SHORE STAR PROPERTIES, LLC

*Plaintiff/Appellant*

v.

KOLBE & KOLBE MILLWORK CO., INC., NORTH AMERICAN WINDOW & DOOR CO., INC., JOHN DOE(S) #1-10, ABC CORPORATION(S) #1-10, and XYZ PARTNERSHIP(S) #1-10 (fictitiously named Defendants)

*Defendants/Respondents*

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003434-23

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY
DOCKET NO.: CPM-L-000-125-20

*Civil Action*

**ON APPEAL FROM MAY 31, 2024 ORDER**

SAT BELOW: HON. JAMES H. PICKERING, JR, J.S.C.

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# BRIEF FOR PLAINTIFF/APPELLANT SHORE STAR PROPERTIES, LLC

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## PROCEDURAL HISTORY

Plaintiff filed a Complaint against Kolbe on April 14, 2020 with causes of action against for violations of the New Jersey Consumer Fraud Act, breach of contract, breach of implied warranty, negligent misrepresentation, negligence, and common law fraud. (Ja001). Thereafter, Kolbe filed an Answer. (Ja029). On December 21, 2023, Kolbe filed a Motion for Summary Judgment to dismiss Plaintiff's Complaint. (Ja043). Plaintiff filed an opposition to the Motion for Summary Judgment on February 6, 2024, arguing that summary judgment should be denied as issues of material fact remained regarding all causes of action. Kolbe filed a Reply on February 9, 2024 which raised new arguments. On February 29, 2024, Plaintiff sent a sur reply letter to the trial court addressing the new arguments. On March 19, 2024, oral argument was held before the trial court judge. On May 31, 2024, the trial court entered an Order granting Kolbe's motion and dismissing the entire matter. (Ja792).

## STATEMENT OF FACTS

On or about October 2, 2014, Dr. Robert Corrato and Donna Corrato, on behalf of Plaintiff, met with Leonard Kazmiroski of North American Window and Door ("NAWD"), acting on behalf of Kolbe pursuant to the Kolbe Basic Policy Guidelines agreement between Kolbe and NAWD (Ja387-402), to review Kolbe

products at NAWD's office for Plaintiff's shore property located at 315 74th Street, Avalon, New Jersey. (Ja112). The Kolbe Basic Policy Guidelines is an agreement between Kolbe and NAWD that requires NAWD to act as an agent of Kolbe during the sale and service of Kolbe products. (Ja387-402).

Kolbe advertises its products to the consuming public as being "the highest quality windows and doors" made with the "finest materials" and "crafted with attention to detail and thoughtful engineering", that its "products are rigorously tested to exceed industry standards for energy efficiency and performance", and the company focuses "on the details, crafting one window or door at a time, precisely to your specifications". (Ja526). Plaintiff relied upon these factual representations, that were more than mere puffery, and thus was induced to purchase Kolbe products. (Ja082; Ja112-113). However, the Kolbe products sold to Plaintiff were substantially impaired because of Kolbe's failure to manufacture and test the windows and doors in accordance with CSI MasterFormat Instructions, AAMA/WDMA 101/ I.S. 2/A 440-08, WDMA standards, and local building codes as detailed in Plaintiff's expert reports. (Ja318-321).

Prior to purchasing the Kolbe products, Dr. Corrato had discussions with Mr. Kazmiroski regarding negative comments about Kolbe products in a shore environment. (Ja112). Mr. Kazmiroski assured Dr. Corrato that Kolbe's products

were re-designed, would be functional and defect-free in a shore environment, and were high-quality products. (Ja112). Dr. Corrato testified that he completed online research and reviewed advertisements (such as those referenced above), and other information available online before deciding to purchase Kolbe products. (Ja082).

The Kolbe products were delivered to the shore property in November 2015 and installed by the end of December 2015. (Ja113-114). From January through February 2016, Plaintiff communicated with Kolbe's representative, NAWD, regarding trivial defects/issues (34 windows with retractable screens that were manufactured by Kolbe with internal latches installed backwards and weather stripping was cut too short). (Ja113-114). Kolbe ordered 100 new latches and 100 feet of weather stripping/wind pile because they were crimped on the bottom of the units and the weather stripping was cut too short at the time of manufacturing. Plaintiff permitted Kolbe the opportunity to correct the defects. (Ja113-114).

Over the course of several weeks during the summer of 2016, while the painter was priming the Kolbe windows at the shore property, the painter noticed signs that the windows were holding water. (Ja114). In June and July 2016, James Card and Mr. D'Angelo, acting on behalf of Plaintiff, communicated with Mr. Kazmiroski regarding the Kolbe products holding water and sashes leaking when the painter removed the sash. (Ja114). A Kolbe representative advised Mr. Card that the leaking

sash should be replaced and the interface between the glazing and sash frames in all the Kolbe windows should be caulked. (Ja114). Bud Ward, acting on behalf of Kolbe, came to the property, inspected the products, and stated "all I do is replace sashes for these people" referring to the Kolbe window sashes. (Ja114). Thereafter, Ward provided several replacement window sashes. (Ja114).

On or about August 17, 2016, Marur Dev, P.E. completed an initial inspection of the Kolbe products while all the windows and doors were installed at the shore property. (Ja279). The purpose of Mr. Dev's inspection of the Kolbe products installed at the shore property was to determine the cause of the water leak in the window sash frames; whether there is a deficiency with flashing around the installed Kolbe windows and doors; whether the construction of sashes and frames of Kolbe windows and doors complied with applicable building codes, industry standards, and the representations by Kolbe contained in its advertising and/or representations to Plaintiff; whether the remedy suggested by Kolbe's representatives was appropriate; the long-term effects of water penetration in Kolbe windows and doors that were not built properly for the hurricane zone; and the life-safety issues associated with Kolbe windows and doors that were not built properly for the hurricane zone. (Ja284-285).

After his inspection, Mr. Dev concluded within a reasonable degree of engineering certainty that the Kolbe windows do not comply with minimum

standards as set forth in the IRC-2009 NJ Edition, the AAMA/WDAA Standards, Kolbe's own manufacturing specifications, and factual representations by Kolbe in its website advertising and representations to Plaintiff. (Ja321). The defects in the Kolbe products existed at the time of manufacturing of the products at the Kolbe plant. (Ja321). The performance and/or value of the Kolbe windows and doors were substantially impaired as a result of Kolbe's failure to manufacture products in accordance with CSI MasterFormat Instructions, AAMA/WDMA 101/ I.S. 2/A 440-08, WDMA standards, and local building codes. (Ja321). Mr. Dev also opined the method of repair recommended by Kolbe to stop the water penetration was unacceptable and temporary as it does not cure the defect, and it will only stop the leaking for a short period of time. (Ja321).

From late December 2015 through the summer of 2016, Kolbe's response to every claim regarding the defective products was to replace the faulty components and apply a bead of caulk to all the products. (Ja114-115). Kolbe did not correct the defects but rather sent replacement sashes with the same defects as the products previously delivered. (Ja115). Per Mr. Dev's expert opinion, such a remedy would not cure the problem with water penetration. (Ja321).

In addition to the window sashes holding water, Plaintiff witnessed cladding of the Kolbe doors popping out due to water retention less than a year after

installation (Ja113-115). Plaintiff reasonably suspected, and later confirmed, that replacement products were manufactured using the same substandard materials, design, techniques, and methodologies, and would also fail over time. (Ja113-115). Plaintiff also reasonably suspected, and later confirmed, that using Kolbe products in the shore property home would result in a constant and perpetual series of component failures and replacements. (Ja113-114). Plaintiff expressed to Kolbe that its products failed in their essential purpose and/or deprived Plaintiff of the substantial value of the bargain, and Plaintiff's experts identified the deficiencies in the products sold to Plaintiff by Kolbe. (Ja113-116; Ja472-473).

On November 1, 2016, Plaintiff's counsel advised Kolbe via letter of his representation, placed Kolbe on notice to preserve all evidence, advised it was the Plaintiff's intent to remove the defective Kolbe products, and gave Kolbe an opportunity to inspect the Kolbe products at the shore property. (Ja115; Ja475-476). In a November 14, 2016 letter, Plaintiff's counsel advised Kolbe that Plaintiff sustained damages as a result of the defective windows. (Ja115). Kolbe was further advised that the windows were inspected by an engineer, and the moisture trapped between the aluminum cladding and the wood frame will ultimately rot the wood and render the windows useless. (Ja115). Plaintiff gave Kolbe another opportunity to inspect the property before removal of the products. (Ja115).

On November 15, 2016, Plaintiff's counsel advised Kolbe via letter that Plaintiff attempted to resolve issues relating to the products with Kolbe since spring of 2016, and expert reports would be provided in the future. (Ja115; Ja483-484). In a November 16, 2016 email, Kolbe's counsel replied to the correspondence from Plaintiff's counsel requesting that all windows be preserved. (Ja486). In or about January 2017, all Kolbe windows and doors were removed and replaced. (Ja283-284). The removed Kolbe products were placed into storage after removal. (Ja284).

John Hanrahan, owner of NAWD acting as Kolbe's agent/representative pursuant to the Kolbe Basic Policy Guidelines agreement, testified that all representations made by NAWD about the Kolbe products come from Kolbe. (Ja500). Hanrahan testified that NAWD passes along all literature and information from Kolbe to consumers, including that Kolbe windows and doors are inspected by third parties. (Ja500). The Kolbe Basic Policy Guidelines agreement between Kolbe and NAWD states that "Kolbe & Kolbe encourages its customers [NAWD] to participate in the sales, advertising and other promotional programs available to them. We [Kolbe] have established a Cooperative Advertising Program which includes complete information on all our [Kolbe] programs. Please refer to the "Customer [NAWD] Only" section of our website for the program details." (Ja393).

Discovery revealed Kolbe does not "craft one window or door at a time" but rather uses an assembly line manufacturing process to manufacture the Kolbe windows and doors delivered to Plaintiff, and there are between 700 to 900 employees on the manufacturing floor during this process. (Ja542). Kolbe represented to Plaintiff and consumers it "submits its windows and doors to independent organizations which test them to rigorous protocols". (Ja653). Despite said representation, the Kolbe products sold to the Plaintiff were not tested by independent organizations. (Ja472-473). Kolbe also represented that it meets the "strict building codes" required for the use of high-performing products that withstand hard conditions. (Ja653). However, forensic testing revealed the Kolbe products failed to meet CSI MasterFormat Instructions, AAMA/WDMA 101/I.S. 2/A 440-08, WDMA standards, and local building codes. (Ja321).

Kolbe represented it was a member of the Window & Door Manufacturing Association ("WDMA") and that its products meet Hallmark Certification standards. Compliance with WDMA I.S. 4 is necessary for Kolbe manufactured millwork to qualify for the WDMA Hallmark Certification program. (Ja526). As a member of the WDMA, all products must be manufactured in accordance with the Hallmark Certification program, which is considered a mark of excellence among architects

and contractors. (Ja416). Plaintiff was induced to purchase the Kolbe products based upon reliance on these representations. (Ja082).

The Hallmark Certification program is governed by ISO Standard 17065.[1] (Ja338). The WDMA operates a Hallmark Certification program to certify windows and doors, and is accredited by the American National Standards Institute ("ANSI"). (Ja338). A product that carries a Hallmark Certification is represented to comply with industry performance standards and to be manufactured in a facility that meets QA/QC requirements of Hallmark Certification. (Ja338). The manufacturer of a Hallmark Certified product must have a functional Quality Management System ("QMS") that defines necessary steps to demonstrate product compliance with product certification requirements. (Ja338). Technical specifications, such as minimum retentions, shall be dictated by industry standards. (Ja338).

The Kolbe products should have been manufactured in strict conformance with the respective samples/prototypes tested by a third-party laboratory. (Ja433). However, the products sold to Plaintiff were not manufactured as the windows and doors that were identified in the CSI specifications, Kolbe engineering drawings, or those identified by Kolbe to have been tested by third parties for quality and performance. (Ja433-434-378). Additionally, discovery revealed 40 of 41 window

1 ISO 17065-12, Conformity assessment - Requirements for bodies certifying products, processes, and services (2012) International Organization for Standardization, Geneva, Switzerland.

and door samples that were tested did not comply with the requirements for WDMA Hallmark Certification, WDMA I.S. 4, and AWPA P53. (Ja361-362).

Dr. Corrato testified that the Kolbe windows holding water within them was not represented to Plaintiff as a feature of the product. (Ja088; Ja090). He also testified that Kolbe recommended placing a bead of caulk on all windows after water was discovered, to which his response was: "Are we going to have to caulk this window every year? Is that what a quality product involves?" (Ja090). Dr. Corrato further testified that "nowhere in the documentation did I recall reading that you would have to caulk your windows every year." (Ja090). He also testified that Kolbe represented it was selling aluminum clad, watertight windows, and not windows that hold water. (Ja090). Discovery revealed the windows were not watertight and not manufactured to specifications, Kolbe engineering drawings, WDMA and Hallmark Certification, local building codes, or other third-party requirements. (Ja472-473).

Marur Dev, P.E. is a licensed professional engineer with over 40 years of experience in the field of structural engineering, building inspections, and construction management. Dev provided the following opinions:

> The water leak I observed from a window sash in a video recording by Mr. Card (still picture of the leak is included in this report, see picture No. 3) is caused by, including but not limited to, the following conditions:

1. Breach in the watertight contact between the glazing and exterior extruded aluminum cladding due to inadequate and/or improper application of the primary sealant by Kolbe during the manufacturing process.

2. Breach in the watertight contact between the glazing and exterior extruded aluminum cladding as the result of vertical movement in the glazing within the sash frame due to the failure of Kolbe to install plastic spacer in some window sashes during the manufacturing process.

3. Breach in the watertight contact between the exterior extruded aluminum cladding and glazing and breach in the butt joint of the exterior extruded aluminum cladding at the lower corner of the sash due to non-compliant / substandard application of wood glue by Kolbe at mortise and tenon joints between the stiles and rails during the manufacturing process.

4. Breach in the watertight contact between the exterior aluminum cladding and glazing and breach in the butt joint of the exterior extruded aluminum cladding at the lower corner of the sash due to thermal expansion and contraction of two dissimilar materials.

5. The breach in the watertight contact between the exterior aluminum cladding and glazing and the breach in the butt joint of the exterior extruded aluminum cladding at the lower corner of the sash has permitted water intrusion into the bottom rail of the sash. Moisture intrusion caused biological decay in the wood and rusting of the fasteners in the mortise and tenon joints between the rails and stiles.

(Ja319-320).

Plaintiff also retained Matthew Roetter who has 16 years of experience manufacturing, installing, and servicing thousands of windows and doors, coupled with 25 years as a fenestration expert witness. (Ja414). After conducting forensic testing, Mr. Roetter opined that the Kolbe windows and doors sold to Plaintiff did not meet the CSI specifications requiring gluing all mortise and tenon joints on the sashes, did not meet the requirements of the WDMA Hallmark Certification program, did not meet preservative treatment in accordance with WDMA I.S. 4-13, most of the Kolbe windows and doors did not follow Kolbe's engineering instructions for the manufacture of the Kolbe windows, and four of the Kolbe doors sold to Plaintiff were not tested by a third party as represented and had no design pressure ("DP") rating. (Ja472-473). Due to not being tested by a third party and having no DP rating, the Kolbe products create a life safety issue. (Ja320).

Mr. Roetter's autopsy of the Kolbe windows and doors identified numerous manufacturing defects. (Ja472-473). Mr. Roetter further determined that Kolbe sold Plaintiff products that did not meet the minimum requirements to be WDMA Hallmark Certified, as falsely represented by Kolbe. (Ja472-473). As a result, Mr. Roetter concluded Plaintiff's Kolbe windows and doors are not of high quality or high performance but of poor quality and poor performance riddled with defects; the

inadequate wood preservative applied to the windows and doors sold to Plaintiff will lead to fungi, mold or extensive wood decay requiring replacement; the installation and maintenance of the Kolbe products did not create the defects and issues identified; the window and door defects identified were caused by Kolbe and "**are hidden or latent defects that most cannot be identified unless an autopsy is performed**" (emphasis added); and the value of the Kolbe windows and doors sold to Plaintiff were substantially impaired as a result of the defects that resulted from Kolbe's failure to follow Kolbe Construction Specification Institute specifications, the WDMA Hallmark Certification program requirements, American Wood Protection Association standards, North American Fenestration Standards & Specifications, Kolbe engineering drawings used to manufacture the Plaintiff's Kolbe products, and the International Residential Code ("IRC"). (Ja472-473).

Kolbe improperly manufactured and assembled the window and door products sold to Plaintiff and then covered up the defects with aluminum cladding. (Ja472-473). Kolbe constructs the windows and doors and assembles the products before shipping them out to the consumers. (Ja570). Kolbe manufactured every item and is the only one with knowledge of any improper assembly. (Ja570).

Glenn M. Larkin, Principal Scientist of LarChem, LLC, was retained by Plaintiff as a wood preservative expert to determine whether the Kolbe products

meet or exceed the Wood Preservation Treatment specifications to meet WDMA requirements. (Ja338). Mr. Larkin stated with 95% confidence that the entire lot of Kolbe windows and doors were undertreated with Woodlife 111 wood preservative. (Ja361-362). The millwork and the production lot they were sampled from did not meet the retention specifications of WDMA I.S. 4 and AWPA P53. (Ja361-362). Hallmark Certification requires compliance with the WDMA I.S. 4 retention and penetration specifications. (Ja361-362). Therefore, the millwork did not comply with the requirements for Hallmark Certification, WDMA I.S. 4, and AWPA P53 as represented by Kolbe. (Ja361-362).

Kolbe's warranty states that it reserves the right to "provide part/product to repair or replace any window/door in whatever stage of fitting and/or finishing it was in when originally supplied by Kolbe (all replacement parts will be pursuant to the standards and/or specifications in effect at the time of claim and not at the time of original manufacture". (Ja236-237). Aside from fact that Kolbe did not supply the windows and doors that were ordered and as represented or built pursuant to the standards and/or specifications, unbeknownst to Plaintiff, Kolbe's contracted representative (NAWD) filed a warranty claim on behalf of Plaintiff. (Ja504-505). John Hanrahan testified:

> **Q.** Okay. Okay. Those e-mails that discuss the seven sash being replaced and being sent back to Kolbe, whether they

> were sent back or not, those e-mails, are you familiar with the e-mail I'm talking about?
> **A.** I am familiar with one e-mail and there might have been a little chain on it, but I reviewed an e-mail, yeah.
> **Q.** Was that a warranty claim?
> **A.** I would say yes, in my opinion.
> **Q**. Okay. **Who made that warranty claim?**
> **A. Technically, I did.**

(Ja504-505) (emphasis added.)

Kolbe's customer/dealer/representative, NAWD, made this warranty claim on behalf of Plaintiff without advising Plaintiff of the same or seeking authorization. (Ja504-505). Kolbe made the decision to replace certain window sashes to be re-installed at Plaintiff's property. (Ja486-489). Kolbe's warranty states that the warranty "applies only to the products as originally installed and does not apply to any tear outs or reinstallations." (Ja236). As soon as Kolbe made the decision to send replacement products to be re-installed at Plaintiff's property, the warranty was no longer applicable according to Kolbe's warranty language. (Ja236-237).

Kolbe's Basic Policy Guideline states that Kolbe's "customers [NAWD] who purchase Kolbe & Kolbe products for resale are required to screen services requests, perform necessary inspections, and perform service on our products". (Ja399). The Kolbe Basic Policy Guidelines states that "after the defective item has been returned and its defectiveness verified, credit will be issued for the defective merchandise."

(Ja398). Discovery revealed that a credit was issued from Kolbe to its sales distributor, NAWD, for Plaintiff's replacement Kolbe products. (Ja526).

Mr. Hanrahan provided additional deposition testimony on September 1, 2022 regarding the warranty as follows:

> **Q.** Okay. So, is it a fair statement that North American Window & Doors, when it is handling warranty claims on behalf of Kolbe, that they never identify what the cause of the problem is?
> **A.** We are not qualified to determine what the cause of an issue is.
> **Q.** Okay. Did you ever tell Kolbe, anyone at Kolbe that North American is not qualified to determine whether an item should be categorized as a warranty item or a service, field service request?
> **A.** We submit warranty or service requests for anyone who has an issue with a window, but we do not try to determine what the causation is. We're just trying to make our client happy and replace something that they perceive or needs to be replaced for whatever reason.

(Ja663). Mr. Hanrahan provided additional deposition testimony as follows:

> **Q.** Okay. Well, have you ever found a defect in any Kolbe product?
> **A.** That's not our determination.
> **Q.** Okay. So we're clear 100 percent, it's never North American's determination as to the cause of an issue with a Kolbe product, correct?
> **A.** I would say 99 percent of the time.
> **Q.** And when I say issue, I mean there's an allegation that the window or door product is not functioning as it was represented to be functioning. Can you accept that as a definition of issue?

**A.** Yes. So, if somebody's lock does not work, then we can determine the lock is broken. Does that answer your question?
**Q.** I don't know.
**A.** I mean, there's lots of things that are visible that you could say, oh, this is -- this is broken, we need to fix it, the glass is broken, you know, a bird hit it, you know, the guy with the lawn mower, you know, smashed the glass or, you know, there's any number of things in the real world that happen. Most of the time it's not a product -- product defect. It's just something that needs to be fixed for any number of reasons.
**Q.** Okay. And when you say for any number of reasons, you are describing a cause of the reason that it is not functioning properly, right?
**A.** Again, I'm not trying to determine a cause. I'm trying to determine if they need a new lock, a new window, a new -- you know, if something is obvious, if it's broken, I don't need to know how it got broken, I just need to fix it.
**Q.** Really?
**A.** In other words, if a glass is broken, it's cracked, it's got a hole in it, I don't need to know if a kid threw a ball at it or somebody shot a BB gun or if something shot up from a lawn mower, I don't need to know or care. I just need to get him a new sash.
**Q.** Okay. Well, doesn't the manner in which a window breaks, doesn't that determine whether or not it's covered under a warranty, and doesn't that ultimately determine who is responsible for payment of the replacement product?
**A.** Yes. Typically something like that would not be covered under a warranty.
**Q.** Okay. So, you made a decision as to the cause of the problem with the product?
**A.** We didn't make a decision as to the cause of it. We made a decision that it's not a warranty issue.

(Ja667).

Keith Koenig, Kolbe's Vice President of Manufacturing and Corporate Designee, testified the warranty does not cover situations when Kolbe makes a misrepresentation about its products. (Ja715).

Kolbe has a seven-year document retention policy. (Ja543). However, despite such policy, Michael Tomsyck, Kolbe's Vice President of Finance, testified that Kolbe destroys their irregularity reports that are created when someone from the field reports a concern/complaint about a Kolbe product. (Ja759). Mr. Tomsyck further testified that Kolbe does not see a "real big business need for them." (Ja759).

Mr. Koenig testified that Kolbe does not maintain documentation if a product is found not to meet specifications as represented to consumers:

> **Q.** So if you found a product did not meet the specifications, nothing would be documented in writing by Kolbe?
> **A.** No. You would just go and cover it with the individual.
> **Q.** Okay. So there's no record that I could ever request from Kolbe to show that a product was not made pursuant to the manufactured specifications, the document does not exist; that's your testimony?
> **A.** That's correct.

(Ja694). Kolbe also does not maintain a record or documentation regarding complaints or allegations for any defective manufacturing:

> **Q.** Okay. Do you know if there are any reports that are ran as far as claims or allegations for any defective manufacturing?
> **A.** No.

> **Q**. Any reports that are ran for any complaints that are made to Kolbe regarding its product?
> **A**. No.
> **Q.** All right. Any reports that are ran for any type of general customer service complaint?
> **A**. No.
> **Q.** All right. By my going through the list of those few items, sitting here today, can you think of any other report that you know are ran by Kolbe that we didn't already discuss?
> **A.** Not that I can think of.

(Ja701). For example, Mr. Koenig recalled having conversations with the manufacturing manager about manufacturing defects relating to the Ultra Series windows between five to ten times. (Ja702). None of that was documented. (Ja702).

Plaintiff has sustained approximately $372,259.42 in damages for the removal and replacement of the defective Kolbe windows and doors.

## STANDARD OF REVIEW

On appeal from summary judgment orders, the court will use a de novo standard of review and apply the same standard employed by the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). That standard compels that summary judgment be granted only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46–2(c). In ruling on a

motion for summary judgment, the court "must give the benefit of all reasonable inferences and any doubt to the opponent." Labree v. Millville Mfg., Inc., 195 N.J. Super. 575, 481 A.2d 286, 290 (App. Div. 1984).

At the summary judgment stage, the court should not resolve various factual questions, but rather accept as true the undisputed facts. Vallillo v. Muskin Corp., 212 N.J. Super. 155, 514 A.2d 528 (App. Div. 1986). Summary judgment must be denied if the court determines that there are issues of material fact requiring answers by a jury. See Reyes v. Egner, 404 N.J. Super. 433, 461 (App. Div. 2009).

## ARGUMENT

### POINT I: THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S CLAIM UNDER THE NEW JERSEY CONSUMER FRAUD ACT (Ja822-829).

The New Jersey Consumer Fraud Act (N.J.S.A. 56:8-2 et. seq.) ("CFA") protects consumers from fraudulent and deceptive business practices. A fraudulent and deceptive practice under the CFA "necessarily entails a lack of good faith, fair dealing, and honesty." Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 168 (3d Cir. 1998). Courts have constrained the CFA to "fraudulent, deceptive or other similar kind of selling or advertising practices." Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271, 390 A.2d 566 (1978), accord Strawn v. Canuso, 271 NJ.Super. 88, 108, 638 A.2d 141 (App.Div. 1994), aff'd, 140 N.J. 43, 49, 657 A.2d 420 (1995); see also Real v. Radir Wheels, Inc., 198 N.J. 511, 524, 527, 969 A.2d

1069 (2009) (concluding defendant "intentionally had engaged in unconscionable commercial practices in connection with the advertisement and sale of merchandise" by falsely representing condition of car).

To set forth a *prima facie* case under the CFA, a plaintiff must prove the following three elements: 1) misrepresentation or unlawful conduct by the defendant; 2) an ascertainable loss by the plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss. D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013). "An intent to deceive is not a prerequisite to the imposition of liability" under the CFA. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997).

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

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

Under the CFA, an affirmative misrepresentation must be material to the transaction and must have induced the buyer to make the purchase. Gennari, 288 N.J. Super. at 535. Violations of the CFA can arise even if the seller is unaware of

the statement's falsity or has no intent to deceive. Depolink Court Reporting & Litig. Support Services v. Rochman, 430 N.J. Super. 325, 587, 564 A.3d 579 (App. Div. 2013). The CFA does not require proof that a consumer has relied on a prohibited act for a plaintiff to recover. Intern. Un. Loc. 68 Welf. Fund v. Merck, 192 N.J. 372, 389, 929 A.2d 1076 (2007).

In a prior New Jersey case with comparable facts, New Mea Construction Corp. v. Harper, 203 N.J. Super. 486 (App. Div. 1985), the court determined that a defendant contractor violated the CFA when they sold lumber to a homeowner that was of inferior quality compared to the lumber provided in the building specifications. Id. at 501-02. The homeowner alleged that "this substitution of inferior quality lumber 'represented a deceptive, unconscionable and fraudulent practice' in violation of N.J.S.A. 56:8-2." Id. at 498. As noted by the appellate court:

> The findings of the trial judge suggest that this is the type of shoddy performance which the Consumer Fraud Act intended to discourage. He found "that the plaintiff shortchanged the defendants in the construction of this house." He said that "the plaintiff [contractor] took complete advantage of the defendant [homeowner] in regard to its performance of the contract obligations." In performing the flooring construction the plaintiff [contractor] "shortchanged the homeowner" and showed "callous indifference to the interest of defendant homeowner." He found the blatant substitution of substandard lumber for framing "abominable." He stated that "the omissions and deviations . . . were occasioned by bad faith" and that there "was a conscious decision to substitute different flooring."

Id. at 501. The court determined that the CFA was applicable to the contractor who used substandard material in the construction of a house. *Id*. at 501-02.

Furthermore, to prevail under the CFA, a plaintiff must prove an ascertainable loss because of unlawful conduct by the defendant. Talalai v. Cooper Tire Rubber, 360 N.J. Super. 547, 562, 823 A.2d 888 (2001). Therefore, to establish a claim under the CFA, the false[2] statements must be linked to an "ascertainable loss" sustained by the consumer. Gross v. Johnson Johnson, 303 N.J. Super. 336, 696 A.2d 793 (Law Div. 1997). This contrasts express warranty claims, wherein the focus is simply on whether the warranty's terms were breached. Thus, while both claims can arise from the same set of facts, they are governed by different legal standards and require different elements to be proven.

In this case, Plaintiff is not pursuing a breach of express warranty claim. The basis for Plaintiff's CFA claim is that Kolbe made misrepresentations of fact regarding the quality and specifications of the windows and doors sold to Plaintiff. Similar to the facts in New Mea Construction Corp., 203 N.J. Super. at 501-02,

[2] "False promise" is an untrue commitment or pledge, communicated to another person, to create the possibility that that other person will be misled. See New Jersey Model Civil Jury Charge 4.43. The terms "fraud," "false pretense," "false promise" and "misrepresentation" have traditionally been defined in this State as requiring an awareness by the maker of the statement of its inaccuracy accompanied by an intent to mislead. However, in Fenwick v. Kay Amer. Jeep, Inc., 72 N.J. 372, 377 (1977), the New Jersey Supreme Court noted that "the requirement that knowledge and intent be shown is limited to the concealment, suppression or omission of any material fact." See also, D'Ercole Sales, Inc. v. Fruehauf Corp., *supra* at 22 (App. Div. 1985). Therefore, the definitions provided for these four terms do not require either intent or knowledge.

Kolbe substituted the windows and doors that were advertised/represented as meeting certain specifications with products of inferior quality. Plaintiff was therefore misled and supplied entirely different windows and doors than Kolbe represented and sold to Plaintiff. As a result, Plaintiff should not be expected to abide by a warranty for a high-quality product that Plaintiff never received.

Kolbe's factual misrepresentations about the products that were delivered to Plaintiff were confirmed by multiple expert opinions and forensic testing, which were ignored by the trial court. Discovery revealed Kolbe does not "craft one window or door at a time" but rather uses an assembly line manufacturing process of the Kolbe windows and doors where there are between 700 to 900 employees on the manufacturing floor during this process. (Ja542).

Moreover, Kolbe falsely advertised it is actively involved in, and a member of, the WDMA, which is not an opinion or mere "puffery". (Ja415). Membership in the WDMA permits a window and door manufacturer to represent to consumers that their products are manufactured to a higher quality than other manufacturers. Said standard is identified as the Hallmark Certification for Kolbe's products and the WDMA Industry Standard for Wood Preservative Treatment. Hallmark Certification is considered a mark of excellence among architects, contractors, and other specifiers, and is accepted industry-wide. Additionally, Kolbe's WDMA

Industry Standard for Wood Preservative Treatment is an internationally recognized specification for the preservative treatment of exterior wood and wood cellulose composite millwork products that ensures the product is preserved to said specifications that will lead to a certain life expectancy. Each requirement listed in this standard must be met or exceeded. This standard is mandated by the IRC Section R 612.6[3]. However, forensic testing revealed Kolbe's products did not meet the above standards. These misrepresentations about being a member of the WDMA and products meeting heightened manufacturing standards deceive and mislead the average consumer. Plaintiff relied upon these factual representations and was induced to purchase the Kolbe products as a result. (Ja112-113).

Moreover, despite factual representations that Kolbe products' wood parts were preservative treated pursuant to Hallmark Certification, discovery revealed 40 of 41 window and door samples tested were undertreated with Woodlife 111 wood preservative, and the millwork did not comply with requirements for WDMA Hallmark Certification, WDMA I.S. 4, and AWPA P53 as represented by Kolbe. (Ja361-362). To further induce Plaintiff to purchase Kolbe products, the windows

[3] Section R612.6 of the International Residential Code 2009 states: "Exterior windows and sliding doors shall be tested by an *approved* independent laboratory, and bear a label identifying manufacturer, performance characteristics and *approved* inspection agency to indicate compliance with a AAMA/ WDMA/CSA 101/I.S.2/A440. Exterior side-hinged doors shall be tested and *labeled* as conforming to AAMA/WDMA/CSA 101/I.S.2/A440 or comply with Section R612.8." (Ja316).

holding water within them was concealed from Plaintiff as a feature of the product. (Ja088; Ja090).

Additionally, on October 2, 2014, Mr. Kazmiroski assured Dr. Corrato that the Kolbe products were re-designed, would be functional and defect-free in the shore environment, and were a high-quality product. Dr. Corrato trusted these representations. (Ja112-116). Based upon Mr. Kazmiroski's representations while acting on behalf of Kolbe, along with extensive due diligence consisting of online research and visiting the showroom, Dr. Corrato purchased the Kolbe products. (Ja082; Ja112-116).

Kolbe advertised that it "submits its windows and doors to independent organizations which test them to rigorous protocols". (Ja653). Kolbe also advertised its products as being "high end windows and doors" made with the "finest materials" and "crafted with attention to detail and thoughtful engineering". (Ja526). Kolbe also represents that its "products are rigorously tested to exceed industry standards for energy efficiency and performance" and it crafts "one window or door at a time, precisely to your specifications." (Ja526; Ja528; Ja653).

Such representations of fact made by Kolbe constituted more than mere "puffery" or statements of opinion as incorrectly described by the trial court in its Memorandum of Decision. (Ja826). Instead, these were affirmative

misrepresentations of fact made by Kolbe through advertisements to the public, which were relied upon by Plaintiff when purchasing the Kolbe products.

Dr. Corrato further testified that Kolbe represented it was selling him aluminum clad windows that were water-tight, and not windows that hold water. (Ja090). Despite the factual representation that Kolbe's windows were water-tight, discovery revealed the Kolbe windows were not watertight and not sealed, which was in violation of specifications, Kolbe engineering drawings, WDMA and Hallmark Certification, were not third-party tested. (Ja318-321). These blatant factual misrepresentations by Kolbe demonstrate there are issues of material fact regarding Plaintiff's CFA claim, and thus summary judgment was improper.

## POINT II: QUESTIONS OF FACT EXIST WHETHER KOLBE CONCEALED/OMITTED TO DISCLOSE PRODUCT DEFECTS TO PLAINTIFF (Ja824-829).

In this case, Kolbe defectively manufactured its products and then concealed the defect from Plaintiff. In Carboni v. Massino, the court determined that a contractor covering up a defect in workmanship by placing drywall over it was sufficient to sustain a claim for violations of the CFA and common law fraud.

The Appellate Division in Carboni v. Massimo stated:

> Substantively, defendant's argument is also without merit. The trial evidence clearly established that defendant improperly used metal connectors; he inserted nails that were not engaged in the wood; and he impermissibly cut prefabricated framing

> connectors. He committed building code violations, and, significantly, defendant attempted to deceive plaintiffs by covering up the improper work with sheetrock. Giving plaintiffs, as the prevailing parties, the benefit of all reasonable inferences, the verdict is supported by the evidence. See Johnson v. Salem Corp., 97 N.J. 78, 92 (1984) (following a jury verdict, the party opposing the motion for a new trial is afforded all reasonable inferences and if reasonable minds could differ, motion must be denied).

Carboni v. Massimo, No. A-2068-05T3, 2007 WL 247884, at *2 (N.J. Super. Ct. App. Div. Jan. 31, 2007) (unpublished decision, Ja848).

Here, Kolbe improperly manufactured its products and then covered the defects with outside components of the products. Kolbe knew the manner in which the products were manufactured and knowingly hid the defects from Plaintiff. The CFA must be "applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud." Lemelledo v. Beneficial Mgmt. Corp. of America, 150 N.J. 255, 264, 696 A.2d 546, 551 (1997). Courts will "interpret the Consumer Fraud Act to encompass the acts of remote suppliers, including suppliers of component parts, whose products are passed on to a buyer and whose representations are made to or intended to be conveyed to the buyer." Perth Amboy Iron Works v. Am. Home, 226 N.J. Super. 200, 211 (App. Div. 1988). Therefore, the CFA applies to Kolbe, and any misrepresentations made by Kolbe, as a manufacturer of the windows and doors purchased by Plaintiff.

In a comparable case, Romond v. Valiant Home Remodelers, homeowners looked at newspapers and magazine advertisements and requested brochures for a specific quality and size window. No. A-5140-05T1, 2007 WL 2362853 (N.J. Super. Ct. App. Div. Aug. 21, 2007) (unpublished decision, Ja848). Similar to Plaintiff in this case, the homeowners relied upon factual representations by the window company and believed they were receiving the window as depicted in the brochure. Id. After the window was installed the homeowners complained they did not receive the window they ordered. Id. The court found there was a genuine issue as to whether the defendants represented to the plaintiffs that they could have the window as pictured in the brochure. Id.

Plaintiff relied upon factual misrepresentations and advertisements by Kolbe that the windows and doors being purchased from Kolbe were WDMA Hallmark Certified as they were advertised. (Ja112-113). Expert analyses and forensic testing of Plaintiff's Kolbe windows and doors revealed that the wood preservative and millwork of these products did not comply with the heightened specifications and requirements for WDMA Hallmark Certification. (Ja472-473). These false misrepresentations and advertisements regarding WDMA Hallmark Certification induced Plaintiff to purchase the Kolbe products. Plaintiff was misled to believe that Hallmark Certified products were purchased, but the windows and doors

delivered to the shore property did not meet the required specifications. Plaintiff has suffered an ascertainable loss as a result of these misrepresentations as the windows and doors purchased from Kolbe have been substantially impaired and rendered useless for their intended purpose in a shore environment.

In addition to Kolbe's factual misrepresentations about its products meeting WDMA Hallmark Certification standards, Dr. Corrato testified that the Kolbe windows holding water was not represented to him as a feature of the windows prior to Plaintiff's purchase. (Ja088). Mr. Kazmirowski of NAWD, who was acting on behalf of Kolbe, assured Dr. Corrato that Kolbe products were redesigned, would be functional and defect-free in the shore environment, and were a quality product.

Dr. Corrato relied upon the factual misrepresentations by Mr. Kazmirowski that the Kolbe products would be of high quality. (Ja112-113). Dr. Corrato was also falsely led to believe that Kolbe was a large and reputable window and door manufacturer. (Ja112-113). Based upon these misrepresentations made by Kolbe, Dr. Corrato made the decision to purchase the Kolbe products. (Ja112-113). Such factual representations by Kolbe were subsequently proven to be false.

The trial court references the case Palmucci v. Brunswick Corp., 311 NJ. Super. 607 (App. Div 1998) as being "instructive" to support its determination that Plaintiff's CFA claim should be dismissed due there being nothing about the Kolbe

warranty, or the manner in which Kolbe attempted to pursue the contractual right to repair and replace the products, that amounts to an unconscionable practice. (Ja806). However, the trial court erred in relying on Palmucci as the facts from that case are readily distinguishable from the facts in this case. In Palmucci, the plaintiff was not provided with an entirely different product than what he was misled to believe he had purchased. Instead, the plaintiff in Palmucci received the type of boat engine he intended to purchase, but it was defective. Due to the plaintiff in Palmucci not affording the defendant the opportunity to repair the engine as per the warranty, the CFA claim was dismissed as there was no misrepresentation by the defendant.

Moreover, the plaintiff in Palmucci did not have multiple expert reports or objective findings to support his CFA claim and establish an issue of material fact. Here, Plaintiff has several expert reports, forensic testing, and objective findings to demonstrate Kolbe made factual misrepresentations about its products in violation of the CFA. The trial court did not appropriately consider these expert findings in its decision, despite such experts clearly demonstrating an issue of material fact exists regarding the CFA claim.

Further, the plaintiff in Palmucci alleged the warranty itself violated the CFA, which Plaintiff is not alleging in this matter. Instead, Plaintiff has set forth that Kolbe made factual misrepresentations about the quality, specifications, and

standards of the products it sold to Plaintiff, which is confirmed by multiple expert findings, and that such factual misrepresentations violated the CFA.

Here, unlike in Palmucci, Plaintiff did not receive the Kolbe products it intended to purchase, and the actual products provided did not meet the specifications and WDMA Hallmark Certification requirements as represented and advertised. Instead, Kolbe provided Plaintiff with an entirely different, subpar product. Plaintiff should not be obligated or expected to abide by a warranty for WDMA Hallmark Certified doors and windows when those are not the products Kolbe sold to Plaintiff. If Kolbe were to repair or replace Plaintiff's doors and windows with the exact same inferior product previously provided, Plaintiff would still be left with the subpar products that do not meet the specifications of the windows and doors Plaintiff was factually misled to believe were being purchased. This resulted in value of the windows and doors being substantially impaired by nonconformity to the specifications that were represented at the time of purchase. This is due to the Kolbe products that were delivered to Plaintiff not being of the same standards as the products Plaintiff had purchased.

There is a genuine issue of material fact regarding whether the products that Plaintiff purchased were the ones delivered to the shore property, and thus whether Plaintiff agreed to the terms of the express limited warranty. Plaintiff was not misled

by disputable opinion or "puffery" in advertisements by Kolbe, but instead was misled by false factual representations made by Kolbe. Plaintiff was misled by Kolbe that the express limited warranty was for windows being built per Plaintiff's specifications that met WDMA Hallmark Certification requirements.

Kolbe's act of providing Plaintiff with an entirely different product than what was represented prior to the sale constitutes a violation of the CFA. This is similar to the facts in New Mea Construction Corp., 203 N.J. Super. at 501-02, wherein a contractor violated the CFA when they sold lumber to a homeowner that was of inferior quality compared to the lumber provided in the building specifications. "[S]ubstitution of inferior [products] 'represented a deceptive, unconscionable and fraudulent practice' in violation of N.J.S.A. 56:8-2." Id. at 498. The facts in both cases are analogous, which demonstrates there is an issue of fact regarding whether Kolbe violated the CFA. Therefore, the trial court's granting of summary judgment should be reversed pertaining to Plaintiff's claim under the CFA.

## POINT III: THE TRIAL COURT IMPROPERLY DISMISSED PLAINTIFF'S COMMOM LAW FRAUD CLAIM AGAINST KOLBE (Ja829-830).

In New Jersey, the elements of common-law fraud are: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable

reliance thereon by the other person; and (5) resulting damages. Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624-25, 432 A.2d 521 (1981). In addition to material facts supporting Plaintiff's claim under the CFA, material facts further demonstrate Kolbe knew about the misrepresentations made to Plaintiff.

As stated above, a contractor covering up a defect is sufficient to sustain a CFA claim. See Carboni, at *2. As set forth in detail above under Point I, there is an issue of material fact regarding whether Kolbe made misrepresentations about the specifications and certification of the Kolbe windows and doors. Plaintiff's experts provided objective opinions that the Kolbe products did not meet the specifications as factually misrepresented by Kolbe that the products would withstand the shore environment. Kolbe further misrepresented that the products were WDMA Halmark Certified as expert testing revealed that the Kolbe products sold to Plaintiff did not meet WDMA I.S. 4 retention and penetration specifications. The millwork did not comply with the requirements for WDMA Hallmark Certification, WDMA I.S. 4, and AWPA P53. (Ja361-362).

Plaintiff also relied upon misrepresentations made by Mr. Kazmirowski from NAWD, acting on behalf of Kolbe, that the Kolbe products met specifications that would enable them to withstand the shore environment. (Ja112-113). This resulted

in Plaintiff sustaining damages as the Kolbe products have been rendered useless for which they were intended to be purchased.

Regarding the additional element of common law fraud that Kolbe knew about misrepresentations made to Plaintiff at the time of sale, Kolbe misrepresented it was a member of WDMA, Hallmark Certified, and that the company submitted products to third parties for testing. Kolbe therefore misrepresented that the products met or exceeded standards to meet WDMA Hallmark Certification. These misrepresentations were made on Kolbe's website.

Kolbe knew it made misrepresentations to consumers as the company never tested products regularly, and there was no quality control. Given that the Kolbe products did not meet WDMA Hallmark Certification, Kolbe knew the quality of the products it built and that they did not meet specific standards as advertised. Kolbe was also the last set of eyes on the products' latent defects before covering them up, demonstrating the company knew it was deceiving customers such as Plaintiff. See Carboni, 2007 WL 247884, at *2 (wherein the defendant attempted to deceive plaintiffs by covering up the improper work with sheetrock).

Dr. Corrato testified he relied on research and Kolbe's website. Keith Koenig, Kolbe's Vice President of Manufacturing and Corporate Designee, testified that

Kolbe knowingly does not document any manufacturing defects, nor does Kolbe maintain documentation if a product is found not to meet the specifications:

> Q. So if you found a product did not meet the specifications, nothing would be documented in writing by Kolbe?
> A. No. You would just go and cover it with the individual.
> Q. Okay. So there's no record that I could ever request from Kolbe to show that a product was not made pursuant to the manufactured specifications, the document does not exist; that's your testimony?
> A. That's correct.

(Ja694).

By not documenting any manufacturing defects, this establishes an issue of material fact where a jury could infer Kolbe knew it was making misrepresentations on its website and to Plaintiff about the Kolbe products meeting certain specifications and being high-quality products.

Further, Kolbe advertises and misrepresents that its "products are rigorously tested to exceed industry standards for energy efficiency and performance" and that it "submits its windows and doors to independent organizations which test them to rigorous protocols." (Ja526; Ja653). Despite the representations regarding the Kolbe products sold to Plaintiff, Kolbe testified that the tested products are prototypes. Ja601; Ja613). None of Plaintiff's windows and doors were tested by Kolbe, and therefore, no actual products sold to consumers are tested.

## POINT IV: THE TRIAL COURT IMPROPERLY DISMISSED PLAINTIFF'S CLAIM FOR BREACH OF IMPLIED WARRANTIES DESPITE THE EXPRESS LIMITED WARRANTY (Ja802-815).

The trial court improperly granted Kolbe's motion for summary judgment as to the claim of breach of implied warranties after determining the parties agreed to exclusive remedies by way of the express warranties. (Ja815). Additionally, the trial court erred when it determined that Plaintiff could not demonstrate that the exclusive remedy failed in its essential purpose because Plaintiff denied Kolbe the right to repair or replace the products. (Ja815).

The Uniform Commercial Code explicitly provides a purchaser of goods with two statutory remedies: (1) a right to reject the goods upon an improper delivery under N.J.S.A. 12A:2-601 (sometimes referred to as "the perfect tender rule"), and (2) a right to revoke acceptance in whole or in part under N.J.S.A. 12A:2-608. The right to revoke acceptance arises only after the purchaser has accepted the goods and when the value of the goods has been substantially impaired by nonconformity. N.J.S.A. 12A:2-608(1); see Herbstman v. Eastman Kodak Co., 68 N.J. 1, 9 (1975). If acceptance of goods occurred without discovery of the nonconformity, such acceptance must have been reasonably induced by either: (1) the difficulty of discovery before acceptance, or (2) the seller's assurances. N.J.S.A. 12A:2-608(1)(b). If acceptance of the goods

occurred with knowledge of the nonconformity, it must have been based upon the reasonable assumption that the nonconformity would be cured but it has not been seasonably cured. N.J.S.A. 12A:2-608(1)(a).

Pursuant to N.J.S.A. 12A:2-608(2), the buyer must revoke the acceptance within a reasonable time after he has or should have discovered the defect, and before there is any substantial change in the condition of the goods not caused by the defect. Once a buyer accepts goods, he has the burden to prove any defect thereafter. N.J.S.A. 12A:2-607(4). "Should the seller fail to cure the defects, whether substantial or not, the balance shifts again in favor of the buyer, who has the right to cancel or seek damages." Ramirez v. Autosport, 88 N.J. 277, 290 (1982).

When a case, such as this one, involves the rejection of goods after acceptance pursuant to N.J.S.A. 12A:2-608, the seller's right to cure is limited to trivial defects. Ramirez, 88 N.J. at 286. "The requirement that there must be substantial impairment of value before the buyer may revoke acceptance precludes revocation for trivial defects or defects which may be easily corrected." Herbstman, 68 N.J. at 9. "Whether there has been a substantial impairment is based upon an objective factual evaluation rather than upon a subjective test of whether the buyer believed the value was substantially impaired." Id. (citations omitted).

"[I]f circumstances cause the limited warranty to fail in its essential purpose or operate to deprive a buyer of the substantial value of the bargain, the limitation of warranty clause may not be invoked. In that event, a buyer . . . may seek remedy under the provisions of the UCC. [N.J. Stat. 12A:2-719], UCC Comment 1. One of those remedies is the right of a buyer to revoke acceptance of the goods or property. N.J.S.A. 12A:2-608(1)." G.M.A.C. v. Jankowitz, 216 N.J. Super. 313, 329 (App. Div. 1987).

> From the viewpoint of the buyer, the purpose of the exclusive remedy is to provide goods that conform to the contract within a reasonable time after a defective part is discovered. Accord Riley v. Ford Motor Company.,442 F.2d 670, 671 (5th Cir. 1971). In other words, the exclusive remedy of repair and replacement of defective parts fails of its essential purpose if, after numerous attempts to repair, the car did not operate as a new car should free of defects.

Id.

"Under the UCC when the seller is either unwilling or unable to conform the goods to the contract, the remedy by way of the limited warranty does not suffice." Id. at 330. "[I]f the non-conformity either substantially impaired the value of the [goods], N.J.S.A. 12A:2-608, or circumstances caused the limited remedy of repair or replacement of parts to fail of its essential purpose, N.J.S.A. 12A:2-719(2), [the buyer] could sue for a breach of warranty or revoke acceptance of the [goods]." Id. at 331.

"Even if a buyer fails to prove damages by way of the loss of value of the [goods] under a breach of warranty, he nevertheless, has a cause of action against [the seller] for revocation of acceptance. However, [the buyer] must demonstrate that the nonconformity substantially impairs the value of the [goods] and that he has complied with the requirements of N.J.S.A. 12A:2-608 and the Magnuson-Moss Act." Id. at 333. "The buyer, upon compliance with the conditions of that section of the UCC and the Magnuson-Moss Act, not only has the option to revoke acceptance and claim a refund of the purchase price, N.J.S.A. 12A:2-711(1); 15 U.S.C.A. § 2304(a)(4), but also for incidental damages, N.J.S.A. 12A:2-714." Id.

Under N.J. Stat. 12A:2-719, if circumstances cause the limited warranty to fail in its essential purpose or operate to deprive a buyer of the substantial value of the bargain, the limitation of warranty clause may not be invoked. In that event, a buyer may seek remedy under the provisions of the UCC. This includes the right of a buyer to revoke acceptance of goods or property under N.J.S.A. 12A:2-608(1).

The trial court improperly accepted Kolbe's argument that Plaintiff is bound by the terms of the express limited warranty when experts provided objective findings that the value of the goods has been substantially impaired. The Kolbe products sold to Plaintiff do not merely contain trivial defects. Instead, as provided by Plaintiff's experts and set forth in detail above under Point I, the windows and

doors do not have the required specifications, as they were previously represented to have, to be functional and defect-free in the shore environment. These material facts support Plaintiff's right to revoke the products under N.J.S.A. 12A:2-608(1) as the value of the Kolbe products has been substantially impaired.

There also remains a question of fact regarding whether the products provided to Plaintiff failed in their essential purpose or deprived Plaintiff of the substantial value of the bargain. Specifically, Kolbe sold Plaintiff windows that were not WDMA Halmark Certified as represented. The products provided to Plaintiff were a different product than what Plaintiff thought was being purchased. The warranty Plaintiff agreed to was for WDMA Hallmark Certified products. Plaintiff should not be required to abide by a warranty for WDMA Hallmark Certified windows when Kolbe never sold those windows to Plaintiff in the first place.

Based on material facts at issue in this case and inferences that can be drawn from them, the express limited warranty failed in its essential purpose as the Kolbe products were never of the quality and standards that Plaintiff had purchased. Such facts allowed Plaintiff to revoke acceptance of the products under N.J.S.A. 12A:2-608(1), and Plaintiff may seek remedies under the UCC such as breach of implied warranties of merchantability and fitness. Plaintiff has a viable claim that the subject warranty should not have been invoked. Given there are issues of material fact that

require an answer by a jury, the trial court erred in granting Kolbe's motion for summary judgment as to the claim of breach of implied warranties.

**POINT V: THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S NEGLIGENCE CLAIM AGAINST KOLBE (Ja815-819).**

The trial court's determination that Plaintiff's negligence claim for economic loss is barred is disproven by case law. Courts have concluded that the recovery of consequential economic damages under a tort claim is permitted. See e.g., Spring Motors Distributors v. Ford Motor Co., 191 N.J. Super. 22, 25 (App. Div. 1983). This is especially applicable since the decision of the New Jersey Supreme Court in H. Rosenblum, Inc., Etc. v. Adler, 93 N.J. 324, 340 (1983), in which the court provided that "[d]amages for products liability have not been limited to physical injury. Recovery for economic loss has also been permitted."

In Santor v. A M Karagheusian, Inc., 44 N.J. 52 (1965), the plaintiff sued a carpet manufacturer and its distributor, claiming that the carpeting was defective. As damages, the plaintiff sought recovery of its cost. The trial judge awarded judgment for plaintiff against both the manufacturer and the distributor. In the court's view, there was no reason to distinguish between personal injury recovery under a strict tort liability theory and a recovery for loss of benefit of the bargain

through a worthless product. Id. at 60. The court did not limit tort liability to cases where a plaintiff suffered both personal injury and economic loss, and reasoned that:

> [f]rom the standpoint of principle we perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer where the defectively-made product has caused personal injury, and not actionable when inadequate manufacture has put a worthless article in the hands of an innocent purchaser who has paid the required price for it.

Id.

Despite the trial court criticizing the Santor case due to its age, since that decision there has been "a line of New Jersey cases pointing to the expansion of the field of strict liability and, therefore, has no difficulty finding that Santor would be applied by our Supreme Court as encompassing a commercial loss." Monsanto v. Alden Leeds, 130 N.J. Super. 245, 259 (Law Div. 1974). Plaintiff therefore has a viable negligence claim for economic loss, and it was improper for the trial court to grant summary judgment regarding Plaintiff's negligence claim.

**POINT VI: THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S BREACH OF CONTRACT CLAIM (Ja819-821, Ja830-831).**

The trial court determined that Plaintiff's claim for breach of contract is barred because the parties agreed to an exclusive remedy by way of an express limited warranty. (Ja821). Such a decision was improper based on the facts presented herein. When a court is presented with a claim for breach of an express

contractual obligation, nothing prevents the court from granting an adequate remedy under state law for breach of contract, including rescission when appropriate. Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 65-66 (App. Div. 1981). Case law provides that there is privity of contract between a purchaser of goods and the manufacturer of those goods, even when the goods are not purchased directly from the manufacturer:

> When a manufacturer [such as Kolbe] gives a warranty to induce the sale, it is consistent to allow the same type of remedy as against that manufacturer . . . Only the privity concept, which is frequently viewed as a relic these days, Koperski v. Husker Dodge, Inc., 208 Neb. 29, 45, 302 N.W.2d 655, 664 (Sup.Ct. 1981); see Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (Sup.Ct. 1979), has interfered with a rescission-type remedy against the manufacturer of goods not purchased directly from the manufacturer. If we focus on the fact that the warranty creates a direct contractual obligation to the buyer, the reason for allowing the same remedy that is available against a direct seller becomes clear.

Ventura, 180 N.J. Super. at 65-66. Case law therefore provides Plaintiff has a viable breach of contract claim against Kolbe, in addition to a claim for breach of implied warranties. As provided by the court in Ventura, the express limited warranty created a contractual obligation by Kolbe to Plaintiff that provides the same breach of contract remedy that would be available against a direct seller.

Although Kolbe may have intended to limit Plaintiff's remedy to the repair and replacement of defective parts, such remedy fails its essential purpose

under N.J.S.A. 12A:2-719(2). There remains a question of fact regarding whether the windows provided to Plaintiff by Kolbe failed in their essential purpose or deprived Plaintiff of the substantial value of the bargain because Kolbe did not build the windows per Plaintiff's specifications. Additionally, the warranty that Kolbe is attempting to enforce is for a product Plaintiff never received. Such facts allow Plaintiff to revoke acceptance of the windows under N.J.S.A. 12A:2-608(1).

A provided under Point VII below, Plaintiff provided Kolbe with an opportunity to repair or replace the products. However, replacing or repairing Plaintiff's windows would not remedy the fact Kolbe provided entirely different products than were intended to be purchased by Plaintiff. The trial court erred in finding that it is "nonsense" that Plaintiff received entirely different windows than were ordered. (Ja820). Instead, the trial court unreasonably concluded if these were different windows than ordered, Plaintiff should have noticed this upon delivery and rejected the windows. However, the differences between the windows ordered by Plaintiff and those provided by Kolbe are not readily apparent to customers, such as Dr. Corrato, without expertise in this field. Plaintiff was required to hire an expert to conduct an autopsy of the Kolbe products to determine that the products were different than those represented to Plaintiff prior to sale. Despite representations that Kolbe products were preservative treated pursuant to Hallmark Certification,

discovery revealed 40 of 41 window and door samples tested were undertreated with Woodlife 111 wood preservative and millwork and did not comply with requirements for WDMA Hallmark Certification, WDMA I.S. 4, and AWPA P53. (Ja361-362). These were not solely defective products as improperly concluded by the trial court (Ja821), but were also completely different products than those represented as being sold to Plaintiff. Plaintiff has a valid breach of contract claim, and the trial court erred in granting summary judgment.

**POINT VII: QUESTIONS OF FACT EXIST WHETHER PLAINTIFF PROVIDED KOLBE WITH AN OPPORTUNITY TO REPAIR OR REPLACE THE DEFECTIVE WINDOWS AND DOORS (Ja806-815).**

The trial court determined that Plaintiff did not provide Kolbe with an opportunity to repair or replace the defective products, and therefore Plaintiff is not entitled to recovery. (Ja815). However, a question of fact remains as to whether Plaintiff afforded Kolbe an opportunity to repair or replace the defective products.

As set forth above, "[u]nder the UCC when the seller is either unwilling or unable to conform the goods to the contract, the remedy by way of the limited warranty does not suffice." G.M.A.C., 216 N.J. Super. at 330. "[I]f the non-conformity either substantially impaired the value of the [goods], N.J.S.A. 12A:2-608, or circumstances caused the limited remedy of repair or replacement of parts to fail of its essential purpose, N.J.S.A. 12A:2-719(2), [the buyer] could sue for a

breach of warranty or revoke acceptance of the [goods]." Id. at 331. Even if "a repair-or-replace provision applie[d] to the dispute, whether the warranty failed [in] its essential purpose [was] a question of fact." Maruka U.S., Inc. v. Specialty Lighting Indus., No. A- 2220-17T4, at *27-28 (App. Div. Nov. 4, 2019).

Under N.J.S.A. 12A:2-719(2), Plaintiff is entitled to relief under N.J.S.A 12A:2-608 as circumstances caused the limited remedy in the express limited warranty "to fail of its essential purpose." This has been demonstrated by material facts set forth above under Point III. "Although the U.C.C. does not explicitly require a buyer of a defective product to allow a seller to 'cure' the defect in a product after the buyer has accepted it, the warranty in this case, which is permitted under the U.C.C., gave the manufacturer the right to repair or replace at its option." Palmucci, 311 N.J. Super. at 612-13.

Here, facts demonstrate that Plaintiff provided Kolbe with the opportunity to repair or replace the defective products. Mr. D'Angelo testified Plaintiff provided Kolbe with the option to repair or replace the products, or refund their price. (Ja149-150). Dr. Corrato also testified that Plaintiff provided Kolbe an opportunity to replace and remedy the issues, but the issues with the water persisted. (Ja77).

The trial court erroneously found that Plaintiff decided to remove the windows and doors in August 2016, before Mr. Dev conducted his site inspections and

evaluations of the products. (Ja811). Such an error by the trial court is especially concerning considering the trial court judge stated during oral argument "the timeline and the facts that establish the timeline of the general contractor's decision, or the property owner's decision, to remove and replace all the windows is of importance." (T70-1). As explained in a sur reply letter to the trial court dated March 20, 2024, Plaintiff's counsel clarified that the one-page signed proposal drafted by O.C.F. Construction, LLC, dated August 16, 2016, was not submitted to O.C.F. and signed by Mr. D'Angelo until December 2, 2016 via email. (Ja788-791). A copy of that email was attached to the sur reply letter. (Ja790). Plaintiff's counsel also addressed this during oral argument where she stated the letter was drafted by O.C.F on August 16, 2016, but not signed by Mr. D'Angelo on that date, which presented a question of fact. (T68-4). Despite such clarification provided to the trial court, the Memorandum of Decision makes no reference to the sur reply letter.

Even if the December 2, 2016 email is ignored by the trial court, it illustrates that the trial court did not provide Plaintiff every reasonable inference that the document was not signed by Mr. D'Angelo on August 16, 2016, as required under a summary judgment review. There is a question of fact regarding whether the signed proposal was sent to O.C.F. after Mr. Dev conducted his property inspections on

August 17, 2016, October 12, 2016, and December 1, 2016 (Ja291), making summary judgment improper.

The trial court noted that George Digman, Kolbe's former Director of Research and Development, testified that Plaintiff erroneously assumed that "there was a problem with the window" and that "[t]here really was not a problem because even though incidental water may have found its way into the cladding, it would have been contained inside of an actual aluminum self-contained channel meaning the back side of the channel is sealed such that incidental water could not contact the wood portion of the window." (Ja800). However, the trial court ignored Mr. Digman's testimony that he advises against field testing because they cannot simulate the same situations. (Ja630). Mr. Digman testified he would have only completed a visual inspection:

> **Q.** Had you received the seven sashes, what would you have done?
> **A.** I would have done a visual inspection to see if my suspicions from the videos were accurate, that there was some -- a void in one of the joints that was allowing water to get in on the exterior cladding.
> **Q.** If there were a void in the joint, would that be considered a defect?
> **A.** Yeah. It's intended to be sealed, yes.
> **Q.** And would you have completed any testing of the sashes?
> **A.** No, because as I explained, it's not desirable to have the water get in and then get out of that area, but it does not affect the function or the weatherability of that window.

(Ja644-645).

As supported by Mr. Digman's testimony, the only way for the Kolbe products to have been tested was for them to be removed, which was done by Plaintiff. Additionally, Mr. Digman is not an expert who is qualified to render an expert opinion. Comparatively, Plaintiff hired multiple experts to inspect the Kolbe products who identified problems with the products, as set forth in detail above.

Material facts demonstrate Kolbe's warranty failed in its essential purpose because Kolbe was allowed the opportunity to repair or replace the windows and doors, but the products were never provided to Plaintiff in a condition free of defects. See N.J.S.A. 12A:2-719(2); G.M.A.C., 216 N.J. Super. at 329. These facts demonstrate granting summary judgment was improper.

## CONCLUSION

The trial court erred in granting summary judgment, and this Court should reverse that decision to allow a jury to determine the questions of material facts.

**TRIMBLE & REGISTER**
Attorneys for Plaintiff/Appellant

By:_____
KATRINA M. REGISTER, ESQ.

Dated: October 7, 2024

| | | |
|---|---|---|
| SHORE STAR PROPERTIES, LLC | : | SUPERIOR COURT OF NEW JERSEY |
| | : | APPELLATE DIVISION |
| *Plaintiff/Appellant,* | : | DOCKET NO.: A-003434-23 |
| | : | |
| | : | **ON APPEAL FROM: MAY 31,** |
| | : | **2024 ORDER** |
| v. | : | |
| | : | |
| | : | SUPERIOR COURT OF NEW JERSEY |
| KOLBE & KOLBE MILLWORK CO. | : | LAW DIVISION CAPE MAYCOUNTY |
| INC., NORTH AMERICAN WINDOW | : | DOCKET NO.: CPM-L-125-20 |
| & DOOR CO., INC., JOHN DOE(S) | : | SAT BELOW: |
| 1-10, ABC CORPORATION(S) #1-10, | : | Hon. James H. Pickering Jr., J.S.C. |
| and XYZ PARTNERSHIP(S)#1-10, | : | |
| (fictitiously named Defendants) | : | |
| | : | |
| *Defendants/Respondents.* | : | |
| _____ | : | |

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# BRIEF OF DEFENDANT-RESPONDENT KOLBE & KOLBE MILLWORK CO., INC.

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By: *Francis X. Donnelly, Esquire*

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## PRELIMINARY STATEMENT

Plaintiff has appealed an Order entered by the Superior Court of New Jersey, Law Division, Cape May County, granting summary judgment as to all claims against defendant, Kolbe & Kolbe Millwork, Inc. (Kolbe).

In 2015, Kolbe manufactured approximately seventy-eight custom-made aluminum clad windows and doors which were ultimately installed in plaintiff's home. The products were sold subject to a ten-year express limited warranty which provided that in the event of a defect covered by the warranty, Kolbe had the option to repair or replace any window or door or to refund the price received by Kolbe. In conformance with New Jersey law, the warranty conspicuously stated that the remedies provided were exclusive and in lieu of all other warranties, express or implied. The trial court properly dismissed plaintiff's claim for breach of implied warranties of merchantability and fitness because the remedy provided by the Kolbe express warranty was plaintiff's sole remedy.

Approximately twelve months after installation, plaintiff removed all the Kolbe windows and doors and replaced them with Andersen products. When the decision to remove was made in August of 2016, without notice to Kolbe, the only complaints plaintiff had with the Kolbe products were with respect to the exterior aluminum cladding on seven window sash, which Kolbe replaced free of charge, retractable screens that Kolbe repaired free of charge, and three French doors which

the distributor offered to replace free of charge. The abrupt removal of the windows and doors was an obvious violation of the terms of the warranty in that it denied Kolbe the opportunity to fulfill its warranty by repairing or replacing any product determined to be defective.

Plaintiff's breach of contract claim was properly dismissed because the only contract that can be said to have been entered into between plaintiff and Kolbe was the express limited warranty which contained remedies which plaintiff failed to pursue. The dismissal of the negligence claim was consistent with well-established New Jersey law which provides that the New Jersey Uniform Commercial Code is the comprehensive statutory scheme to be used in connection with contracts for the sale of goods. The lack of unconscionable or material misrepresentations of fact on the part of Kolbe and the absence of a causal connection between Kolbe's alleged misrepresentations and plaintiff's alleged economic loss properly resulted in the dismissal of plaintiff's consumer fraud and common law fraud claims. It is submitted that the trial court's dismissal of all of plaintiff's claims should be affirmed because the rulings are factually supported by the evidential record and in complete conformance with New Jersey law.

## PROCEDURAL HISTORY

On April 14, 2020, Plaintiff filed a complaint against Kolbe & Kolbe Millwork Company, Inc., ("Kolbe") and North American Window & Door Company, Inc. ("NAWD") (Ja001). The causes of action asserted against Kolbe and NAWD consist of consumer fraud, common law fraud, breach of implied warranty, breach of contract, negligent misrepresentation and negligence (Ja013). Kolbe filed an answer to the complaint on June 1, 2020 (Ja029). Plaintiff settled its claims against NAWD for consumer fraud, common law fraud, negligence and negligent misrepresentation and dismissed NAWD from the case with prejudice on October 20, 2020 (Ja276).

On December 21, 2023, Kolbe filed a motion for summary judgment with respect to all counts of the complaint. On February 6, 2024, plaintiff filed an opposition brief. On February 9, 2024, Kolbe filed a reply brief and on February 29, 2024, plaintiff filed a sur- reply. Oral argument of the motion was conducted on March 19, 2024. On May 31, 2024, the trial court entered an order granting Kolbe's motion and dismissing all of plaintiff's claims with prejudice (Ja792). This appeal followed.

## COUNTER STATEMENT OF FACTS

This lawsuit arises out of the 2015 sale of custom-made aluminum clad windows and doors designed and manufactured by defendant, Kolbe & Kolbe Millwork Company, Inc. ("Kolbe"). (Ja001-028). Kolbe sold the windows and doors to defendant, North American Window & Door Co., Inc. ("NAWD") (Ja045-064) which in turn sold the Kolbe products to Correlation Real Estate Venture, LLC ("CREV"). (Ja404-405). CREV is a property management company, and its sole member is Robert Corrato ("Corrato"). Its business purpose is to manage multiple residential properties under Corrato's control. (Ja069 p.12). CREV is not a party to this case despite the fact that it is the company which purchased the Kolbe products. (Ja001-028). NAWD is an independent wholesale window and door distribution company which sells windows and doors manufactured by multiple manufacturers including Kolbe. (Ja274-275).

The Kolbe windows and doors were installed in a bayfront home under construction located at 315 74th Street, Avalon, New Jersey (the "Project"). (Ja006). At all relevant times, the bayfront home was owned by plaintiff, Shore Star Properties, LLC., ("Shore Star"). (Ja110). Corrato is the sole member of CREV and Shore Star. (Ja110). Christopher D'Angelo ("D'Angelo") acted as the owner's representative on the Project. (Ja074 p.33).

James Card is the owner of Stonewood Builders ("Stonewood"). (Ja203 p.20). Stonewood entered into a written contract with CREV to frame plaintiff's house and install the windows and doors. (Ja204 p.24-25). The Kolbe windows and doors were installed in plaintiff's house in or around November of 2015. (Ja006). During November and December of 2015 and the entire year of 2016, there was no heating or air conditioning system in plaintiff's house. (Ja139 p.60). As per Corrato's instructions, the windows and doors were ordered unprimed meaning that the interior of the windows and doors, which was wood and not clad in aluminum, was not protected by paint. (Ja085 p.74-75).

Leonard Kazmiroski is a sales manager for NAWD. (Ja163 p.10). Sometime after the windows were installed, Corrato called Mr. Kazmiroski and told him that certain windows had been left open for a long period of time resulting in the unprimed interior wood getting wet. Corrato requested Mr. Kazmiroski to come out to the site to determine if any of the window sash needed to be replaced. (Ja190 p.119). Mr. Kazmiroski determined that there was no damage to the sash and that the sash in question did not need to be replaced. (Ja190-191 p.120-121).

In approximately June of 2016, a painting contractor began priming the interior wood of the windows including the sash. (Ja211 p.53). During the process of priming the interior of the windows, the painter removed a sash and while tilting it, observed what he thought was water leaking out of the exterior aluminum

cladding of the window sash. (Ja212 p.55). Mr. Card took videos of this condition on July 7, 2016 and July 20, 2016. (Ja211 p.51-52). The videos depict drops of water on the exterior aluminum cladding of a window sash but does not depict the source of the water or path of the water before the drops formed. (Ja229). Mr. Card sent the videos to D'Angelo who was managing the project. (Ja213 p.58). NAWD was advised that the condition identified in the videos allegedly involved seven window sash.[1] (Ja231-234).

In response to the reported issues involving the seven window sash, Kolbe manufactured seven new window sash which NAWD ultimately delivered to the job site. (Ja077 p.44, Ja090 p.94, Ja151 p.106 and Ja219 p.82-83). Plaintiff chose not to install most of the new replacement sash because Corrato made the decision to replace all of the windows with Andersen windows. (Ja219 p.83). Shore Star also identified three (3) aluminum clad French doors which appeared to have some separation in the seams of the aluminum cladding. (Ja145 p.82). NAWD offered to provide CREV with three new French doors but Corrato rejected that offer (Ja150 p.102). Kolbe was never given an opportunity to repair or replace the three French doors or any of the windows in the house with the exception of the seven sash which were replaced with new ones. (Ja150 p.102-103). The only issues Shore Star identified with the Kolbe windows and doors prior to their removal involved the

[1] The plural of a window sash is either sash or sashes. This Brief uses sash as both the singular and plural.

seven sash which Kolbe replaced, retractable interior screens which were repaired and three aluminum clad French doors which NAWD offered to replace. (Ja150 p.103). During the time the Kolbe windows and doors were installed in Shore Star's house, neither the builder, Corrato, nor D'Angelo ever observed or became aware of water infiltrating through the windows or doors and into the interior of the house. (Ja147 p.91-92, Ja219 p.84 and Ja078-079 p.48-51).

The Kolbe custom-made aluminum clad windows and doors were sold subject to Kolbe's Express Limited Warranty for Window and Door Products which warranted that the products shall be free from defects in material and workmanship for a period of ten years from the date of shipment. In the event of a defect covered by the warranty, Kolbe had the option to repair or replace any window or door or to refund the price received by Kolbe. The express limited warranty conspicuously stated that it was in lieu of all other warranties, express or implied. (Ja235-237). During his online search to determine which manufacturer's doors and windows to purchase, Corrato looked at the warranties applicable to Kolbe products. (Ja085 p.76). D'Angelo testified that Corrato engaged in extensive due diligence before a decision was made as to which windows and doors to buy and he believed Corrato's due diligence included comparing the warranties for Andersen Windows (a competitive manufacturer of windows and doors) and Kolbe windows and doors. (Ja137 p.49-50).

After receiving information from the painter showing what he believed to be exterior aluminum cladding on certain window sash retaining water, and after observing some movement in the exterior aluminum cladding of three French doors, Corrato made the decision to remove all of the installed Kolbe windows and doors from Shore Star's house. (Ja076-077 p.41-42). D'Angelo is unaware of any warranty claims made on behalf of Shore Star with the possible exception of the seven sash which were replaced, retractable screens that had been repaired and the three aluminum clad French doors on the third floor which NAWD offered to replace. (Ja150 p.103-104). D'Angelo and Corrato had no interest in providing Kolbe with the opportunity to repair or replace any window or door determined to be defective and, for that reason, they decided to disregard the terms and conditions of the express limited warranty. (Ja149 p.99-100). Kolbe's former Director of Research and Development, George Digman, testified that Mr. Corrato erroneously assumed that there was a problem with the performance of the windows simply because he believed that water may have dripped out of the exterior aluminum cladding of certain window sash. Mr. Digman testified further that the condition depicted in the two videos had nothing whatsoever to do with the performance of the windows because even though incidental water may have found its way into the exterior cladding, it would have been contained inside of an actual aluminum self-contained

channel meaning the backside of the channel is sealed such that incidental water could not make contact with the wood portion of the window. (Ja628 p.133-136).

Pursuant to D'Angelo's instructions, Mr. Card requested lumber salesman, Mike Webber, to give him a price on new Andersen windows. (Ja220 p.87-89). Mr. Webber subsequently provided an August 2, 2016 quote for seventy-eight new Andersen windows and doors. (Ja239-267). On August 8, 2016, CREV contracted with O.C.F. Construction, LLC to replace the Kolbe windows. (Ja269). In or around August of 2016, plaintiff's counsel requested Marur Dev P.E. to perform an engineering evaluation of the installed Kolbe windows and doors. During the course of Mr. Dev's initial visit to the project on August 17, 2016, he learned that plaintiff had already made the decision "to remove all the Kolbe products to mitigate the expense of having to remove the products post-completion of the construction." (Ja283). Plaintiff began removing the Kolbe windows and doors in or around December of 2016. (Ja155 p.121-122). At no time did Shore Star have any interest in pursuing the remedies available to it by way of the Kolbe warranty because Corrato and D'Angelo contend that they believed that any replacement windows or doors provided by Kolbe would turn into an ongoing maintenance issue with replacements failing in the future. (Ja145 p.82-83, Ja149 p.99-100).

As they pulled the Kolbe windows and doors out of their installed positions, Stonewood Builders' employees loaded the windows and doors into a storage

container which D'Angelo rented from Caprioni Portable Toilets. (Ja154 p.199-120 and Ja271-272). Several months later, the windows and doors were removed from the first container, loaded onto a moving truck and then loaded into a second Caprioni trailer which was placed at Shore Storage in Somers Point, New Jersey. (Ja156 p.125-126). In August of 2019, more than two years later, Stonewood Builders' employees removed the windows and doors from the Caprioni trailer, loaded them onto an open bed truck and transported them to the Stonewood Builders' shop where they were subjected to destructive testing. (Ja226 p.110-111).

Corrato had direct communications with NAWD personnel but at no time did he have any communication with Kolbe employees (Ja080 p.55). At his deposition, Corrato was unable to comment on whether any of the information provided to him by the NAWD salesman was false other than to say he was told that these were not defective windows. (Ja088 p.89). When asked whether he had any information about false advertising by Kolbe, Corrato stated that the windows as advertised did not perform to the level of advertisement. (Ja089-090 p.93-94). When asked to explain the factual basis for the claim that the defendants' representations were false and misleading and were made knowing they were false and misleading (Ja008), D'Angelo testified that "we were led to believe that we were buying a high-end product that was built to provide relatively maintenance free service in a shore environment and very shortly after installing the product we were experiencing

evidence of failure." D'Angelo went on to state that during the course of a meeting at the NAWD facility on Route 50, "we were told that they acknowledged the problem in the past, but it had been changed, the process has been changed." (Ja152). On October 20, 2020, plaintiff settled its claims against NAWD for consumer fraud, common law fraud, negligence, and negligent misrepresentation and dismissed NAWD from this lawsuit with prejudice. (Ja277).

In 2023, Shore Star served reports from an engineer and a wood scientist which alleged that the Kolbe windows and doors had various manufacturing defects at the time they were manufactured eight years earlier in 2015. (Ja280-322 and Ja335-362). The alleged manufacturing defects were first identified more than six and a half years after Corrato made the decision to remove all of the windows and doors and replace them with Andersen products. (Ja269). The belated allegations of manufacturing defects were made despite the fact that none of plaintiff's experts ever conducted any tests of the windows and doors while they were installed in Shore Star's house to determine if they were unserviceable or unfit for the ordinary use for which they were manufactured. (Ja280-322 and Ja335-362).

# LEGAL ARGUMENT

## POINT I

## THE TRIAL COURT CORRECTLY RULED THAT KOLBE'S EXPRESS LIMITED WARRANTY WAS PLAINTIFF'S EXCLUSIVE REMEDY THEREBYBY REQUIRING THE DISMISSAL OF PLAINTIFF'S BREACH OF IMPLIED WARRANTY CLAIM.

**(Raised below at T9-22)**

### A. The New Jersey Uniform Commercial Code permits parties to a contract to agree on an exclusive remedy in the event of a breach.

The Kolbe windows and doors were sold to Shore Star subject to an express limited warranty with the following conspicuously written language:

> In the event of a defect in material or workmanship, which is covered by this Express Limited Warranty, Kolbe reserves the right, at its option, to determine the best method needed to correct the situation as follows: (1) provide part/product to repair or replace any window/door in whatever stage of fitting and/or finishing it was in when originally supplied by Kolbe (all replacement parts will be pursuant to the standards and/or specifications in effect at the time of claim and not at the time of original manufacture), or (2) refund the price received by Kolbe for any window/door. Labor is not covered under this warranty. The Warranty for replacement products (including upgrades thereto) furnished pursuant to this Warranty will be limited to the remainder of the warranty period of the original product...
>
> THIS EXPRESS LIMITED WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR ANY OTHER WARRANTIES THAT EXTEND BEYOND THIS EXPRESS LIMITED WARRANTY. KOLBE DOES NOT WARRANT ANY SPECIAL PRODUCT OR ITEM WHICH IS MANUFACTURED ACCORDING TO SPECIFICATIONS PROVIDED BY THE CUSTOMER, ITS AGENTS, OR REPRESENTATIVES. UNDER NO CIRCUMSTANCES WILL KOLBE BE LIABLE FOR ANY COSTS

> OF SHIPPING, TAXES, LABOR FOR DISSEMBLY, REMOVAL OR REINSTALLATION OF THE PRODUCT OR ANY PART, INCLUDING THE INSULATING GLASS, PAINTING (EXCEPT AS PROVIDED BY THIS WARRANTY), STAINING OR ANY OTHER ACTIVITY NECESSARY IN FINISHING THE REINSTALLATION OR FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES OR LOSS TO OTHER PROPERTY. **THE REMEDIES PROVIDED UNDER THIS EXPRESS LIMITED WARRANTY ARE EXCLUSIVE AND IN LIEU OF ALL OTHER REMEDIES AT LAW OR EQUITY.** (emphasis added) (Ja236-237).

Contracts for the sale of goods are governed by the New Jersey Uniform Commercial Code ("NJUCC"). The NJUCC provides that parties to a contract may agree on an exclusive remedy in the event of a breach. (T9). N.J.S.A. 12A:2-719 states as follows:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> (a) The agreement may provide for remedies in addition to or in substitution for those provided in this Chapter and may limit or alter the measure of damages recoverable under this Chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
>
> (b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Parties to a contract may establish an exclusive remedy by way of an express warranty which, if so labeled, is the sole remedy available to a purchaser. BOC Group Inc., v. Chevron Chemical Co., LLC., 359 N.J. Super. 135, 146 (App. Div. 2003) (citing N.J.S.A. 12A:2-719 (1)(b)). The Kolbe warranty expressly states that the remedies provided are "exclusive and in lieu of all other remedies at law or equity" and that "there are no implied warranties of merchantability or fitness for a particular purpose, or any other warranties which extend beyond this Express Limited Warranty." (Ja237). The "complete exclusion of implied warranties including warranties of merchantability and of fitness for a particular purpose is specifically permitted under the Code." Gladden v. Cadillac Motor Car, 83 N.J. 320, 330 (1980). There exists no reasonable dispute regarding the fact that New Jersey law permits the complete exclusion of all implied warranties and that the Kolbe Express Limited Warranty expressly states that there are no implied warranties of merchantability or fitness for a particular purpose. As such, the trial court was correct in its determination that "there was not any implied warranty" in connection with the sale of Kolbe windows and doors. (T22). It is therefore submitted that the

dismissal of Shore Star's breach of implied warranty claim was proper and in complete conformance with New Jersey law.

## B. The trial court correctly ruled that Shore Star did not provide Kolbe with the opportunity to fulfill its warranty and therefore did not have the right to revoke acceptance.

In its efforts to convince this Court that the Kolbe Express Limited Warranty should not be enforced, Shore Star argues that the express limited warranty failed in its essential purpose because the Kolbe products allegedly "were never of the quality and standard that plaintiff had purchased." (Pb41). At another point in its brief, Shore Star contends that "[T]here also remains a question of fact regarding whether the products provided to Plaintiff failed in their essential purpose or deprived Plaintiff of the substantial value of the bargain." (Pb41). The trial court correctly pointed out that "Shore Star conflates the purpose of the windows and doors with the purpose of the exclusive remedy." (T12). New Jersey law is clear that "… before the exclusive remedy is considered to have failed in its essential purpose, the seller must be given an opportunity to repair or replace the product." BOC Group, Inc., 359 N.J. Super. at 147 (citing Palmucci v. Brunswick Corp., 311 N.J. Super. 607, 614 (App. Div. 1998)); General Motors Acceptance Corp., v. Jankowitz, 216 N.J. Super. 313, 329-330 (App. Div. 1987).

It is submitted that the Palmucci case is directly on point. In that case, the plaintiff purchased a boat with a new engine from defendant Sanborn Marine Center.

The express limited warranty permitted Sanborn, at its option, to repair or replace any defective parts or to refund the purchase price. After only 3-5 hours of operation, the engine began to make a loud noise. The plaintiff returned the boat to Sanborn which diagnosed the problem as "studs pulled" and advised plaintiff that it would replace the heads. Palmucci, 311 N.J. Super. at 612. Plaintiff refused to allow Sanborn to repair the boat and he demanded a new engine. Sanborn informed plaintiff that the engine would not be replaced. Plaintiff contended that N.J.S.A. 12A:2-608 permitted him to revoke acceptance of the engine because the defects substantially impaired the product's value to him. The court ruled that under N.J.S.A. 12A:2-719(2), plaintiff was not entitled to relief under Section 12A:2-608 unless circumstances caused the limited remedy to fail of its essential purpose. Palmucci, 311 N.J. Super. at 612 (citing N.J.S.A. 12A:2-719(2)). The court ruled further that since the warranty provided the manufacturer the right to repair or replace at its option and "[S]ince plaintiff did not abide by the requirements of the warranty in that he did not allow the manufacturer to use the remedy the warranty permitted, he was not entitled to recovery under his breach of warranty claim. A directed verdict was therefore appropriate." Id. at 613. The court concluded that plaintiff had an obligation to allow the defendant to try to repair the engine and that the defendant had a right to expect plaintiff to comply with the terms of the warranty. Id. at 613.

The evidence in this case is that while priming the interior wood of the Kolbe windows, a painter removed the sash and while tilting it, observed what he thought was water leaking out of the exterior aluminum cladding of the window's sash. (Ja212 p.55). The independent distributor, NAWD, was advised that this condition allegedly involved seven window sash. (Ja231-234). In response to the reported issues, Kolbe manufactured seven new window sash which NAWD ultimately delivered to the job site. (Ja077 p.44, Ja090 p.94, Ja151 p.106 and Ja219 p.82-83). Shore Star did not install most of the new replacement sash because Corrato had already decided to replace the Kolbe windows and doors with Andersen products. (Ja219 p.83). Shore Star also identified three aluminum clad French doors which appeared to have some separation in the seams of the aluminum cladding. (Ja145 p.82). NAWD offered to provide three new French doors, but Corrato rejected that offer. (Ja150 p.102). Kolbe was never given an opportunity to repair or replace the three French doors or any of the windows in the house with the exception of the seven sash which were replaced with new ones (most of which were never installed). (Ja150 p.102-103). The only issues Shore Star identified with the Kolbe windows and doors prior to their removal involved seven aluminum clad window sash which Kolbe replaced free of charge, retractable interior screens which were repaired and three aluminum clad French doors which NAWD offered to replace free of charge. (Ja150 p.103). During the time that the Kolbe windows and doors were installed in

Shore Star's house, neither the builder, Corrato, nor D'Angelo ever observed or became aware of water infiltration through the windows or doors and into the interior of the house. (Ja147 p.91-92, Ja219 p.84 and Ja078-079 p.48-51).

Shore Star contended that its representative D'Angelo testified that Kolbe was provided with the option to repair or replace the windows and doors or refund the price of the windows and doors. (T14). The trial court properly rejected this argument and included in its Memorandum of Decision D'Angelo's relevant testimony on this issue. A portion of the cited testimony is as follows:

> Q: Is it true when we look at paragraph 3 in light of your testimony, you think [North] American Window & Door offered to provide new doors and that offer was rejected, in light of that testimony and your memory, do you agree with me that Kolbe was not provided with the opportunity to repair or replace those three (3) doors or any of the other windows in the house with the exception of the seven sash?
>
> A: They were not because we weren't going to replace substandard materials with substandard materials.
>
> Q: And the only issues you were aware of when that decision was made involved seven sash that had been replaced, retractable screens that had been fixed & three third-floor doors Kolbe had offered to replace. That's fair?
> Objection to form. Can you reread that for me please?
>
> A: Yes, I would agree with that. (T14-16 citing Ja149-150)

The trial court correctly concluded that contrary to plaintiff's contentions, D'Angelo's testimony demonstrates that Kolbe was in fact NOT given the

opportunity to fulfill the warranty by repairing or replacing the windows and doors or by refunding the amount paid to Kolbe for any windows or doors determined to be defective. (T16-17). Shore Star's disregard of the warranty requirements is virtually identical to Palmucci's conduct in not permitting the manufacturer to repair the boat engine. Just like Palmucci was not entitled to revoke acceptance and pursue a breach of warranty claim, the trial court properly ruled that Shore Star is barred from revoking acceptance and pursuing a warranty claim.

In Palmucci, the boat engine was making noise and was in need of repair. In this case, Corrato decided to remove all of the Kolbe windows and doors in 2016 despite the fact that he had no complaints whatsoever with respect to the vast majority of the windows and doors which were installed in Shore Star's house for an entire year. (T19). Additionally, neither Corrato nor D'Angelo could cite to even one instance of water infiltrating through the windows or doors and into the interior of the house. (Ja147 p.91-92, Ja219 p.84 and Ja078-079 p.48-51). Even if one were to accept as true (despite the lack of evidence) that the remaining windows and doors were defective in 2016, the fact remains that Kolbe had the right to repair or replace every single window and door in the entire house and Shore Star had the duty to allow Kolbe to exercise that right. The trial court correctly determined that Shore Star breached its duty under the warranty and that this breach bars it from revoking its acceptance of the Kolbe products. (T20-22).

## POINT II

## THE TRIAL COURT PROPERLY DETERMINED THAT KOLBE'S EXPRESS LIMITED WARRANTY WAS SHORE STAR'S EXCLUSIVE REMEDY THEREBY NECESSITATING THE DISMISSAL OF ITS NEGLIGENCE CLAIM.

**(Raised below at T22-26)**

Shore Star seeks to recover damages for the economic loss it allegedly suffered as a result of alleged defects in the Kolbe windows and doors. One of the causes of action asserted was a negligence claim. (Ja019). It is well-established law in New Jersey that when a product fails to fulfill a purchaser's expectations, contract principles, particularly as implemented by the UCC, provide a more appropriate analytic framework. See Alloway v. General Marine Indus., L.P., 149 N.J. 620, 628 (1996). "…A tort cause of action for economic loss duplicating the one provided by the UCC it is superfluous and counterproductive." Id. at 641. In Alloway, the plaintiff purchased a 33-foot boat which the manufacturer expressly warranted for twelve months that the boat was free of defects. Three months later the boat sank as a result of a defective seam in the swimming platform. Alloway sought to recover against the seller on a negligence claim. The New Jersey Supreme Court barred Alloway's negligence claim and held that plaintiff's exclusive remedy was the manufacturer's express warranty. Id. at 642, 643. In so ruling, the court noted "that the United States Supreme Court, the overwhelming majority of state courts and legal scholars have

recognized the unfairness of imposing on a seller tort liability for economic loss." Id. at 643.

Shore Star seeks recovery for economic losses in connection with the purchase price of the Kolbe windows and doors and the cost associated with their removal. These are, without question, purely economic losses. There is no claim in the complaint or in the brief in support of this appeal that the Kolbe products caused any personal injuries or damaged any other property. As such, the trial court was correct in ruling that Shore Star's sole remedy is that which was provided in the Kolbe Express Limited Warranty and therefore, negligence is not a viable claim. (T22-26).

Shore Star relies on Santor v. A.M. Karagheusian, Inc., 44 N.J. 52 (1965). In Alloway, the Supreme Court noted that Santor was decided "[o]ver 30 years ago, before the UCC took in effect…" Alloway, 149 N.J. at 632. In accordance with the holding in Alloway, the trial court correctly ruled that the UCC is the current law to be applied in this case and the Santor case simply does not apply. (T24)

Plaintiff also cites to a 1974 Law Division case, Monsanto v. Alden Leeds, 130 N.J. Super. 245 (Law Div. 1974) for the proposition that the Santor case would be applied by our Supreme Court to encompass a commercial loss. (Pb43). Monsanto involved a plaintiff who sold large quantities of dry organic chloride and moved for summary judgment on its claim to be paid for the product sold. Defendants counterclaimed alleging that moisture problems developed with the product and

from time to time chlorine gas would escape and containers of chemicals would spontaneously ignite. This process allegedly caused three fires which resulted in extensive property damage to multiple warehouses and their contents. The facts in Monsanto bear no resemblance to the case before this Court and provide no support for the proposition that Shore Star should be permitted to pursue a negligence claim in this case. In his Memorandum of Decision, the motion judge pointed out that "one commentator has stated: "the holding in Alloway overruled Santor…" citing Dreier, Kar & Keefe, Current New Jersey Products Liability and Toxic Torts Law "GANN," 2023, p.138." (T25). It is noteworthy that Judge Dreier, who wrote the opinion in Monsanto, also co-authored the 2023 GANN products liability book which acknowledges that Santor was effectively overruled.

Shore Star also cites to H. Rosenblum, Inc. v. Adler, 93 N.J. 324 (1983), a case involving damages against an accountant incurred by a nonclient where privity was the primary issue. In that case, the court cited to the 1965 decision in Santor (which was essentially overruled in the 1997 Alloway decision) and stated in dicta that economic loss damages were recoverable in product liability actions. Id. at 340. The trial court correctly pointed out that H. Rosenblum, Inc. was written well before the adoption of the New Jersey Products Liability Act which bars damages for injuries to the product itself. (T25). Additionally, in the more recent case of E. Dickerson & Son, Inc., v. Ernst & Young, LLP., 179 N.J. 500 (2004), the court stated that "… the

manifest legislative intent in adopting N.J.S.A. 2A:53A-25 was to limit the impact of our 1983 Rosenblum decision that greatly expanded the scope of accountants' liability to all reasonably foreseeable claimants, including stock holders and public investors." Id. at 504 (T25-26). The trial court correctly found Rosenblum to be unpersuasive and ruled that pursuant to the holding in Alloway, the remedy provisions of the express limited warranty preclude Shore Star from pursuing a claim for negligence. (T26).

## POINT III

## THE TRIAL COURT CORRECTLY RULED THAT THE EXCLUSIVE REMEDY IN THE KOLBE WARRANTY NECESSITATED THE DISMISSAL OF SHORE STAR'S BREACH OF CONTRACT CLAIM

**(Raised below at T26-28)**

The Supreme Court has previously ruled that by "enacting the UCC, the legislature adopted a comprehensive system for compensating consumers for economic loss arising from the purchase of defective products." Spring Motors Distributors v. Ford Motor Co., 98 N.J. 555, 577 (1985). The UCC permits the manufacturer to limit a buyer's remedies to repair or replacement of non-conforming goods or return of goods and repayment of the price. See N.J.S.A.12A:2-313. Accordingly, the relationship between the manufacturer, Kolbe, and the purchaser, Shore Star, is governed by the terms and conditions of Kolbe's Express Limited Warranty. The warranty states in pertinent part that the remedies provided "are exclusive and in lieu of all other remedies at law or equity." (Ja235). The trial court

correctly ruled that Shore Star cannot assert a breach of contract claim which is separate and apart from the Kolbe warranty. (T28). The warranty is the only contract entered into between the parties. Additionally, there exists no evidence that Kolbe breached the warranty. To the contrary, Shore Star's actions denied Kolbe its contractual right to repair or replace any door or window which it deemed to be defective. For all these reasons, the trial court's dismissal of Shore Star's breach of contract claim should be affirmed.

## POINT IV

## THE TRIAL COURT'S DISMISSAL OF PLAINTIFF'S CONSUMER FRAUD CLAIM SHOULD BE AFFIRMED DUE TO THE ABSENCE OF UNCONSCIONABLE COMMERCIAL CONDUCT ON THE PART OF KOLBE AND THE LACK OF CAUSAL CONNECTION BETWEEN KOLBE'S ALLEGED MISREPRESENTATIONS AND ANY ASCERTAINABLE LOSS

**(Raised below at T29-36)**

### A. There exists no evidence that Kolbe's website contained misrepresentations or the knowing concealment of any material fact.

The Consumer Fraud Act (CFA) is a remedial statute intended to root out consumer fraud. To succeed on a consumer fraud claim, a plaintiff must demonstrate "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss." New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003). With respect to the first element, unlawful conduct, the CFA requires an "unconscionable

commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment… of any material fact with intent that others rely upon such concealment…" N.J.S.A. 56:8-2. Shore Star contends that Kolbe's unconscionable conduct consists of affirmative misrepresentations which induced Corrato to purchase Kolbe's products (Pb25). The evidential record demonstrates that Corrato had no communications whatsoever with any Kolbe employees either before or after the purchase of the Kolbe products. (Ja080 p.55). When asked whether he had any information about alleged false advertising by Kolbe, the most Corrato could say was that the windows as advertised did not perform to the level of advertisement. (Ja089-090 p.93-94). In an effort to elevate this UCC sale of goods claim to a consumer fraud claim, Shore Star contends that Kolbe's misrepresentations consist of statements on its website such as Kolbe "is actively involved and a member of the WDMA" (Pb24); "submits its windows and doors to independent organizations which test them to rigorous protocols;" that its products are "high end windows and doors" made with the "finest materials" and "crafted with attention to detail and thoughtful engineering;" that it's "products are rigorously tested to exceed industry standards for energy efficiency and performance" and that it crafts "one window at a time, precisely to your specifications." (Pb26).

The contention that it is a fraudulent misrepresentation for Kolbe to inform the public that it is a member of the WDMA and that it submits its windows and doors to independent organizations, which test them to rigorous protocols, is directly undermined by the evidential record. Kolbe's former Director of Research and Development, George Digman, testified that Kolbe designs and builds prototype windows and doors which are initially tested in Kolbe's test wall facility for air infiltration, water infiltration and structural performance. This in-house testing is to ensure that all Kolbe windows and doors function properly and comply with North American Fenestration Standards (NAFS) (Ja601 p.27-28). Hallmark, a third-party certification agency, conducts random inspections of the Kolbe products to verify that they are being built to the standards that are specified. (Ja609 p.59). The WDMA Hallmark Certification Program conducts semi-annual plant audits to ensure continued compliance with applicable industry standards (Ja780). As such, it was and continues to be completely accurate for Kolbe to inform the general public that it is a member of the WDMA and that it submits its windows and doors to independent organizations for testing pursuant to rigorous protocols. In fact, one of the web pages Shore Star submitted in support of this appeal accurately states that "Kolbe is actively involved with the WDMA. Kolbe President, Jeff De Lonay, is on the Board of Directors. Plus, several Kolbe employees serve on various WDMA

committees and boards, and regularly attend WDMA conferences and seminars." (Ja658).

Shore Star also contends that Kolbe is guilty of a fraudulent misrepresentation because the Kolbe windows and doors which were installed in the Shore Star house were not themselves subjected to independent third-party testing. However, the evidence in this case demonstrates that Kolbe never represented that every finished product shipped to its distributors is subjected to independent testing. To the contrary, the website states "… product samples and components are tested periodically by third-party testing laboratories…" (Ja658). Additionally, George Digman testified that the testing of product samples and components involves destructive testing (Ja613 p.70-74) and it therefore would be impossible to test the actual built-to-order windows and doors which were installed in the Shore Star house.

Shore Star also argues that the phrase on Kolbe's website "crafting one window at a time precisely to your specifications" is somehow a fraudulent misrepresentation of fact. (Pb26). The web page plaintiff is apparently relying on is entitled, "Craftsmanship." (Ja528). The relevant paragraph reads as follows: "At Kolbe, each product is truly made to order. We do not start building your windows and doors until after you place your order, so they can be truly handcrafted to your specifications. All of our products are made with the same commitment to expert

craftsmanship and design excellence as when we started nearly seventy years ago. Our team members are craftspeople who focus on building one window and door at a time. That's why we have time to focus on the details that make our products unique and higher performing." (Ja528). The sole basis for the argument that the above constitutes a material representation of fact is that Kolbe employees have testified that its "built to order" windows are assembled by a team of employees at numerous stations on the manufacturing floor. It is respectfully submitted that stating craftspeople focus on building one window at a time in the context of a paragraph that emphasizes that each product is built to order, only after the order is placed, falls far short of a fraudulent misrepresentation of a material fact. The trial court was correct when it found that these statements consist of marketing words and sales talk which cannot be the basis of a consumer fraud claim. New Jersey courts have repeatedly held that marketing slogans used by sellers of goods are not statements of fact and therefore cannot rise to the level of a consumer fraud claim. See Rodeo v. Smith, 123 N.J. 345 (1991). In Rodeo, the court rejected plaintiff's contention that the slogan "you're in good hands with Allstate" was a false statement which guaranteed customer satisfaction. The court ruled that such marketing slogans are mere puffery. Id. at 352. Additionally, the court below correctly ruled that no reasonable person could believe that the statement in question means that Kolbe makes one window from scratch and only after it finishes that window does it move

onto the next. (T33). The fact is that the web page accurately conveys that all Kolbe windows and doors are built to order as opposed to being mass produced. None of the information on the Kolbe website is misleading, factually incorrect or fraudulent.

### B. The trial court correctly ruled that the alleged manufacturing defects in the Kolbe products do not constitute unconscionable fraudulent misrepresentations under the Consumer Fraud Act.

**(Raised below at T33-35)**

The Kolbe custom-made aluminum clad windows and doors were sold subject to Kolbe's Express Limited Warranty for Window and Door Products which warrants that the products shall be free from defects in materials and workmanship for a period of ten years from the date of shipment. In the event of a defect covered by the warranty, Kolbe had the option to repair or replace any window or door or to refund the price received by Kolbe. (Ja235-237). Plaintiff has alleged that the Kolbe windows and doors were sold with certain manufacturing defects. One of the alleged defects was that the exterior aluminum cladding on the sash of seven windows had reportedly retained drips of water (Ja231-234). Upon being advised of this claim, Kolbe made the decision to satisfy its distributor's request and manufacture seven new custom-made aluminum clad window sash (despite the lack of any determination that the original sash were defective) and arranged for their delivery to the Shore Star job site. (Ja077 p.44, Ja090 p.94, Ja151 p.106 and Ja219 p.82-83). Plaintiff did not bother to install most of the new replacement sash, and, in August

of 2016, Corrato decided, instead, to remove all the windows and doors in the house and replace them with Andersen windows. (Ja219 p.83). Shore Star also alleged that three aluminum clad French doors appeared to have some separation in the seams of the aluminum cladding. (Ja145 p.82). NAWD offered to provide plaintiff with three new French doors but Corrato rejected that offer. (Ja150 p.102).

The windows and doors were removed from their installed positions in or around December of 2016 and placed into a storage container. (Ja154 p.199-200, Ja156 p.125-126). Approximately six and a half years after the windows were removed, plaintiff served expert reports, dated May 23, 2023, which alleged, for the first time, the existence of various manufacturing defects in the Kolbe windows and doors. In the Lar Chem report of May 12, 2023, it is alleged that laboratory testing of certain wood samples of the windows demonstrated that the Kolbe wood preservative treatment complied with the WDMA penetration requirement but did not comply with the retention requirement. The retention requirement concerns a specific amount of wood preservative that is to be present in the initial one eighth inch of the end grain of the mill work. (Ja335-362). The Lar Chem opinions were vigorously disputed by a wood scientist retained by Kolbe. (Ja363-375). The trial court was correct in its ruling that even if the alleged defects, first identified more than seven and a half years post manufacture are true, they are manufacturing defects as opposed to fraudulent misrepresentations of fact. Shore Star would have this

Court believe that every manufacturing defect is equivalent to a misrepresentation and therefore, every manufacturing defect constitutes consumer fraud. However, as the trial court succinctly stated, "this is simply not the law." (Ja827).

In its analysis of New Jersey law, the trial court properly ruled that a breach of warranty or breach of contract is not per se unconscionable and does not alone violate the CFA (T31 (citing Palmucci v Brunswick Corp., 311 N.J. Super. 607 (App. Div. 1998)). The Third Circuit has stated that there must be a showing of "substantial aggravating circumstances" to make a warranty claim a consumer fraud claim. (T31 (citing Suber v Chrysler Corp. 104 F3d 578,587 (3d Cir. 1997)). In D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11 (App. Div. 1985), plaintiff purchased a tow truck from Fruehauf which custom built and assembled the vehicle parts to the truck. The chassis, cabin, engine and drivetrain had been manufactured by General Motors and purchased from Beyer Brothers, a General Motors dealer. The tow truck broke down the day it was delivered and several times thereafter. Beyer Brothers tried unsuccessfully to rectify the problem. It was not until 4 to 6 weeks later that Beyer determined the problem was caused by Fruehauf. Id. at 14. Fruehauf refused to acknowledge any responsibility and did nothing to rectify the condition. The court held that Fruehauf's refusal "to honor its warranty and its intransigent and shoddy attitude toward plaintiff" did not constitute an unconscionable commercial practice. Id. at 28. The court went on to rule that although Fruehauf's refusal to honor its

warranty and its poor treatment of plaintiff was certainly offensive, it was not deplorable enough to constitute an unconscionable commercial act under the CFA. Id. at 31. The fact that the tow truck was manufactured defectively was not viewed by the court as a misrepresentation nor was it viewed as a consumer fraud violation. Unlike the tow truck in D'Ercole, which repeatedly experienced performance failure, the Kolbe windows and doors did not leak, suffer structural failure, or experience any insect infestation or wood deterioration due to insufficient wood preservative during the entire time they were in service. The incidental drops of water the painter believed dripped out of the aluminum cladding of seven window sash had absolutely no impact on the performance of the windows. (Ja268 p.133-136). Unlike Fruehauf which refused to honor its warranty, Kolbe promptly manufactured seven new window sash (even though it never had the opportunity to determine whether the original seven sash were defective) and NAWD offered to replace three French doors which were the subject of a Shore Star concern. It is submitted that this case involves a complete and total lack of the "substantial aggravating circumstances" required to elevate a breach of warranty claim to one involving consumer fraud. Shore Star's belated allegation of manufacturing defects is completely unrelated to Corrato's decision to remove the Kolbe products. Additionally, Corrato's abrupt and ill-advised decision denied Kolbe its right under the warranty to repair or replace any window or door it determined to be defective.

In the brief in support of its appeal, Shore Star relies on New Mea Constr. Corp., v. Harper, 203 N.J. Super. 486 (App. Div. 1985) (Pb22). New Mea Constr. Corp. involved a contractor who constructed a new home based on drawings and specifications prepared by the homeowner's architect. The defendant contractor improperly substituted an inferior ungraded lumber in place of the specified "Graded #1 Douglas Fir." In finding a consumer fraud violation, the Appellate Division ruled that the improper substitution of substandard material constituted "merchandise sold" and thus was within the purview of the CFA. In the case at bar, there is no evidence that the manufacture of Kolbe windows and doors involved a substitution of a substandard material or that plaintiff received windows and doors which were entirely different from the ones that they ordered. The trial court correctly ruled that the facts and holding in New Mea Constr. Corp. have no relevance to this case. (T35).

Plaintiff also cites two unpublished opinions which were not cited or argued before the Motion Judge. The first is Carboni v. Massimo, No. A-2068-05T3, 2007WL247884 (App. Div. January 31, 2007) (Ja848) in support of the argument that Kolbe improperly manufactured its products and then knowingly hid the defects. (Pb28). Carboni involved a contractor which performed improper work and then covered the work with sheet rock. In finding Carboni unrelated to the facts of this case, the trial court properly found that the aluminum cladding on the windows and doors was a feature of the Kolbe product ordered by Shore Star; it was not put on

the windows and doors for the purpose of concealing any defect. The trial court was correct when it concluded that there is a complete absence of evidence that Kolbe intentionally hid any known defects when it sold its aluminum clad windows and doors. (T35). The second unpublished opinion is Romond v. Valiant Home Remodelers, No. A-5140-05T1, 2007 WL 2362853 (App. Div. 2007) (Ja848) which plaintiff relies upon in connection with its factually unsupported claim that Kolbe provided it with windows and doors which were entirely different from the ones they ordered. In Romond, the plaintiffs ordered, from their home remodeling contractor, a five-light bow window with narrow mullions and a star beveled glass pattern which was depicted in a brochure to replace their existing eight-foot bow window. The window which the defendant installed did not have the narrow mullions plaintiff had ordered nor did it have the minimal amount of frosted glass along the perimeter like the window in the brochure. Plaintiffs complained that they could not even see out the window because of the excessive amount of frosted glass. In the case at bar, all of the Kolbe custom made windows and doors were installed in Shore Star's house for approximately one year and at no time did Shore Star ever allege that it did not receive the custom made aluminum clad windows and doors which they ordered. An alleged manufacturing defect is quite different than claiming that you received the wrong model window or door. It is obvious that the facts in Romond bear no relationship, whatsoever, to the facts in this case.

## C. The trial court correctly determined there is no causal connection between Kolbe's alleged misrepresentations and Shore Star's alleged ascertainable loss.

**(Raised below at T31, T35, and T36)**

The third element of a consumer fraud claim requires a causal connection between the unlawful conduct and the ascertainable loss. The New Jersey Supreme Court has stated that the "causation" provision of N.J.S.A. 56:8-19 requires that the alleged unlawful consumer fraud be the cause of plaintiff's loss. Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994); Meshinsky v. Nichols Yacht Sales Inc., 110 N.J. 464 (1988); Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978).

In the case before the Court, it is abundantly clear that there is no causal connection between Kolbe's alleged misrepresentations and Shore Star's alleged ascertainable loss. Shore Star's alleged loss occurred when Corrato made the decision to disregard the terms and conditions of the warranty and remove the Kolbe windows and doors. Corrato's decision to remove the Kolbe products was made in early August of 2016 as evidenced by the August 2016 quote for 78 new Andersen Windows and Doors (Ja239-267) and CREV's August 8, 2016 contract with OCF Construction, LLC. (Ja269). Shore Star began removing the Kolbe windows and doors in December of 2016 (Ja155 p.121-122). As of 2016, the only Kolbe representations which Shore Star could have contended were untrue were general statements on the Kolbe website regarding the high quality of the windows and doors. (T36). For example, the website stated the products were made with the finest

materials and were crafted with attention to detail and thoughtful engineering. (Ja525). The trial court correctly ruled that this language consists of nothing more than marketing words which are statements of opinions/puffery, and which cannot be the basis for a consumer fraud claim. (T33). In 2023, more than six years after the windows were removed, manufacturing defects were alleged for the first time by three of plaintiff's experts. In August of 2016, neither Corrato nor his representative D'Angelo had any knowledge whatsoever of the 2023 allegations. The only complaints Shore Star had with the Kolbe windows and doors prior to their removal concerned seven window sash which Kolbe replaced, retractable interior screens which Kolbe repaired, and three aluminum clad French doors which NAWD offered to replace (Ja150 p.103). The retention of the experts, years after the removal of the windows and doors, was an obvious attempt to belatedly justify Corrato's ill-advised 2016 decision to remove the windows and doors.

Corrato's March 2022 deposition testimony confirmed the fact that the opinions of plaintiff's experts are completely and totally unrelated to the reasons the windows and doors were removed in 2016. In March of 2022, Corrato testified that he decided to remove the windows and doors in 2016 based upon information he received from his painter that the exterior cladding of certain window sash was retaining water and his own observation of movement in the exterior cladding of some of the doors. (Ja076-077 p.41-42). The alleged financial loss occurred in 2016

when costs were incurred to remove the windows and doors and install new ones. As such, there cannot possibly be a causal relationship between the alleged loss in 2016 and opinions arrived at years later in 2023. Furthermore, as accurately noted by the trial court, the only representations that plaintiff could have possibly contended were untrue in 2015 (when the windows were purchased) and in 2016 (when they were removed) were general statements on the Kolbe website regarding the high quality of the windows and doors and the materials used in them (T35-36). As previously noted, New Jersey courts have held that these type of marketing words are statements of opinion/puffery as opposed to statements of fact and, therefore, cannot be the basis of a consumer fraud claim. Rodeo v. Smith 123 N.J. 345, 352 (1991) (T33, 36).

**D. There is no evidence that Shore Star sustained an ascertainable loss.**

The March 3, 2015, sales order from the independent distributor, NAWD, to CREV was signed by Robert Corrato as sole member of CREV. (Ja403). Corrato testified that he is a sole member of at least five LLCs, one of which is CREV, his property management company in Newtown Square Pennsylvania, and four (4) of which are corporations which own properties located in New Jersey, Pennsylvania, and Florida. (Ja069). One of his LLCs is plaintiff, Shore Star Properties, LLC., which purports to be the owner of the bayfront house in question. (Ja002). CREV purchased

the Kolbe windows and doors (Ja403) and contracted with Scott Tihansky to build plaintiff's house (Ja084 p.72-73) and Stonewood Builders (Stonewood) to frame the house and install the windows and doors (Ja204 p.24-25). CREV also contracted with OCF Construction, LLC in August of 2016 to replace windows and door trim and re-shingle around new windows and trim. (Ja268). There exists no evidence to support the contention that Shore Star spent any money at all with respect to the construction of the house, the purchase of the windows and doors, or the replacement of the windows and doors. It is beyond any reasonable dispute that Mr. Corrato created multiple business entities in order to separate their respective legal rights and obligations while at the same time protecting himself from liability. The New Jersey Revised Uniform Limited Liability Act, N.J.S.A. 42:2C-1, et seq. does not contain any provision which grants one LLC the legal right to sue on behalf of a different LLC simply because both LLCs have the same managing member. CREV and Shore Star have separate and distinct legal rights and liabilities. An ascertainable loss is an essential element of a consumer fraud claim. Cox, 138 N.J. at 24. The evidential record in this case demonstrates that Shore Star did not sustain an ascertainable loss which is yet another reason its consumer fraud claim must fail as a matter of law.

## POINT V

## THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMMON LAW FRAUD CLAIM DUE TO THE LACK OF ANY EVIDENCE OF MISREPRESENTATIONS ON THE PART OF KOLBE

**(Raised below at T36-37)**

In order to establish a prima facie case of common law fraud, a plaintiff must set forth facts which establish (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Gennari v. Weichert Co. Realtors 148 N.J. 582, 610 (1997) (citing Jewish Ctr. of Sussex Co. v. Whale, 86 N.J. 619, 624, 625 (1981)).

In support of its common law fraud claim, plaintiff argues that Kolbe misrepresented it was a member of WDMA and that it submits products to third parties for testing. (Pb35). The credibility of this contention is directly undermined by the certification documents which WDMA sent to Kolbe in 2015 which is the same year the Shore Star windows and doors were manufactured. (Ja780-787). This argument also ignores the detailed testimony of Mr. Digman regarding the fact that Hallmark, a third-party certification agency, conducts random inspections of the Kolbe products to verify that they are being built to the standards that are specified. (Ja609 p.59). Plaintiff also contends that it is a misrepresentation for Kolbe to state that its products are rigorously tested to exceed industry standards because no actual

products sold to consumers are tested. (Pb35). As noted previously in this brief, the Kolbe website states "… product samples and components are tested periodically by third-party testing laboratories." (Ja658). The trial court correctly ruled that no reasonable jury could conclude that the information on the website meant that each and every window and door sold to a consumer is tested by an independent organization (T37) and, following an exhaustive analysis of the evidential record, the court below correctly ruled that, "[T]here is no evidence of a material misrepresentation of a presently existing or past fact which Kolbe knew to be false …"(T37). For all these reasons, the trial court's determination that plaintiff's common law fraud claim is without merit should be affirmed.

## CONCLUSION

Kolbe's Express Limited Warranty was Shore Star's sole remedy thereby requiring a dismissal of its implied warranty claims. Shore Star breached the warranty by not allowing Kolbe to repair or replace any window or door deemed to be defective which is the remedy the warranty permitted. The breach of contract claim was properly dismissed because no contract existed between Kolbe and Shore Star outside of the Kolbe warranty. The negligence claim for Shore Star's economic loss was properly dismissed because the New Jersey Uniform Commercial Code is the comprehensive statutory scheme to be used in connection with contracts for the sale of goods, and tort actions for economic loss are barred by New Jersey law. The claims of consumer fraud and common law fraud were likewise properly dismissed due to the lack of evidence of unconscionable conduct or material misrepresentations of fact on the part of Kolbe which were causally related to Shore Star's alleged economic loss. For all of these reasons, it is respectfully submitted that the trial court's dismissal of all of plaintiff's claims should be affirmed by this Honorable Court.

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| SHORE STAR PROPERTIES, LLC<br><br>*Plaintiff/Appellant*<br><br>v.<br><br>KOLBE & KOLBE MILLWORK CO., INC., NORTH AMERICAN WINDOW & DOOR CO., INC., JOHN DOE(S) #1-10, ABC CORPORATION(S) #1-10, and XYZ PARTNERSHIP(S) #1-10 (fictitiously named Defendants)<br><br>*Defendants/Respondents* | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-003434-23<br><br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>CAPE MAY COUNTY<br>DOCKET NO.: CPM-L-000-125-20<br><br>*Civil Action*<br><br>**ON APPEAL FROM MAY 31, 2024 ORDER**<br><br>SAT BELOW: HON. JAMES H. PICKERING, JR, J.S.C. |

# REPLY BRIEF FOR PLAINTIFF/APPELLANT SHORE STAR PROPERTIES, LLC

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NJ 08012

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## PRELIMINARY STATEMENT

Summary judgment must be denied if the court determines that there are issues of material fact requiring answers by a jury. See Reyes v. Egner, 404 N.J. Super. 433, 461 (App. Div. 2009). Kolbe's brief clearly demonstrates that several questions of material fact remain in this case, making summary judgment improper. Questions of fact remain regarding whether Plaintiff provided Kolbe with an opportunity to repair or replace the windows and doors; whether the windows and doors failed of their essential purpose, thus warranting Plaintiff rejecting the Kolbe products; when Plaintiff decided to remove the windows and doors from the Shore Property; and whether Kolbe made factual material misrepresentations in their advertisements. Therefore, the trial court erred in granting summary judgment, and this Court should reverse that decision to allow a jury to determine the questions of material facts.

## ARGUMENT

### POINT I: THERE IS A QUESTION OF FACT REGARDING WHETHER PLAINTIFF PROVIDED KOLBE WITH AN OPPORTUNITY TO REPLACE OR REPAIR THE DEFECTIVE WINDOWS AND DOORS (Ja806-815).

Kolbe argues that it was never given an opportunity by Plaintiff to repair or replace any of the windows and doors in the Shore Property. (Db17). The allegations raised by Kolbe in their brief demonstrate there is a question of fact regarding whether Plaintiff afforded Kolbe with such opportunity to repair or replace them.

Dr. Robert Corrato ("Dr. Corrato") testified that Plaintiff provided Kolbe with an opportunity to replace and remedy the issues with the windows and doors, but the issues with water persisted. (Ja077). Specifically, Dr. Corrato testified:

> **Q.** So with respect to the sashes that were identified to have the water retention problem, is it true that North American Window or Kolbe arranged to replace those sashes with the new ones?
> **A.** They did replace the sashes.

(Ja077).

Christopher D'Angelo ("Mr. D'Angelo") also testified that Plaintiff provided Kolbe with the opportunity to repair or replace the products or refund their price. (Ja149-150). While Kolbe argues that Mr. D'Angelo made the decision to remove the remove the windows and doors without providing Kolbe with an opportunity to repair or replace them (Db 18), Mr. D'Angelo is not a party to this action.

After Plaintiff notified Kolbe about the problems with the windows and doors, Kolbe's solution for Dr. Corrato was to place a bead of caulk on all windows after water was discovered. (Ja090). Dr. Corrato testified "nowhere in the documentation did I recall reading that you would have to caulk your windows every year." (Ja090). This demonstrates that at the time of purchase, Kolbe never represented to Dr. Corrato that the windows would need to be caulked. (Ja090). Therefore, when Kolbe was given the opportunity to repair or replace the windows, the solution it offered

did not align with the representations made at the time of sale. Given that Dr. Corrato did not purchase windows that were represented as having to be caulked to prevent water leakage, Kolbe's solution did not remedy the problem.

Finally, Kolbe argues that "Corrato had direct communications with NAWD personnel but at no time did he have any communication with Kolbe employees." (Db 10). However, as testified by George Waldvogel, Kolbe's Vice President of Quality, Service & ServicePro, Kolbe's policy is not to communicate directly with customers, and customers are directed to speak with the distributor instead:

> **Q.** Is it Kolbe's policy that they only communicate with the distributors when dealing with a field service issue?
> **A.** That's where we like it to start.
> **Q.** Anything else? It seemed like you were going to say something else. I don't want to cut you off.
> **A.** That's where it starts, but eventually sometimes it gets further, we have to deal with others other than the distributor, meaning the homeowner or the builder.
> **Q.** But the initial policy from Kolbe is to tell the homeowner we only deal with the distributor because that's who you have the contract with?
> **MR. DONNELLY:** Objection to the form of the question. You can answer, sir.
> **THE WITNESS:** Yes.

(Ja0541). It is therefore unreasonable for Kolbe to criticize Plaintiff for only contacting the distributor, NAWD, when Kolbe's policy was not to directly communicate with a homeowner regarding field service issues.

## POINT II: THERE IS A QUESTION OF FACT AS TO WHEN PLAINTIFF MADE THE DECISION TO REMOVE THE WINDOWS AND DOORS (Ja811).

Kolbe alleges in its brief that Plaintiff made the decision to remove the windows and doors in August 2016. (Db35). However, Plaintiff presented facts and evidence before the trial court that Plaintiff had requested a quote from O.C.F. Construction, LLC in August 2016 for 78 new Andersen Windows and Doors, but did not enter a contract to purchase those new windows and doors until December 2016. (Ja788-791). As explained in a sur reply letter to the trial court dated March 20, 2024, Plaintiff's counsel clarified that the one-page signed proposal drafted by O.C.F. Construction, LLC, dated August 16, 2016, was not submitted to O.C.F. and signed by Mr. D'Angelo until December 2, 2016 via email. (Ja788-791). A copy of that email was attached to the sur reply letter. (Ja790). Plaintiff's counsel also addressed this during oral argument where she stated the letter was drafted by O.C.F on August 16, 2016, but not signed by Mr. D'Angelo on that date. (T68-4). These facts also counter Kolbe's allegation that "CREV also contracted with OCF Construction, LLC in August of 2016 to replace windows and door trim and re-shingle around new windows and trim." (Db 38). The trial court ignored these facts despite them raising a question of fact that should be decided by a jury.

Additionally, there are facts that Dr. Corrato did not decide to remove the Kolbe windows until after an engineer, Marur Dev, P.E. ("Mr. Dev"), inspected the

windows at the Shore Property. Mr. Dev conducted his inspections at the property on August 17, 2016, October 12, 2016, and December 1, 2016 (Ja291). Dr. Corrato did not enter a contract with O.C.F. Construction, LLC to purchase new windows and doors until December 16, 2016, which is supported by evidence. (Ja788-791).

Specifically, on August 17, 2016, Mr. Dev completed an initial inspection of the Kolbe windows and doors while they were installed at the Shore Property. (Ja279). After his inspection, Mr. Dev concluded within a reasonable degree of engineering certainty that the Kolbe windows do not comply with minimum standards as set forth in the IRC-2009 NJ Edition, the AAMA/WDAA Standards, Kolbe's own manufacturing specifications, and factual representations by Kolbe in its website advertising and representations to Plaintiff. (Ja321). The performance and/or value of the Kolbe windows and doors were substantially impaired because of Kolbe's failure to manufacture products in accordance with CSI MasterFormat Instructions, AAMA/WDMA 101/ I.S. 2/A 440-08, WDMA standards, and local building codes. (Ja321). Mr. Dev also opined the caulking method of repair recommended by Kolbe was unacceptable and temporary as it does not cure the defect, and it will only stop the leaking for a short period of time. (Ja321).

From late December 2015 through the summer of 2016, Kolbe's response to every claim regarding the defective products was to replace the faulty components

and apply a bead of caulk to all the products. (Ja114-115). Per Mr. Dev's expert opinion, such a remedy would not cure the problem with water penetration. (Ja321). It was after Mr. Dev opined that Kolbe's remedy of caulking the windows would not cure the water penetration problem that Dr. Corrato ordered windows and doors from another company in December 2016. As testified by Dr. Corrato:

> **Q.** Did you retain window experts?
> **A.** I'm talking about Kolbe and North American.
> **Q.** Okay.
> **A.** And I believe at some point we did have an engineer come in to look and that was part of, as I recollect, my ultimate decision to decide to change the windows. Because there was some commentary that, yes, indeed there's water getting into these windows and that's going to become a consistent, recurrent and chronic issue in terms of the defect of these windows and the damage that would happen to them over time.

(Ja079). Such facts counter Kolbe's allegation that "Corrato testified that he decided to remove the windows and doors in 2016 based upon information he received from his painter that the exterior cladding of certain window sash was retaining water and his own observation of movement in the exterior cladding of some of the doors." (Db 36). This is another question of fact that should be decided by a jury.

Further, Dr. Corrato's testimony about consulting Mr. Dev (Ja079), in addition to Mr. Dev's report with the dates of inspection on August 17, 2016, October 12, 2016, and December 1, 2016 (Ja291), counter Kolbe's allegation that

"[t]he retention of the experts, years after the removal of the windows and doors, was an obvious attempt to belatedly justify Corrato's ill-advised 2016 decision to remove the windows and doors." (Db36). Mr. Dev was retained in August 2016 to inspect the windows and doors at the Shore Property before removal of the doors and windows (Ja283), and the other experts retained by Dr. Corrato at later dates were utilized to corroborate Mr. Dev's opinion after additional testing was done. The additional expert witnesses were retained in 2023 after the parties engaged in the lengthy process of this litigation, which is not abnormal in a case such as this one. However, given that an expert inspected the property in 2016, prior to removal of the doors and windows and commencement of litigation, Kolbe cannot feasibly argue that Mr. Corrato removed the products prior to obtaining an expert opinion.

Moreover, George Digman from Kolbe testified that he would have only completed a visual inspection in the field, which is exactly what Plaintiff's expert engineer, Mr. Dev, did in August of 2016:

> **Q.** Had you received the seven sashes, what would you have done?
> **A.** I would have done a visual inspection to see if my suspicions from the videos were accurate, that there was some -- a void in one of the joints that was allowing water to get in on the exterior cladding.
> **Q.** If there were a void in the joint, would that be considered a defect?
> **A.** Yeah. It's intended to be sealed, yes.

> **Q.** And would you have completed any testing of the sashes?
> **A.** No, because as I explained, it's not desirable to have the water get in and then get out of that area, but it does not affect the function or the weatherability of that window.

(Ja644-645).

There is also a question of fact regarding whether Plaintiff gave Kolbe an opportunity to inspect the windows and doors at the Shore Property prior to their removal. On November 1, 2016, Plaintiff's counsel advised Kolbe that Plaintiff intended to remove the defective products and gave Kolbe an opportunity to inspect the Kolbe products at the Shore Property. (Ja115; Ja475-476). In a November 14, 2016 letter, Plaintiff's counsel advised Kolbe that Plaintiff sustained damages as a result of the defective windows. (Ja115). Kolbe was also advised the windows were inspected by an engineer, and the moisture trapped between the aluminum cladding and wood frame will ultimately rot the wood and render the windows useless. (Ja115). Plaintiff gave Kolbe another opportunity to inspect the property before removal of the products. (Ja115). Instead of inspecting the products at the Shore Property, in a November 16, 2016 email, Kolbe's counsel replied to Plaintiff's counsel by requesting that all windows be preserved. (Ja486).

## POINT III: THERE IS A QUESTION OF FACT REGARDING WHETHER KOBLE'S WINDOWS AND DOORS FAILED OF THEIR ESSENTIAL PURPOSE (Ja802-815).

Kolbe argues in its brief that the trial court correctly ruled that Plaintiff did not provide Kolbe with the opportunity to fulfill its warranty and therefore did not have the right to revoke acceptance. (Db15). However, the facts referenced by Kolbe, in addition to the case law cited, demonstrate a question of fact remains regarding this issue, which should be decided by a jury.

Case law provides that "if circumstances cause the limited warranty to fail in its essential purpose or operate to deprive a buyer of the substantial value of the bargain, the limitation of warranty clause may not be invoked. In that event, a buyer . . . may seek remedy under the provisions of the UCC. [N.J. Stat. 12A:2-719], UCC Comment 1. One of those remedies is the right of a buyer to revoke acceptance of the goods or property. N.J.S.A. 12A:2-608(1)." G.M.A.C. v. Jankowitz, 216 N.J. Super. 313, 329 (App. Div. 1987). Here, there is a question of fact regarding whether the Kolbe doors and windows failed of their essential purpose permitting Plaintiff to revoke acceptance of the Kolbe products.

Kolbe has repeatedly relied upon the case Palmucci v. Brunswick Corp., 311 NJ. Super. 607 (App. Div 1998) in support of their argument that Plaintiff failed to meet the obligation to allow Kolbe to repair or replace the windows and doors. Despite Kolbe's reliance on Palmucci, the facts in this case are readily distinguishable, and therefore, that case is not "directly on point" as alleged by

Kolbe. (Db15). Notably, one of the clear differences between this matter and Palmucci is that here, there are experts reports that serve as evidence the Kolbe windows and doors failed of their essential purpose. The plaintiff in Palmucci provided no expert reports or other evidence that the boat had failed of its essential purpose. The experts' findings here are addressed in detail under Point IV below.

Another difference between the cases is that in Palmucci, there was no question of fact that the plaintiff had not allowed the manufacturer to repair the boat. Palmucci, 311 N.J. Super. at 613. Here, as set forth in detail under Point I above, there is a question of fact as to whether Plaintiff provided Kolbe with an opportunity to repair or replace the windows.

Plaintiff does not dispute Kolbe's claim that there was no instance of water infiltrating through the windows or doors and into the interior of the house. (Db19). However, Mr. Dev provided the opinion that water was lying in the wood due to penetration, which would cause the windows to rot over time and become useless. (Ja319-321). This also demonstrates the products failed of their essential purpose.

## POINT IV: THERE IS A QUESTION OF FACT REGARDING WHETHER KOLBE MADE FACTUAL MATERIAL MISREPRESENTATIONS ABOUT THE WINDOWS AND DOORS (Ja822-829).

Kolbe argues that "[t]he trial court was correct when it concluded that there is a complete absence of evidence that Kolbe intentionally hid any known defects

when it sold its aluminum clad windows and doors." (Db34). However, case law clearly provides that "[a]n intent to deceive is not a prerequisite to the imposition of liability" under the New Jersey Consumer Fraud Act ("CFA"). Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997). In fact, violations of the CFA can arise even if the seller is unaware of a statement's falsity or has no intent to deceive. Depolink Court Reporting & Litig. Support Services v. Rochman, 430 N.J. Super. 325, 587, 564 A.3d 579 (App. Div. 2013). Therefore, Plaintiff is not required to prove Kolbe intended to conceal defects in their products in order to establish a CFA claims.

Kolbe argues that Plaintiff had no communication with any Kolbe employees either before or after the purchase of the Kolbe products, and thus could not make a misrepresentation to Plaintiff. (Db25). As set forth above under Point I, Kolbe has a policy where employees do not communicate with customers, and customers are directed to communicate with the distributor. (Ja0541).

Kolbe further argues the company never falsely advertised its products. Specifically, Kolbe claims "it was and continues to be completely accurate for Kolbe to inform the general public that it is a member of the WDMA and that it submits its windows and doors to independent organizations for testing pursuant to rigorous protocols." (Db26). However, being a member of the WDMA does not mean

Kolbe's products meet the specifications established by the WDMA Hallmark Certification program as advertised by Kolbe.

While Kolbe may be a member of the WDMA, the company does not comply with the rigorous standards required to be WDMA Hallmark Certified as Kolbe's products are not built to the specifications required under such certification. This was confirmed by expert witness Matthew Roetter who conducted forensic testing and opined that the Kolbe windows and doors sold to Plaintiff did not meet the CSI specifications requiring gluing all mortise and tenon joints on the sashes, did not meet the requirements of the WDMA Hallmark Certification program, did not meet preservative treatment in accordance with WDMA I.S. 4-13, most of the Kolbe windows and doors did not follow Kolbe's engineering instructions for the manufacture of the Kolbe windows, and four of the Kolbe doors sold to Plaintiff were not tested by a third party as represented and had no design pressure ("DP") rating. (Ja472-473). Therefore, the opinions provided by Plaintiff's expert witnesses, such as Mr. Roetter, establish that there is a question of fact regarding whether Kolbe falsely advertised to the public that its products meet WDMA Hallmark Certification standards. Notably, the trial court's decision, and Kolbe's brief, ignore the findings by Plaintiff's expert witnesses despite such findings establishing questions of material facts.

Further, Kolbe represented to Corrato that Kolbe was selling him aluminum clad windows that were watertight, not windows and doors that hold water. Kolbe, through affirmative acts, which included: fraud, false pretense, false promise, and misrepresentations induced the plaintiff to purchase the Kolbe products. In addition, Kolbe knowingly suppressed, concealed, and omitted material facts in connection with the sale/advertisement of the Kolbe products. Despite the representations about the Kolbe products, the Kolbe products did not comply with minimum standards as set forth in the IRC-2009 NJ Edition, the AAMA/ WDMA Standards, the manufacturing specifications for the described products, and the representations by Kolbe contained in its online advertising and/or representations to the Plaintiff.

However, this is a question of fact for a jury as Kolbe's advertisements are open to interpretation. Specifically, a jury should be provided with Kolbe's advertisements and representations made to the plaintiff to review and compare the findings of Plaintiff's experts and Kolbe's arguments to determine if Kolbe's advertisements include fraudulent misrepresentations to the public.

Finally, Kolbe argues that its advertisements "consist of marketing words and sales talk" and are "statements of opinions/puffery, and which cannot be the basis for a consumer fraud claim." (Db28, 29). Kolbe attempts to compare this case with the facts in Rodio v. Smith, 123 N.J. 345 (1991). In Rodio, the court held the slogan

"you're in good hands with Allstate" was not a false statement that guaranteed customer satisfaction, and that such marketing slogans are puffery. Id. at 352. However, the slogan in the Rodio case contained an opinion, not a material fact.

A statement is a matter of fact if it is "'susceptible of exact knowledge when the statement was made'"; it is a matter of opinion if "'it is unsusceptible of proof'" at that time. Joseph J. Murphy Realty, Inc. v. Shervan, 159 N.J. Super. 546, 551 (App. Div. 1978) (citations omitted). "However persuasive," an opinion that the customer is "in good hands' . . . is nothing more than puffery," "is not a statement of fact, and therefore cannot rise to the level of common law fraud." Rodio, 123 N.J. at 352 (citations omitted). For example, claiming a product is "'the best' . . . is only a statement of the seller's opinion." Jakubowski v. Minn. Mining & Mfg., 80 N.J. Super. 184, 195 (App. Div. 1963). Statements that a house is "'very saleable'" were merely "opinions" rather than "a material representation of a presently existing or past fact." Joseph J. Murphy Realty, 159 N.J. Super. at 550-51.

Kolbe's advertisements do not contain opinions, or "mere puffery" that cannot be factually confirmed, such as the opinion of being in "good hands" with an insurance company. Instead, Kolbe makes factual misrepresentations that have been factually confirmed by Plaintiff's expert witnesses to be false. This includes Kolbe

products not meeting the specifications of WDMA Hallmark Certification standards, windows and doors not being crafted one at a time, and that the individual products sold to customers do not all undergoing rigorous testing. Given that such statements are factual assertions, and not opinions, they can constitute fraudulent misrepresentations of material facts. It should be up to a jury to decide if such factual statements were misrepresentations based on evidence presented at trial.

## CONCLUSION

The trial court erred in granting summary judgment, and this Court should reverse that decision to allow a jury to determine the questions of material facts.

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By: _____
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Dated: January 2, 2025