2024, Plaintiff filed her Notice of Appeal and Case Information Statement appealing the Trial Court's May 2, 2024, Order. (Pa848). Plaintiff filed an Amended Notice of Appeal removing the Estate of Lenard Leeds from the caption on July 18, 2024. (Da0002-0005). Plaintiff filed a Stipulation of Dismissal of the Estate of Lenard Leeds on August 7, 2024. (Da0001).

ARGUMENT

POINT I

THE ORDER STRIKING THE EXPERT REPORTS SHOULD BE AFFIRMED AS THE PRECLUSION ORDERS BAR THEIR SUBMISSION

A. Plaintiff's Expert Reports Opine On Guyden's Alleged Damages

Despite the Preclusion Orders, the expert reports of both Piekarsky and Zatuchni improperly opine on Guyden's proximately caused damages. Piekarsky concludes that by counseling Plaintiff to enter the ADR Agreement in 1999, Guyden "was proximately caused damages resulting in the lower amount she recovered as a result of settlement in the matter with Prudential after years of litigation." (Pa380). He further concludes that "[t]he measure of her damages is what she would've received from a Jury considering her claims of employment discrimination." *Id*. He then adopts wholesale the Zatuchni Report as to the computation of Guyden's damages. *Id.* This portion of Piekarsky's opinion is in violation of the Preclusion Orders as it is an opinion on damages and is barred.

This violation is not cured, but compounded by Piekarsky's wholesale reliance on the Zatuchni Report for a quantification of the value of her alleged claims at trial as Zatuchni's expert opinion on damages is barred by the Preclusion Orders as well.

Plaintiff's contention on appeal that the Zatuchni Report, adopted by Piekarsky, is not a damages report (Pbr34-35) is belied by the plain language of

the report itself. The first paragraph states that he was asked to give an opinion as to Guyden's "damages" and "the monetary value of [her] underlying case against Prudential." (Pa382). The report also contains subheadings titled "Guyden's Damages" and "Guyden's Punitive Damages Opinion". (Pa396-401). Thereafter, Zatuchni opines that Guyden would have recovered before a jury and purports to compute and quantify the value of Guyden's alleged economic, personal hardship and punitive damages. *Id*.

Plaintiff's contention that the Zatuchni Report was not a damages expert report barred by the Preclusion Orders because he is an attorney not a "CPA" or "economist" opining on "present value" calculations (Pbr36) is meritless. Damages experts in legal malpractice actions are often lawyers opining on the value of the claim lost or the settlement not achieved. *Kelly v. Berlin*, 300 N.J. Super. 256, 269 (App. Div. 1997) (holding that expert testimony was necessary to enable a jury to determine "the amount of damages plaintiff sustained" where the professional's malpractice allegedly "caused plaintiff to settle for a lower amount than he otherwise would have"). The law is well-settled that "[o]nly an expert could show that [plaintiff] would have succeeded in obtaining a better result at trial" than what was received in settlement. *See Morris Props., Inc. v. Wheeler*, 476 N.J. Super. 448, 461 (App. Div. 2023).

Zatuchni plainly offered his opinion on Guyden's alleged damages by his

assessment of what her underlying employment case was worth before a jury. Plaintiff's contrary claim assumes either that Judge Martinotti's Preclusion Orders were meaningless or that he did not intend to preclude the precise type of damages experts that are used in legal malpractice actions – *i.e.*, lawyers opining on the value of an underlying claim or settlement. Plaintiff offers no evidence to support such an assumption.

Plaintiff's additional contention that the Zatuchni Report is not a "damages expert report" covered by the Preclusion Orders because it is a "traditional format" in legal malpractice actions that one expert opines on both breach of the standard of care and proximately caused damages and that for some unstated reason, Zatuchni's Report should therefore be classified as a liability report as opposed to a damages report. (Pbr35-36). This argument sets up a false dichotomy as the Zatuchni and the Piekarsky Reports can and are **both** liability and damages reports and are both barred by the Preclusion Orders to the extent they opine on Guyden's alleged proximately caused damages as the Trial Court correctly held. (Pa813-817).[6]

B. Plaintiff Waived Appellate Review Of The Preclusion Orders

Judge Martinotti's 2015 order granting summary judgment disposed of all

[6] If Plaintiff's assertion is accepted as true and her expert reports do not opine on proximately caused damages, then Plaintiff cannot make out a *prima facie* claim of legal malpractice in any event as noted above.

claims in the case against the remaining parties and was a final judgment. *See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co*., 202 N.J. 369, 384 n.8 (2010) (holding that "[a]n order granting summary judgment and disposing of the case is a final judgment…"). The appeal from the final judgment brought up for review the validity of all interlocutory orders previously entered in the Trial Court. *See Ricci v. Ricci*, 448 N.J. Super. 546 (App. Div. 2017).

While Plaintiff appealed eleven interlocutory orders entered in the consolidated action, when she appealed the 2015 order granting summary judgment, she did not appeal the Preclusion Orders.[7]

Plaintiff's failure to appeal these orders when they came up for review on appeal was a waiver or abandonment of the right to seek their review now. *See Silviera-Francisco v. Board of Educ. of the City of Elizabeth*, 224 N.J. 126, 140-41 (2016) (holding "[f]ailure to identify an interlocutory order [as subject of an appeal] may be considered a waiver of any objection") (internal citation omitted); *Drinker Biddle & Reath, LLP v. N.J. Dep't of Law & Pub. Safety*, 421 N.J. Super. 489, 496 n5 (App. Div. 2011) (explaining that claims not addressed in an appellant's brief are deemed abandoned); *N.J. Dep't of Env't. Prot. v. Alloway Twp*., 438 N.J. Super. 501, 505 n2 (App. Div.. 2015) (noting issue

[7] The issue of the Preclusion Orders was, therefore, not addressed by the Appellate Division on Plaintiff's appeal of the 2015 summary judgment order as it was not before it and Zatuchni was not a designated trial expert.

waived if not briefed on appeal); *1266 Apartment Corp. v. New Horizon Deli, Inc.*, 368 N.J. Super. 456, 459 (App. Div. 2004) (same).

Plaintiff's contention that the Preclusion Orders can be reviewed by this Court now – thirteen years later – despite her failure to appeal them when they came up for review on appeal of the 2015 order granting summary judgment, is unsupportable. The cases relied upon by Plaintiff for this proposition do not support such a claim, and unlike the case at bar, involved the trial court's ability to revise interlocutory orders (like orders for partial summary judgment) prior to the entry of final judgment. *See, e.g., Johnson v. Cyklop Strapping Corp.*, 220 N.J. Super. 250 (App. Div. 1987); *see also Lombardi v. Masso,* 207 N.J. 517 (2011). Here, unlike *Johnson* and *Lombardi,* the 2015 order granting summary judgment disposed of the *entire case* against all parties, as Guyden was the last Plaintiff in the consolidated action and the grant of summary judgment was a final judgment. *See Estate of Hanges,* 202 N.J. at 384 n8.

Plaintiff's reliance on *R.*4:42-2 (Pbr38) makes no sense, as it too provides that nonfinal/interlocutory orders are "subject to revision at any time before the entry of final judgment" (emphasis added). However, the 2015 order granting summary judgement was final and Plaintiff's appeal of that order was her last chance to seek review of the Preclusion Orders when they came up for review. Plaintiff cannot simply ignore this critical language from the Rule upon which

she relies to prop up her untenable argument.

C. Plaintiff Cannot Now Collaterally Attack The Preclusion Orders

Plaintiff cannot collaterally attack the Preclusion Orders now having failed to appeal them. *See Rimsans v. Rimsans,* 261 N.J. Super. 214 (App. Div. 1992) (recognizing that a plaintiff cannot collaterally attack a previous order without lawfully appealing it); *Delbridge v. Office of Public Defender*, 238 N.J. Super. 288 (Law Div. 1989) (holding that a legal malpractice/conspiracy claim could not be premised on a collateral attack of a court order that had not been reviewed or reversed on appeal).[8]

Moreover, Plaintiff does not present any good cause for revisiting the decades-old Preclusion Orders in any event. She does not deny her violation of prior court orders setting deadlines for damages expert disclosure. (Da0199 ¶17). Plaintiff's contention that it is "completely unreasonable" to rely on Judge Martinotti's prior orders entered when there were over 200 Plaintiffs in this matter is meritless. (Pbr37). The fact that the Preclusion Orders were issued when Plaintiff's case was part of the centrally managed case does not change

[8] Plaintiff's failure to address LMB's argument that she waived review of the Preclusion Orders by her failure to appeal them is a tacit concession of the argument's merit. *See Cole-Parker v. Fid. Nat'l Title Ins. Co.*, 2018 N.J. Super. Unpub. LEXIS 1605 (App. Div. July 9, 2018) (noting plaintiff's failure to address legal arguments raised on summary judgment in opposition is a waiver of any argument in response).

the fact that she was bound by those Orders as the Trial Court held. (Pa816-817).

Plaintiff's assertion that there is no "rationale" and "absolutely no basis" to exclude these reports (Pbr37) ignores the obvious – the Plaintiff's violation of the prior orders setting deadlines for disclosure of damages expert reports is sufficient "rationale" for preclusion to the extent they opined on Guyden's damages. Under New Jersey law, the disregard of the Court's orders without any good explanation is itself sufficient to establish the absence of good cause and a basis in and of itself for the Preclusion Orders. *See Tynes v. St. Peter's Univ. Med. Ctr.*, 408 N.J. Super. 159 (App. Div. 2009).

Similarly meritless is Plaintiff's false assertion that the Preclusion Orders were never addressed in the CMO after remand. (Pbr37). Rather, the first CMO after remand, dated December 21, 2022, provided that "Plaintiff is to serve liability expert report" by the date set forth. (Pa343-344 emphasis added).[9] No date for damages expert reports were included in the CMO as the Preclusion Orders barred them. *Id.* Plaintiff never objected to this order and its limitation to "liability expert reports."

[9] Plaintiff failed to respond to LMB's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment which explicitly addressed this issue (Da0201 ¶29). As a result, this fact, as well as all material facts in LMB's Statement are "deemed admitted" for purposes of this motion under *R.*4:46-2(b). *See Allstate Ins. Co. v. Fisher*, 408 N.J. Super. 289 (App. Div. 2009).

Plaintiff's criticism of LMB for not seeking to bar Zatuchni's report as a "damages expert" report in the nine years since his report was submitted in connection with prior motion practice, is simply frivolous. (Pbr37). Plaintiff never identified Zatuchni as a testifying trial expert until December 7, 2023, in opposition to Defendants' Motion to Strike Expert Reports and for Summary Judgment, long after the expert disclosure deadline for liability experts, despite numerous extensions. (Pa472-473). Prior thereto, Defendants had no legal ground, nor reason, to move to strike his report as the Trial Court noted. (Pa817).

In sum, Plaintiff's claim that this Court should ignore the Preclusion Orders "lacks merit in law, logic or fundamental fairness" as the Trial Court properly held. (Pa817).

POINT II

THE ORDER STRIKING THE EXPERT REPORTS SHOULD BE AFFIRMED BECAUSE THEY ARE IMPERMISSIBLE NET OPINIONS

A. Plaintiff's Expert Opinions Lack Foundation And Ignore Critical Documents In The Record

The "necessity for, or propriety of, the admission of expert testimony, … are judgments within the discretion of the trial court." *State of N.J. v. Zola,* 112 N.J. 384, 414 (1988). It has been held that on review courts should "generously sustain" such determinations so long as they are supported by credible evidence in the record." *Estate of Hanges,* 202 N.J. at 384. *See also Morris Props.,* 476

N.J. Super. 448.

An expert's conclusion is considered a net opinion, and thereby inadmissible, when it is a bare conclusion unsupported by factual evidence. *Creanga v. Jardal*, 185 N.J. 345, 360 (2005); *see also State of N.J. v. Townsend*, 186 N.J. 473, 494-95 (2006). An expert opinion that does not rely on reliable factual evidence in support is lacking in foundation and is worthless. *Koruba v. American Honda Motor Co.*, 396 N.J. Super. 517, 526 (App. Div. 2007).

Here, Plaintiff's experts both conclude that the arbitration forum itself (as opposed to the absence of merit of her underlying employment discrimination claims) caused her allegedly inadequate settlement after her arbitration loss. Notably, however, neither Piekarsky nor Zatuchni states that they read anything pertaining to Plaintiff's underlying arbitration proceedings, including the discovery sought or exchanged in arbitration, the depositions taken, the transcript of the eight days of hearings in arbitration, the evidence submitted or the extensive arbitrator's decision explaining in detail the basis for his decision dismissing Guyden's claims on the merits.[10]

[10] Zatuchni's opinion (upon which Piekarsky relies) states that he relied upon unidentified documents from among the voluminous documents in the federal action *Guyden v. Prudential* and the instant action *Guyden v. LMB* but is deliberately opaque as to what exactly he reviewed from these actions in violation of *R.*4:17-4. He never refers to review of the documents exchanged in arbitration or the arbitrator's decision or discusses these documents. (Pa383).

Although the focus of Zatuchni's opinion is that Guyden lost the ability to secure needed discovery by virtue of being in arbitration, he neither reviewed nor discussed the discovery sought or obtained in arbitration or whether any discovery sought was refused and would have been available in Court and how any allegedly missing discovery impacted the ultimate result.

Having failed to review anything regarding Guyden's arbitration, Piekarsky and Zatuchni lack any actual personal knowledge of the arbitration proceedings and thus they cannot and do not explain why if she lost in arbitration, she would, in fact, have won before a jury at trial, at all, no less in a sum greater than the substantial post-arbitration settlement with Prudential as required by the Appellate Division in its decision on the 2015 appeal. This is a classic net opinion as it lacks a reliable foundation in the record. *See Fox Rothchild, L.L.P. v. Alanwood Tr.*, 2009 N.J. Super. Unpub. LEXIS 492, at *20 (App. Div. Mar. 12, 2009) (affirming a decision barring expert report in legal malpractice counterclaim because the expert had "virtually no personal knowledge of the underlying case, not having reviewed the trial tape or transcript").

Napoleon v. Colicchio, 2013 N.J. Super. Unpub. LEXIS 2227 (Law Div. Sept. 6, 2013), makes this point under very analogous facts. In *Napoleon*, the plaintiff argued that his former lawyer committed malpractice by *failing to*

recommend arbitration. The court held that the expert's "failure to review the operative documents in the underlying cases [was], in and of itself, grounds for barring the testimony as a net opinion." The court stated that:

> [The expert's] opinions regarding arbitration have an insufficient factual basis. He did not review the pleadings or discovery in the cases that he argues should have been arbitrated. [The expert] does not tailor his opinion regarding arbitration to the facts or circumstances of this particular case and does not identify any particular facts or circumstances that would have made it preferable in this specific instance. His opinion is, essentially, that arbitration is always preferable to litigation…. Without adapting his opinion regarding arbitration to this case, especially considering the complexity of the underlying matters, his opinion is a "net opinion".

Id. at *23-27.

The same conclusion is warranted here.[11] This is not an issue of the weight or emphasis Plaintiff's experts place on the evidence they rely on as suggested. (Pbr33-34). Rather, this is a failure to consider critical evidence regarding Plaintiff's essential theory of this case, i.e. that the arbitration forum – not the facts – caused Guyden's alleged damages.

In a similar vein, the failure of either of Plaintiff's experts to have reviewed for themselves the ADR Agreement and the Fee Agreement, which Plaintiff claims to be the vehicles by which LMB breached the standard of care, is another fatal flaw in the foundation of their reports. It is not enough that

[11] Both experts are silent on Guyden's retaliation claim and thus they have abandoned that portion of Guyden's underlying employment claim in any event.

Piekarsky relied on Plaintiff's counsel's spin of those critical documents in his appellate brief, including his pejorative characterizations of LMB's acceptance of the fee advance as being "bribed". (Pa379; Pa376); (Pbr23). He was required to independently evaluate these critical documents in the context of his opinion. He failed to do so. So did Zatuchni.

Plaintiff's claim that her experts had a solid factual foundation thus does not pass cursory scrutiny. Plaintiff is deliberately misleading when she states that Piekarksy relied on "massive" amounts of data (Pbr32) and quotes the Piekarsky Report wherein he stated that he "examined documents from the itemized below …contained in Plaintiff's Brief and the Appendix dated April 11, 2016" but omits (with the deliberately placed ellipses above) that Piekarsky stated that he did "not review" the entire Appendix on the 2015 appeal. (Pbr25).

Instead, Piekarsky stated that he only reviewed the statement of facts in the Plaintiff's Appellate Brief from the 2015 appeal, the March 15, 2001 Declaration of Linda Guyden, a letter from Plaintiff's counsel having nothing to do with Guyden, and 137 pages of hearsay litigation expert reports he adopted/bootstrapped to his net opinion. (Pbr25). None of these documents addressed anything in Guyden's arbitration nor even referred to the arbitrator's 20-page decision. The documents reviewed also did not include the ADR Agreement and Fee Agreement at the heart of this action either.

Plaintiff's expert's sole reliance on facts and legal arguments curated by Plaintiff's counsel in legal briefs, certifications or letters has been held to be an improper foundation, particularly where, as here, critical documents in the record are ignored. *See, e.g.*, *Morici v. Miller*, 2023 N.J. Super. Unpub. LEXIS 81 (App. Div. Jan. 19, 2023) (rejecting expert opinion submitted by plaintiff's current counsel as lacking in foundation where the expert relied solely on plaintiff's certifications and letter brief); *see also Heyburn v. Madaio*, 2022 N.J. Super. Unpub. LEXIS 2003 (App. Div. Oct. 27, 2022) (barring expert report in legal malpractice action where expert relied exclusively on third-party complaint and answers to interrogatories without reviewing critical documents including grand jury testimony and criminal complaints); *Wiebel v. Morris, Downing & Sherred, LLP*, 2018 N.J. Super. Unpub. LEXIS 2673 (App. Div. Dec. 6, 2018) (holding that an expert opinion containing a brief statement of the law and a repetition of allegations in the complaint coupled with bare conclusions is a net opinion).

The lack of a proper evidentiary foundation for Piekarsky and Zatuchni's reports is an independent basis to reject them as net opinions. *Gore v. Otis Elevator Co.*, 335 N.J. Super. 296, 303-04 (App. Div. 2000) (holding that an expert's testimony may be termed a "net opinion" when the data on which it is based is perceived as insufficient or unreliable).

B. Plaintiff's Expert Opinions Are Based On Facts And Arguments Contradicted By The Record And Rejected By The Appellate Division

A party's burden of proof on an element of a claim "may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts the record". *Townsend v. Pie*rre, 221 N.J. 36, 55 (2015) (emphasis added); *see also Funtown Pier Amusements, Inc. v. Biscayne Ice Cream & Asundreis, Inc.*, 477 N.J. Super. 499, 517 (App. Div. 2024) (same).

Here, Plaintiff's expert reports rely on facts and arguments contradicted by the record. For example, Piekarsky claims Guyden was" deceived" and "coerced" into arbitration (Pa379-380). However, Judge Lechner, in the underlying Federal Court action, affirmatively concluded that "there is no indication that Guyden …was coerced or defrauded into agreeing to the… ADR Agreement." (Pa143).

Nor is there any evidence in the record in the two decades of this case establishing the existence of any ADR Agreement other than the May 1999 ADR Agreement Judge Lechner concluded Guyden voluntarily signed. Judge Lechner's order compelling arbitration and holding that Guyden agreed to arbitrate and enter the May 1999 ADR Agreement collaterally estops Guyden and her experts from asserting otherwise now. *See, e.g., Jayasundera v. Garcia*, 684 F. App'x 254 (3d Cir. 2017) (determination compelling plaintiff/employee to arbitrate employment discrimination claims and holding employee voluntarily

entered binding arbitration agreement was collateral estoppel and barred plaintiff from arguing otherwise in a later suit).

Likewise, Piekarsky's (and Zatuchni's) reliance on the Second Circuit decision in *Johnson v. Nextel*, 660 F.3d 131, is rebutted by the explicit rulings of the Appellate Division in this action in its 2015 decision. Specifically, Piekarsky opined that LMB breached its fiduciary duty to Guyden by advising her to enter the ADR Agreement and accepting fees under the Fee Agreement and that Guyden's damages were "presumed" in the amount of the fees advanced in reliance on *Johnson v. Nextel*. (Pa379).

The Appellate Division however, affirmed the Trial Court's rejection of *Johnson v. Nextel* and Guyden's reliance on it, noting that the fee arrangement and agreement in *Johnson* had different provisions from the agreement in the case at bar. (Pa317fn6). It also rejected any presumption of damages in purported reliance on *Johnson* or otherwise and held Guyden must prove her proximately caused loss. (Pa317).[12] Thus, the very arguments contained in Plaintiff's experts' reports – lifted wholesale from Plaintiff's 2015 appellate

[12] LMB secured a voluntarily dismissal in *Johnson v. Nextel*, 660 F.3d 131, without any settlement, and was exonerated thereafter in a recent decision granting Nextel summary judgment and rejecting the claim made by Piekarsky that LMB had a non-consentable conflict or breached their fiduciary duty in the underlying representation by accepting advanced fees in that ADR process. *See Dymkowski v. Nextel Commc'ns, Inc.*, 2025 U.S. Dist. LEXIS 54558 (S.D.N.Y. Mar. 25, 2025).

brief – were flatly rejected by the Appellate Division in the 2015 appeal. Plaintiff and her experts may not "reargue the merits of what was decided in the first appeal" and are "precluded from relitigating" such issues now. *See Khoudary v. Salem Cnty. Bd. of Soc. Servs*, 281 N.J. Super. 571, 575 (App. Div. 1995).

Zatuchni's opinion (relied upon by Piekarsky) that LMB breached the standard of care because competent employment lawyers would never recommend arbitration is not supported by the EEOC Policy he purports to rely on. Rather, the materials Zatuchni relies upon are astoundingly in favor of post-dispute arbitration, like the ADR agreement at issue here, stating:

> Voluntary Post-Dispute Agreements to Arbitrate Appropriately Balance the Legitimate Goals of Alternative Dispute Resolution and The Need to Preserve the Enforcement Framework of the Civil rights Laws.

(Da0209; Da0210). *see also* van Schaick Certification bootstrapped to Piekarsky and Zatuchni Reports quoting this language. (Pa645 ¶23).

Likewise, the Dunlop Report also relied on by Zatuchni, is in accord, (Pa384) stating "The Commission strongly supports the expansion and development of alternative workplace dispute resolution mechanisms including…voluntary arbitration systems that meet specified standards of fairness" (Da0265; *see also* Da0273)

Thus, Zatuchni's claim (bootstrapped by Piekarsky) that LMB breached

the standard of care by recommending the post-dispute ADR Agreement in issue is not supported by the materials he relies upon, and these materials do not establish any recognized standard of care that does so. These sources limit their criticism to pre-dispute mandatory arbitration agreements.

Zatuchni's argument that because she was in arbitration Guyden did not get adequate discovery is a bare conclusion which cannot be reconciled with the record and the fact that Zatuchni did not read the discovery sought or obtained in arbitration (through successor counsel Watkins). (Pa383). Zatuchni neither identified any specific allegedly missing discovery sought by Watkins in arbitration denied by the arbitrator, nor explained why any allegedly missing discovery would have been obtained in Court. He also fails to explain how such discovery would have impacted the result in arbitration or Guyden's settlement thereafter.

Similarly, Zatuchni reaches conclusions about alleged pay disparity untethered to and rebutted by the facts in the record. For example, Zatuchni uses a list of white Prudential employees in his opinion (with higher titles or seniority than Guyden) which he simply concludes were "comparable" to Ms. Guyden for purposes of making compensation comparisons without any support for such conclusion in his report.

Nor does Zatuchni or Plaintiff on this appeal address that the arbitrator

found that Guyden failed to demonstrate that she was performing "substantially equal" work to those white employees with whom she compared herself for purposes of her pay disparity claim. (Pa160-161). Critically, the arbitrator's decision was based on Guyden's own testimony (Pa161) and her inability to "explain[ ] anyone's role or function as being the same or substantially the same as hers." (Pa163). As to Guyden's failure to promote claim, Zatuchni ignored the arbitrator's conclusion and evidence that Prudential had non-pretextual reasons for its promotional decisions unrelated to Plaintiff's race. (Pa164-167).

Zatuchni's Report ignores Guyden's testimony and the arbitrator's decision (as he never read either) when classifying certain white employees as Guyden's "comparators" for purposes of his opinion on Guyden's pay disparity claim or assessing Guyden's failure to promote claim. Courts should reject expert opinions where, as here, they are directly contradicted by the evidence presented. *Smith v. Estate of Kelly*, 343 N.J. Super. 480, 497 (App. Div. 2001).

C. Plaintiff's Expert Reports Are Conclusory And Lack Independent Analysis In Violation of *R.*4:17-4 And N.J.R.E. 703

New Jersey Court Rule 4:17-4 makes clear that an expert must set forth the basis of his expert opinion in his report. New Jersey Rule of Evidence 703 requires an expert to give the "why and wherefore" of his opinion rather than a mere conclusion. *See Polzo v. County of Essex*, 196 N.J. 569, 583 (2008). *See also Rosenberg v. Tavorath*, 352 NJ Super. 385, 401 (App. Div 2002)

(recognizing that the most basic tenet of the net opinion rule is that an expert must explain the "why and wherefore" of his opinion).

1. Piekarsky and Zatuchni's Bare Conclusions that LMB Breached the Standard of Care Lack Any Independent Analysis or Support

Beyond boilerplate, basic principles of the law of legal malpractice, Piekarsky's opinion consists of nothing more than bare legal conclusions strung together without a scintilla of independent analysis, or support and the wholesale bootstrapping of the opinions of other non-testifying litigation experts and the preliminary 2014 Zatuchni Report. (Pa376-377; Pa379-380).

Both Piekarsky and Zatuchni claim that LMB departed from the standard of care by advising Guyden to agree to arbitrate her employment claims and enter the ADR Agreement. Piekarsky simply concludes that such departure is "obvious" and that the ADR Agreement was "written for the benefit of Prudential, Leeds, Morelli & Brown and not Ms. Guyden" although he never read it. (Pa379). He also claims "independent competent counsel would have been loath to commit clients to arbitration absent [unstated] guarantees…." (Pa380).

Piekarsky fails to independently analyze or explain why or how he has an opinion about what reasonable plaintiff's employment discrimination lawyers would recommend as he is not himself a plaintiff's employment discrimination lawyer. (Pa376). Zatuchni similarly states that "in 1999 competent counsel in

New Jersey would have refused to confidentially arbitrate Ms. Guyden's claims." (Pa387).

Neither expert explains what the standard of care is or how LMB breached it. For example, is the standard of care that competent Plaintiff's employment lawyers would never recommend any arbitration as all arbitrations are bad for employees in discrimination claims – or just this arbitration? If just this arbitration was problematic, they offer no analysis as to why. Nor do Plaintiff's experts distinguish between pre-dispute arbitration agreements and post-dispute arbitration agreements as the sources they rely on do.

In a professional negligence case, "there must be some evidential support offered by the expert establishing the existence of the standard." *Taylor v. DeLosso*, 319 N.J. Super. 174, 180 (App. Div. 1999). An expert is required "to point to a generally accepted, objective standard of practice and not merely to standards personal to the witness" *Koruba,* 396 N.J. Super. at 526 (internal quotations and citation omitted).

Plaintiff's expert's reports fail to provide such an objective standard as noted above and the sources upon which Zatuchni purports to rely on including the EEOC Policy and the Dunlop Report limit their criticisms to pre-dispute arbitration agreements and not post-dispute arbitration agreements like in the case at bar. These sources instead acknowledge a general endorsement by the

Plaintiff's bar of post-dispute arbitration agreements to resolve employment discrimination claims like the one at issue here. (Pa385).[13] The evidence Zatuchni relies on thus contradicts his suggested standard of care--it does not support it. Plaintiff's experts' opinions are thus net opinions as they are not based on "any textbook, treatise, standard, custom, or recognized practice, other than [these experts] personal views." *Kaplan v. Skoloff & Wolfe, P.C.,* 339 N.J. Super. 97, 103 (App. Div. 2001) (internal quotations and citations omitted.[14]

Piekarsky and Zatuchni also both fail to address in their reports the wealth of law in New Jersey which favors arbitration for the resolution of claims generally and employment discrimination claims specifically. *See Hojnowski v. Vans Skate Park,* 375 N.J. Super. 568 (App. Div. 2005) *aff'd*, 187 N.J. 323 (2006). They also ignore the law that holds that arbitration is not an inferior form of dispute resolution for plaintiff's statutory employment discrimination claims. *See Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002) (recognizing that

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[13] *See also* renowned Plaintiff's employment lawyer Wayne N. Outten's article: *ADR in Employment Cases*: A Plaintiff's Lawyer's Perspective, A.B.A. Lab. & Emp. L. Sec. ADR Comm., 1, 11 (Aug. 9, 1999) (stating "Most attorneys for employees have no problem with so-called post dispute arbitration.").

[14] The EEOC Policy was ultimately rescinded in any event consistent with U.S. Supreme Court precedent. *See* EEOC "Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition (last visited April 11, 2025) (Da0327-331).

individuals can fully vindicate their rights under LAD in arbitration); *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252 (App. Div. 2000). Nor do they explain why they postulate a standard of care for Guyden's case which is inconsistent with this body of law and the materials Zatuchni relies upon.

Zatuchni also claims that LMB breached the standard of care because competent plaintiff's counsel would have "wage[d] the wider war" and conducted expansive discovery into Prudential's alleged "institutional racism". (Pa387). This claim ignores that Guyden's successor counsel, Watkins, pled an individual disparate treatment claim not a class action or disparate impact case relying on "institutional discrimination" involving statistical discovery as Zatuchni claims should have been obtained. Further it was Watkins, (not LMB) who decided what claims to allege in federal court and arbitration and charted the course of Guyden's discovery in arbitration. Zatuchni's Report is, therefore, more an indictment of Watkin's handling of Guyden's claims than LMB's 1999 advice to arbitrate.

To the extent Zatuchni concludes that discovery in arbitration was inadequate it is a bare conclusion as he failed to analyze what discovery was requested by successor counsel, what discovery was permitted under the ADR Agreement or granted by the arbitrator. He also failed to analyze or explain how any missing discovery would have changed the result, as discussed below.

2. Piekarsky's Conclusion that LMB Violated the Rules of Professional Conduct Lacks Any Independent Analysis or Support

Piekarsky's Report simply concludes that LMB violated New Jersey Rules of Professional Conduct ("R.P.C.") and had nonwaivable conflicts by advising Guyden to enter the ADR Agreement and by accepting the fee advance in reliance on *Johnson v. Nextel*. (Pa379-380). Yet, Piekarsky fails to identify a single R.P.C. that was allegedly violated with specificity. Nor does he explain the nature of such generic ethics rule violations or how they constituted a departure from the standard of care.[15] Piekarsky does not independently analyze any of the provisions of the ADR Agreement or Fee Agreement or explain why the arbitration provided for in that agreement was more beneficial to Prudential than to Guyden. Rather, he simply concludes that it was. (Pa379).

As to the Fee Agreement and the advancement of fees by Prudential, Piekarsky does not analyze why acceptance of the advanced legal fee was so "obvious[ly]" more beneficial to Prudential, or LMB than Guyden, particularly where, as here, the Fee Agreement explicitly states that the more the claimants earn in settlement or award in the ADR process the more LMB would earn. LMB

[15] Piekarsky's conclusory and cryptic reference to LMB's "other business dealings with their adversary subsidiary" and alleged failure to disclose stolen client funds and "egregious conduct" by LMB (Pa377) is completely unexplained, untethered to the record, and unrelated to the handling of Guyden's claims as she terminated LMB in 2000 and the events referenced allegedly occurred thereafter in a different venue.

was thus fully incentivized to recover as much as possible for each claimant. (Pa074-076¶¶ 1(a), 1(c)(iii)) (providing that Prudential will pay attorney's fees to LMB in an additional amount equal to 33 1/3% of a covered claimant's award without any cap).

While an ethical violation can provide evidence of the standard of care, the violation of an ethical rule in and of itself does not create a cause of action. *See Baxt v. Liloia*, 155 N.J. 190 (1998). *See also Green v. Morgan Props.*, 215 N.J. 431, 458 (2013). Piekarsky was required to explain why any alleged ethics rule violation operated as a departure from the standard of care in this case and as noted below, how such ethics violation in1999 proximately caused Guyden's alleged damages in 2009. He has failed to do so. [16]

3. Piekarsky's and Zatuchni's Bare Conclusions on Proximately Caused Damages Lack Any Independent Analysis or Support

Neither the Piekarsky nor Zatuchni Reports causally link the various acts alleged to constitute the breach of the standard of care to Guyden's proximately caused damages.

For example, Piekarsky does not explain how LMB's alleged ethics rule violation in 1999 is the proximate cause of Guyden's loss in arbitration or

[16] Piekarsky also failed to review the decision of the New York State Grievance Committee which rejected a disciplinary complaint interposed by Watkins on Guyden's behalf against LMB and its finding that LMB was not guilty of an ethical violation. (Da0190-0195).

allegedly inadequate settlement thereafter on her successor lawyer's advice. This too renders the opinion insufficient. *See Devone v. Favieri*, 2007 N.J. Super. Unpub. LEXIS 348 (App. Div. Mar. 5, 2007) (rejecting experts' opinion because the expert made no factually based connection between the attorney's alleged conflict of interest and plaintiff's alleged loss); *see also SFI Advisors, LLC v. Lenney Law Firm, LLC,* 2022 N.J. Super. Unpub. LEXIS 11 (App. Div. Jan. 4, 2022) (holding expert testimony concerning causation would be required to show how the client was harmed by the alleged ethical violation).

Likewise, Piekarsky and Zatuchni's bare conclusion that Guyden "was damaged" by LMB's 1999 advice to arbitrate, concluding that advice resulted in an "inadequate settlement" contains no causation analysis whatsoever. Guyden cannot sustain her *prima facie* case without competent expert evidence (based on facts in the record) explaining why Guyden would not only have prevailed before a jury (when she lost in arbitration) but would have recovered more than she received from Prudential in her confidential settlement. *See Morris Props.*, 476 N.J. Super. 4 (in legal malpractice action proximate causation must ordinarily be proven by expert testimony).

Guyden's experts simply ignore the critical fact that Guyden lost in an AAA employment discrimination arbitration before an African-American arbitrator after an eight-day hearing, while represented by successor counsel --

not LMB. Plaintiff on appeal does not explain how Piekarsky's opinion supplies the "why and wherefore" of his bare legal conclusions causally linking Guyden's allegedly inadequate settlement in 2009, while represented by Watkins, to LMB's advice a decade earlier to agree to ADR. Instead, Plaintiff simply proclaims that such causal linkage exists and that Piekarsky sought to "spare metaphorical paper" by simply not retyping the net opinions of the other litigation experts into Piekarsky's opinion. (Pbr30,34).

Piekarsky also concludes that "[t]he measure of her damages is what she would've received from a Jury considering her claims of employment discrimination." (Pa350). However, a jury needs an expert to value her employment discrimination claims and to explain how LMB's 1999 advice to arbitrate caused her to settle for less than she otherwise would have and the amount of those damages. *See Kelly v. Berlin*, 300 N.J. Super. at 269 (holding expert testimony required to enable a jury to determine whether malpractice caused lower settlement and to quantify damages). Here, neither Piekarsky nor Zatuchni conducted an independent analysis of the actual admissible evidence regarding Guyden's underlying employment claims. Nor did they analyze the settlement value of her claims in court.

Without such an analysis Zatuchni and Piekarsky cannot opine on the value of her claims, the alleged insufficiency of her settlement or that she would

have prevailed in the first instance before a jury in any amount. This too is a fatal flaw in his report and is apparently a flaw Piekarsky and/or Plaintiff's counsel has made before in other legal malpractice cases. *See, e.g.*, *Kaplan,* 339 N.J. Super. at 103-04 (another legal malpractice case handled by Plaintiff's present counsel rejecting an expert opinion regarding the sufficiency of a settlement where expert failed to render a comparison of similar property settlement agreements) *see also Morici*, 2023 N.J. Super. Unpub. LEXIS 81, at *6-7 (rejecting Piekarsky's expert opinion that the plaintiff suffered damages from the lack of equitable distribution of stock as Piekarsky "conducted no independent analysis of what the stock would have been worth on the date the original complaint was filed"); *Orloff, Lowenbach, Stifelman & Siegel, P.A. v. Angrisani.*, 2016 N.J. Super. Unpub. LEXIS 318 (App. Div. Feb. 12, 2016), *cert. denied*, 226 N.J. 211 (2016) (rejecting four expert opinions on summary judgment in connection with malpractice counterclaim as experts failed to explain how the lawyer's conduct resulted in diminution in settlement value); *Whisler v. Lundy Flitter Beldecos & Berger*, 2014 N.J. Super. Unpub. LEXIS 1852, at *9 (App. Div. July 23, 2014) (rejecting expert opinion where expert failed to show that but for lawyer's alleged error "plaintiffs would have received a more generous settlement").

Guyden's experts were required to present proof as a matter of reasonable

probability of the outcome at trial if the alleged malpractice had not occurred. *Garcia v. Koslov, Seaton, Ramanini & Brooks, P.C.* 179 N.J. 343, 361 (2004). Piekarsky's bare conclusion, adopted from Zatuchni's bare conclusion, that Guyden would have won in court when she lost in an eight-day arbitration is unsupported. These experts both failed to review the arbitrator's decision, failed to analyze the discovery actually requested and obtained by successor counsel in arbitration, or the evidence presented, and failed to identify the supposedly critical discovery they claim would have been discovered in court or how such discovery would have changed the result. "The lack of reasoned explanation" for the conclusion that more or broader discovery in this case would have made one iota of difference "makes [the] opinion a classic 'net opinion'". *Orloff, Lowenbach, Stifelman & Siegel*, 2016 N.J. Super. Unpub. LEXIS 318, at *12 (barring expert opinion based on a theory that lawyer failed to do more extensive discovery where the expert failed to explain what such additional discovery would have shown and how it would have changed the result).

Plaintiff's claim that even if Zatuchni's Report were excluded, Plaintiff could still prove her case with Piekarsky's Report alone is fatally flawed. (Pbr40). This contention ignores the myriad of deficiencies in the Piekarsky Report and its failure to provide any independent analysis of liability or proximately caused damages whatsoever for which he relies solely on

Zatuchni's net opinion or the hearsay reports of other non-testifying experts.

Plaintiff's theory that she could just introduce Piekarsky's testimony and prove LMB's breach of the standard of care and proximately caused damages in a "a case within a case" format and allow a "jury to determine what her damages are" is confused. The fact that Plaintiff would prove her claim in the "case within a case" format (also known as the "suit within a suit"), would not relieve plaintiff of her burden to establish proximately caused damages through expert evidence. Rather, it would just allow Plaintiff to present the evidence she claims would have been submitted at trial had no malpractice occurred. *See Morris Props.*, 476 N.J. Super. at 463 (rejecting plaintiff's argument that the suit within a suit approach at trial excuses the plaintiff's failure to present expert evidence on proximate cause and damages). As noted above, a jury could not value Guyden's claim without competent expert evidence. That evidence is lacking here.

4. Piekarsky's Conclusion that LMB Engaged in the Unauthorized Practice of Law Lacks Any Independent Analysis or Support

Piekarsky's opinion also contains the bare legal conclusion that LMB engaged in the unauthorized practice of law, presumably as a basis of the sole remaining malpractice claim.[17]

This bald conclusion is again lacking in any relevant independent legal or

[17] Guyden never pled any statutory claim designated as the "unauthorized practice of law" (Pa016-027; Pa028-040).

factual analysis in the Piekarsky Report. The unauthorized practice of law contains three critical elements: (1) the conduct in issue involves the practice of law; (2) the conduct occurs in the State of New Jersey; and (3) the conduct is unlawful when performed by a person not admitted to practice in the jurisdiction. *See R*.1:21-1(a) ("A lawyer shall not (a) practice law in a jurisdiction where doing so violates the legal profession in the jurisdiction"); *see also* R.P.C. 5.5 effective 1999, providing "[no] person shall practice law in this state unless that person is an attorney holding a plenary license to practice in this state."

Piekarsky's opinion fails to independently analyze any of the requisite components of the unauthorized practice of law as to Guyden but simply parrots the failed hearsay opinion issued *for other Plaintiffs*, of attorney Robin Hill, a prior non-testifying expert. (Pa379-380). Piekarsky concludes that LMB engaged in the unauthorized practice of law based on two discrete acts: (1) entry into a retainer agreement with Guyden; and (2) advice to Guyden to enter the ADR Agreement. (Pa379-380). On the uncontroverted facts here, these acts do not constitute the unauthorized practice of law in New Jersey.

The practice of law involves the rendition of legal services to a client involving knowledge, training and skill. *See In In re Jackman,* 165 N.J. 580 (2000). Entry into a retainer agreement is not the rendition of legal services or

the practice of law itself, but rather the agreement to provide such services. Neither Piekarsky nor Plaintiff has supplied any authority to the contrary in support of this conclusory claim.[18]

To the extent Piekarsky suggests that the advice to enter the ADR Agreement constituted the unauthorized practice of law in New Jersey he conveniently fails to address where the advice to enter the ADR Agreement and its execution occurred. Guyden conceded in her federal court Declaration (one of the few documents Piekarsky claims to have reviewed), that she was advised to execute the May 1999 Agreement and signed a signature page in the World Trade Center offices of LMB in New York City. (Pa079-080). The giving of such advice in New York by New York lawyers does not constitute the unauthorized practice of law in New Jersey. *See R*.1:21-1(a) (recognizing that to constitute the unauthorized practice of law the legal services in issue must be rendered in a state in which the lawyer is unlicensed). Piekarsky's failure to address this critical fact renders his opinion wrong on the law and wrong on the facts and lacking in foundation in the record. *See Appell v. Reiner,* 43 N.J. 313 (1964) (holding that services rendered in the State of New York by a New York

[18] Piekarsky also misstates the terms of LMB's retainer as he claims that LMB agreed to "file suit" in New Jersey. (Pa379). However, the retainer provided that LMB would "seek a negotiated settlement" and only "if necessary", file suit. (Pa053). LMB never filed suit and would have retained local counsel, "if necessary", as did successor New York Counsel Watkins. (Pa119).

admitted lawyer were plainly appropriate).

The case of *In re Jackman*, 165 N.J. 580 relied upon by Piekarsky lifted from another expert's report, is thus patently distinguishable from the case at bar, as the attorney in that case worked exclusively as an associate in a New Jersey law firm for seven years without New Jersey admission.

It is also well accepted that the conduct of arbitrations and mediations in a state by an unlicensed attorney in that state is not the unauthorized practice of law. *see* New Jersey Comm. Unauthorized Practice of Law Op. 28, 1994 WL 719208, at *2 (Dec. 19, 1994) but is an exception to the unauthorized practice of law rules as the Appellate Division in 2015 confirmed.[19] (Pa317). Thus, Piekarsky's bare reference to LMB's "appearance in Newark" to meet with Plaintiff regarding her pursuit of the ADR ignores that the critical advice to enter the ADR agreement and Guyden's entry into that agreement both occurred in New York by Plaintiff's own admission.

[19] Piekarsky's claim that Guyden is entitled to disgorgement of the $5 million advance by Prudential for LMB's representation of all 359 participants in the ADR process also contains no analysis and makes no sense (Pa379-380). It ignores that Prudential ultimately paid LMB no fees for representing Guyden. (Da0188). Rather, Watkins' legal fees were paid by Prudential as part of the confidential settlement of Guyden's claim. (Da0173).

POINT III

THE ORDER STRIKING THE EXPERT REPORTS SHOULD BE AFFIRMED AS THEY IMPROPERLY BOOTSTRAP THE LITIGATION REPORTS OF NON-TESTIFYING EXPERTS

Piekarsky does not cure the patent insufficiency in his Report by impermissibly bootstrapping the reports of five non-testifying experts and Zatuchni's Report – he just compounds it. The two pages in Piekarsky's Report containing his "opinion" adopts wholesale 137 pages of other hearsay expert opinions. The Supreme Court of New Jersey has made plain that such wholesale adoption of non-testifying expert reports is patently impermissible.

Under N.J.R.E. 703, a testifying expert is generally permitted to detail for the trier of fact all of the materials on which he relied in deriving his opinion, including other expert reports, "so long as they are of a type reasonably relied upon by other experts in his field." *Agha v. Feiner*, 198 N.J. 50, 62 (2009).

However, "it does not allow expert testimony to serve as a vehicle for the wholesale introduction of otherwise inadmissible evidence" and "it was not intended as a conduit through which the jury may be provided the results of contested out-of-court statements." *Id.* at 63 (internal quotations and citation omitted).

Thus, "an expert witness should not be allowed to relate the opinions of a non-testifying expert merely because those opinions are congruent with the ones

he has reached." *Hayes v. Delamotte*, 231 N.J. 373, 392 (2018) (internal quotations and citation omitted). That is because "[i]t does not comport with fundamental fairness to have the opinions of the non-testifying experts bootstrapped into evidence through the testimony of the testifying experts without an opportunity for cross-examination of the underlying opinions." *In re Commitment of E.S.T.*, 371 N.J. Super. 562, 575 (App. Div. 2004). *See also Brun v. Cardoso*, 390 N.J. Super. 409, 421 (App. Div. 2006) (holding that an "MRI report could not be bootstrapped into evidence" through expert testimony). The hearsay statements of non-testifying experts, therefore, cannot be relied upon "for the correctness of the non-testifying expert's conclusion…" *Hayes*, 231 N.J. at 392-93. In other words, the testifying expert cannot "establish the substance of the report of a non-testifying" expert. *Agha*, 198 N.J. at 64.

Here, both Piekarsky and Zatuchni rely on the other litigation expert reports for their substance and purported correctness which is entirely impermissible under N.J.R.E. 703 and controlling case law above. For example, instead of analyzing whether LMB's advice concerning entry into the ADR Agreement constituted a breach of the standard of care, Piekarsky simply states in his Report that: "[he] wholly agree[s] with and adopt[s] the analysis and conclusion of Professor Regan in his October 22, 2014 report that entering into these agreements was a breach of LMB's fiduciary duty." (Pa379).

Piekarsky also concludes that LMB violated the R.P.C.s without identifying a single rule in his Report. (Pa377-379). Rather than conduct his own analysis of the Rules, he states that the Rules were violated "as noted by Professor Ambrosio and Professor Regan". (Pa377). Nor does Piekarsky conduct an independent analysis as to the allegation that LMB's purported conduct constituted the unauthorized practice of law but concludes it did "as set forth in Ms. Hill's report." (Pa379). He also adopts the opinion of deceased litigation expert Peter van Schaik who never addresses Guyden or her employment claims. (Pa380).

While Piekarsky opines on proximately caused damages, in violation of the Preclusion Orders, he does not conduct his own analysis in that regard either. Rather, he states that "Mr. Zatuchni values Ms. Guyden's claims" (Pa380) and he adopts his opinion on valuation. Instead, he bootstraps the Zatuchni Report without performing his own independent analysis or quantification of Guyden's alleged loss.

Zatuchni similarly bootstraps the opinions of Michael Ambrosio, Robyn Hill and Milton Regan stating that he "adopts" these reports "on the appropriateness of LMB's representation of Ms. Guyden…" (Pa384) as well as the certification of Peter Van Schaik dated January 11, 2012. (Pa383).

Plaintiff's claim that it is appropriate for his experts to adopt wholesale

the hearsay reports of non-testifying litigation experts for their truth (Pbr31) is in patent contradiction to the precise holdings of *Agha* and *Hayes* and their interpretation of N.J.R.E. 703.

As a testifying expert, Piekarsky is obligated to set forth the factual and legal basis of his opinions based on the record and set forth the whys and wherefores of his opinion.

> …[i]t is not enough that an expert repeats what he read or was told…" but that he is required to explain in his report and testify to "what he thinks" and not what "someone else thinks" and "insisting on this formality is useful in weeding out cases where the expert has no independent view….

See James v. Ruiz, 440 N.J. Super. 45, 71-72 (App. Div. 2015) (internal quotations and citation omitted).

In violation of the forgoing standard, Piekarsky and Zatuchni adopts wholesale the opinions of the non-testifying litigation experts so as to be mere conduits for the introduction of such opinions. Such bootstrapping is impermissible and such opinions inadmissible. see *James*, 440 N.J. Super. at 71 (recognizing that testifying expert "cannot properly act as a conduit by presenting an opinion that is not his own but that of someone else….")

Plaintiff's alternative claim, without any legal support, that the prohibition on the wholesale bootstrapping of hearsay non-testifying expert reports is limited to experts who adopt "MRI Reports" is also meritless. (Pbr33)

Plaintiff's argument, that the same legal and evidentiary rules do not apply to bootstrapped reports on employment law or legal ethics in issue here, is simply wrong. N.J.R.E. 703 is not limited to MRI reports and is an evidentiary rule of general application and has been applied to experts in other disciplines. *See*, *e.g.*, *6400 Corp v. Chevron U.S.A. Inc*., 2007 N.J. Super. Unpub. LEXIS 2272, at *16 (App. Div. Jan. 29, 2007) (applying the rule to testifying geologists).

Plaintiff also ignores the critical language of N.J.R.E. 703, which provides that while an expert may rely on facts or data from a hearsay or other inadmissible source he may do so only "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject…." (Emphasis added). The illustration of such proper reliance would be a testifying expert who relied on a non-testifying expert "who examined a person, place or object" if of a type reasonably relied upon by experts in the particular field. *See James*, 440 N.J. Super. at 64.

Experts retained for a litigation objective, as here, whether for this Plaintiff or another, plainly fall outside the category of other expert reports "reasonably relied upon by experts in the field." *See In re Commitment of E.S.T.*, 371 N.J. Super. at 572 (recognizing that reports, as here, "specifically prepared for purposes of litigation are not, by definition, of a type reasonably relied upon by experts in the particular field" and may not come into evidence just because

they have been adopted by the testifying expert) (internal quotations and citation omitted).

Here, each of the non-testifying expert opinions adopted/bootstrapped by Piekarsky were procured for a litigation purpose and are therefore inadmissible under 703 for this reason as well.[20]

POINT IV

PLAINTIFF'S FAILURE TO OFFER "GOOD CAUSE" FOR HER UNTIMELY AND INCOMPLETE EXPERT REPORTS PROVIDES ADDITIONAL GROUNDS FOR AFFIRMANCE

Plaintiff noticed Zatuchni as a trial expert and identified his 2014 report as a trial expert report for the first time in opposition to the Defendants' underlying motion to strike and for summary judgment on December 7, 2023. This was two and half months after the last liability expert report/disclosure deadline lapsed. (Pa472-473). Piekarsky's Report was also served after this deadline. (Pa375).

Plaintiff has offered absolutely no good cause for her complete disregard of the Orders of this Court setting explicit dates for liability expert disclosure, even after repeated adjournments, as required under *R*.4:17-7. The disregard of the Court's orders without any good explanation is, itself, sufficient to establish

[20] For example, these litigation-related reports included an Affidavit of Merit and Affidavits or certifications in support of or opposition to motions for summary judgment and the like. (Pa512-646).

the absence of good cause and a basis to strike Plaintiff's expert report(s) and affirm summary judgment. *See Tynes*, 408 N.J. Super. 159 (applying the "good cause" standard to a motion to extend expert discovery holding Plaintiff's decision not to make timely expert disclosure for strategic reasons did not justify the disregard of the court's order); *Collins v. Menza*, 2009 N.J. Super. Unpub. LEXIS 222 (App. Div. Jan. 7, 2009) (noting in legal malpractice action that even in the absence of a scheduled arbitration or trial date good cause must be shown for the delayed notice and production of expert report).

Plaintiff attempts to excuse her failure to timely notice Zatuchni as a trial expert by claiming there can be no prejudice to LMB because they had the Zatuchni report for over nine years. (Pbr29). Plaintiff ignores that Zatuchni had not been designated as a trial expert until December 2023 long after the court-ordered deadline. *See Makai v. Winston Towers 200 Ass'n, Inc.*, 2020 N.J. Super. Unpub. LEXIS 2357, *22 (App. Div. Dec. 9, 2020) (rejecting plaintiff's untimely expert designation although the expert and his report were previously disclosed by a co-defendant plaintiff previously settled with).

Plaintiff also trivializes her serial violation of the Court's Orders and the Court Rules regarding expert disclosure. Despite being precluded from introducing damages experts because of her pervasive disregard of court-ordered damages expert deadlines in 2012, she compounds that error by failing

to meet the court-ordered deadline for liability expert disclosure in 2023 as well.

Guyden also ignores the prejudice to Defendants. Defendants relied on the disclosure of the Piekarsky Report as the sole trial expert initially in both preparing the underlying Motion to Strike and for Summary Judgment and in directing defense expert's preparation of reports. Plaintiff's reports were also patently incomplete. Defendants were thus forced to prepare their motion and rebuttal expert reports without all the information to which they were entitled under *R*.4:7-4 providing yet an additional basis to strike them. *See Brickell v. Cablevision*, 2020 N.J. Super. Unpub. LEXIS 1208, at *7-8 (App. Div. June 22, 2020) (affirming striking timely but incomplete expert reports).

POINT V

SUMMARY JUDGMENT SHOULD BE AFFIRMED AS PLAINTIFF CANNOT SUSTAIN HER LEGAL MALPRACTICE CLAIM WITHOUT COMPETENT EXPERT EVIDENCE

To meet her burden on the malpractice claim, pled Plaintiff was required to establish LMB's departure from the standard of care, proximate causation and actual damages by admissible expert evidence. *See Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 N.J. Super. 1, 12 (App. Div. 2001); *see also Morris Props.*, 476 N.J. Super. at 461; *2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J. Super. 478, 488 (App. Div. 1994).

As explained above Plaintiff has not and cannot establish the requisite

elements of her claim through competent expert evidence. The Preclusion Orders bar Plaintiff's expert reports to the extent they opine on, or purport to quantify, her proximately caused damages. That alone warrants summary judgment as plaintiff in a legal malpractice action "must also quantify the damages suffered as a proximate consequence of defendants' breach." *Marrero v. Feintuch*, 418 N.J. Super. 48, 61 (App. Div. 2011).

Further, both expert reports are also barred as impermissible net opinions on both liability and proximately caused damages and are additionally inadmissible as they improperly bootstrap the hearsay reports of non-testifying litigation experts.

Plaintiff's failure (and inability) to offer competent expert opinions on the standard of care, its breach and proximately caused damages warrants affirming summary judgment to LMB as a matter of law because she cannot make out a *prima facie* case without them. *See Kaplan*, 330 N.J. Super. at 104; *see also Trang v. Markizon*, 2018 N.J. Super. Unpub. LEXIS 1041, at *16 (App. Div. May 3, 2018) (barring Piekarsky's opinion in legal malpractice action as a net opinion and granting summary judgment as a matter of law holding that "[a]bsent the expert's opinion, 'plaintiff [is] unable to satisfy [his] burden of establishing the applicable standard of care and a breach of that standard") (quoting *Davis v. Brickman Landscaping, Ltd.*, 219 N.J. 395, 414 (2014));

Morici, 2023 N.J. Super. Unpub. LEXIS 81, at *10-11 (barring Piekarsky's opinion in a legal malpractice action as a net opinion and holding that such finding supports the "order granting summary judgment to defendants in the legal malpractice action"); *Angrisani v. Law Off. Of Leo B. Dubler, III, LLC*, 2024 N.J. Super. Unpub. LEXIS 142 (App. Div. Jan. 30, 2024) (affirming summary judgment in legal malpractice action after rejecting Piekarsky expert report that also relied on an inadmissible expert opinion on damages).

CONCLUSION

Based on the foregoing, it is respectfully requested that the Trial Court's May 2, 2024 Order be affirmed in its entirety.

Respectfully submitted,

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May 16, 2025

VIA ECOURTS APPELLATE
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RE: Linda Guyden v. Leeds, Morelli & Brown, LLP, Steven A. Morelli, Esq. and Jeffrey K. Brown, Esq.
Trial Court Docket No.: BER-L-3571-10
Appellate Docket No.: A-003158-23

Dear Honorable Judges of the Appellate Division:

Please accept this letter brief in lieu of a more formal reply brief as to the opposition the Defendants-Respondents filed in this matter.

TABLE OF CONTENTS

LEGAL ARGUMENT

I. ZATUCHNI'S REPORT IS NOT A DAMAGES EXPERT OPINION

An expert report on damages is as the term is commonly used in litigation refers to a calculation of losses by consisting of mathematical computation applied by off an applied over periods of time and using percentages to reflect certain losses. A liability expert report in a legal malpractice case opines on the amount a case was worth is not a damages report.

Furthermore, the Order precluding damages reports was entered prior to Ms. Guyden being deposed or the completion of fact discovery as to the Defendants. Said order was also not directed at what was called the "operations Plaintiffs" in the mass tort but at the "insurance agent Plaintiffs".

In Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 353-354 (2004), the Court noted that Plaintiff's legal malpractice expert permitted to testify as to Plaintiff's underlying case, including issues of damages and percentages of liability in said testimony, was not considered a damages report.

II. THE REPORTS OF PIEKARSKY AND ZATUCHNI ARE NOT NET OPINIONS

The supposed flaws in Piekarsky's expert report are subject to cross examination and are not barred to his opinion. While Defendants claim that Piekarsky ignored parts, Mr. Piekarsky's reliance on the extensive record he cited indicates it is not a net opinion.

An expert is entitled to credit the factual version presented by a litigant and it is for a jury to decide whether or not the facts relied upon were proven by a preponderance of the evidence.

The net opinion rule is not a standard of perfection. The rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable. An expert's proposed testimony should not be excluded merely "because it fails to account for some particular condition or fact which the adversary considers relevant." Creanga, supra, 185 N.J. at 360 (quoting State v. Freeman, 223 N.J. Super. 92, 116, (App.Div.1988), certif. denied, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App.Div.2002) (citing Freeman, supra, 223 N.J. Super. at 115–16). Such omissions may be "a proper 'subject of exploration and cross-examination at a trial.'" Ibid. (quoting Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App.Div.1990), modified on other grounds, 125 N.J. 421 (1991)); see also State v. Harvey, 151 N.J. 117, 277 (1997) ("[A]n expert witness is always subject to searching cross-examination as to the basis of his opinion." (quoting State v. Martini, 131 N.J. 176, 264 (1993))).

Furthermore, Mr. Piekarsky gives the why and wherefores for his opinion. He says if the Plaintiff had received the advice for the standard of care required them to render, Ms. Battaglia would have accepted at an early date which was much more advantageous than the one she accepted later on and would not have incurred the exorbitant professional fees which the Defendants and Mr. Saccomanno are now claiming are due. See Battaglia. The proximate cause, the whys and wherefores as to these proximately caused damages as set forth in Mr. Piekarsky's report are indeed the common sense conclusion of his opinion regarding deviation.

For example, Defendants criticized Piekarsky for not crediting an interlocutory finding by Judge Lechner, that was later revised by the Trial Judge who ordered discovery on the issue of fraud or coercion and as a result, Prudential settled.

Furthermore, the issue of whether or not the agreement presented to Ms. Guyden was different from the one that has been used in this litigation is one of credibility for the jury to decide. Mr. Piekarsky's opinion is based upon the May 5th agreements in the record.

Similarly, Defendants criticism of Mr. Zatuchni's report is subject to cross examination but should not be barred. The fundamental basis of both these expert's opinion – that Ms. Guyden's claims were worth more before a jury than before an arbitrator is one for the jury to credit or not. Certainly, the jury could draw the inference

that by accepting a secret bribe of five million dollars ($5,000,000.00) to commit Ms. Guyden to arbitration. Leeds, Morelli and Brown and Prudential recognized that these claims were worth much more before an arbitrator and a jury.

CONCLUSION

For the foregoing reasons set forth above and in Appellant's initial brief, the Trial Court's dismissal of Plaintiff's action should be reversed, and this matter be remanded to the Court for trial on the merits.

Respectfully submitted,

/s/ Kenneth S. Thyne

Kenneth S. Thyne, Esq.

KST/hd

Dated: May 16, 2025