Superior Court of New Jersey

Appellate Division

Docket No. A-003976-24

NEWARK HOUSING AUTHORITY, *Plaintiff-Respondent,* vs. IRONMAN ROAD SERVICES LLC; GUILLERMO BENALCAZAR; OSCAR BENALCAZAR; THEODORE FIORE; RUFFINO HOLDINGS LLC; TED FIORE SERVICES LLC, *Defendants-Respondents,* T. FIORE DEMOLITION INC.; T&C AUTO SALES LLC, *Defendants-Appellants,* FIORE HOLDINGS LLC; FIORE HOLDINGS II LLC, *Defendants-Respondents,* T. FIORE RECYCLING CORP., *Defendant-Appellant,* JANE and JOHN DOES #1-10, *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-3639-25 Sat Below: HON. ALDO J. RUSSO, J.S.C.

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Defendants T. Fiore Demolition Inc., T&C Auto Sales LLC, and T. Fiore Recycling Corp (the "Adverse Possession Defendants") filed a Motion to permit the counterclaim of adverse possession. The trial court denied the motion and granted an Order for Possession to the Plaintiff. The trial court held that the Adverse Possession Defendants had failed to appear on the OTSC return date and did not respond to the Order to Show Cause on the dates scheduled by the Trial Court and therefore the Adverse Possession Defendants were not permitted to assert adverse possession of 457 Wilson Avenue, Newark, NJ (the "Property"). Judge Russo was in error as he permitted an adjournment for the OTSC return date <u>and all other dates</u> (Emphasis added), including the filing of the Answer. Further, the trial court erred in prejudgment of the Adverse Possession Defendants' counterclaim and violated their right of due process. The Adverse Possession Defendants ask this court to reverse the trial court's decision denying the filing of counterclaims of adverse possession, and any other defenses to the OTSC Complaint, and to remand the case to the trial court to be litigated by the Adverse Possession Defendants.

PROCEDURAL HISTORY

Plaintiff, Newark Housing Authority, filed an Order to Show Cause for Writ of Possession (the "OTSC") on May 12, 2025 (Da24 – Da63).[1] The Court entered the OTSC on May 13, 2025 (Da19 – Da23). Defendants' Attorney filed correspondence on June 11, 2025 explaining why for the Defendants Theodore Fiore, Ruffino Holdings LLC, Ted Fiore Services LLC, T. Fiore Demolition Inc., T&C Auto Sales LLC, Fiore Holdings LLC, Fiore Holdings II LLC, and T. Fiore Recycling Corp. did not file an answer to the OTSC on June 6, 2025 and requested a two-week adjournment of the return date and all other dates set forth in the OTSC (Da87 – Da88). Plaintiff's attorney filed correspondence in response to Defendants' Attorney's correspondence (Da141 – Da149), and Defendants' Attorney filed reply correspondence (Da89 – Da93).

On June 12, 2025, Judge Russo held a virtual hearing where he granted a two-week adjournment of the return date and <u>all other dates set forth in the OTSC</u> (Emphasis added) (2T).[2]

Adverse Possession Defendants filed the Answer to the OTSC on June 24, 2025 (Da64 – Da86). Further, Adverse Possession Defendants filed a Motion to permit the counterclaims for adverse possession on June 26, 2025 (Da94 –

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1 Da = Adverse Possession Defendnats/Appellants' appendix

Da130). The return date of the Adverse Possession Defendants' motion to permit the counterclaims was scheduled by the Trial Court to be heard on July 18, 2025.

A hearing occurred on June 30, 2025, notice of which Defendant's Attorney did not receive for the reasons set forth below. Judge Russo entered an Order for Possession on June 30, 2025 (Da138 – Da140). Adverse Possession Defendants filed a Motion for Reconsideration of the Order for Possession on June 30, 2025 (Da133 – Da140). The return date of the Motion for reconsideration was scheduled for July 18, 2025.

On July 10, 2025, Plaintiff filed opposition to both Adverse Possession Defendants' Motion to permit the counterclaims (Da150 – Da168) and the Motion for reconsideration (Da169 – Da186).

On July 18, 2025, oral argument was heard on the Adverse Possession Defendants' Motion to permit counterclaims of adverse possession and the Motion of reconsideration of the Order for Possession (1T). Judge Russo denied both motions and entered the Orders dated July 18, 2025(Da1 – Da4). Defendants filed a Notice of Appeal to this Court on August 13, 2025 (Da5 – Da9).

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2 2T = transcript of June 12, 2025; 1T = transcript of July 18, 2025

STATEMENT OF FACTS

Plaintiff, Newark Housing Authority, filed an Order to Show Cause for Writ of Possession (the "OTSC") on May 12, 2025 (Da24 – Da63). The Court entered the OTSC on May 13, 2025 (Da19 – Da23). Pursuant to the OTSC, the return date for Defendants' answers was June 6, 2025 (Da21). The Affidavits of Service were properly served upon the registered agents of the Defendants, or as otherwise permitted by law (Da87). The attorney for the Defendants Theodore Fiore, Ruffino Holdings LLC, Ted Fiore Services LLC, T. Fiore Demolition Inc., T&C Auto Sales LLC, Fiore Holdings LLC, Fiore Holdings II LLC, and T. Fiore Recycling Corp. ("Defendants' Attorney") was not authorized to accept service and did not accept service (Da87, Da89).

Defendants' Attorney filed correspondence on June 11, 2025 explaining why the Defendants Theodore Fiore, Ruffino Holdings LLC, Ted Fiore Services LLC, T. Fiore Demolition Inc., T&C Auto Sales LLC, Fiore Holdings LLC, Fiore Holdings II LLC, and T. Fiore Recycling Corp. did not file an answer on June 6, 2025 and requested a two-week adjournment of the return date and all other dates set forth in the OTSC (Emphasis added) (Da87 – Da88).[3] Plaintiff's attorney filed correspondence in response to Defendants' Attorney's correspondence (Da141 –

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3 Jarrid Kantor, Esq. did not appear, and is not involved in the action.

Da149), and Defendants' Attorney filed reply correspondence (Da89 – Da93), all on June 11, 2025.

On June 12, 2025, Judge Russo's Chambers contacted Plaintiff and Defendants' attorneys and scheduled a virtual hearing (the "Virtual Hearing") to discuss the matter before Judge Russo that day (2T). At the hearing Judge Russo granted a two-week adjournment of the return date and all other dates set forth in the OTSC (Emphasis added) (2T5). Further, in accordance with Judge Russo's granting of the two-week adjournment at the Virtual Hearing, Adverse Possession Defendants were instructed to (i) order a transcript of the hearing that occurred before Hon. Cynthia Santomauro on March 14, 2025 under docket no. ESX-C-93-24, and (ii) file a motion to permit the filing of the counterclaims of adverse possession by the Adverse Possession Defendants (2T6). Judge Russo instructed the Adverse Possession Defendants to file two separate pleadings: one pleading was the Adverse Possession Defendants' Answer to the OTSC Complaint, and the second pleading was a motion to permit the counterclaims to the OTSC Complaint to assert adverse possession (2T6).

On June 11, 2025, a Court notice was sent via eCourts advising that a hearing was scheduled for June 30, 2025 (Da175). Defendants' Attorney did not receive notice of this hearing as eCourts requires that a responsive pleading or

Notice of Appearance be filed prior to eCourts notifying a party of any scheduled dates or other communications, and Defendants had not yet filed an Answer or a Notice of Appearance (Da131). Therefore, no notice of the June 30th hearing date was given to Defendants' Attorney by either the Court or Plaintiff (Da131). Having received no notice of the June 30th date, Defendants' Attorney did not appear on the return date (Da131).

Adverse Possession Defendants filed the Answer to the OTSC on June 24, 2025 (Da64 – Da86), two days before it was due, and filed a Motion to permit the counterclaims for adverse possession by the Adverse Possession Defendants on June 26, 2025 pursuant to Judge Russo's order of June 12 at the Virtual Hearing (Da94 – Da130). Defendants' Attorney sent courtesy copies of the Answer to the OTSC and the Motion to permit counterclaims to Plaintiff pursuant to the provisions of the OTSC; however, Defendants' Attorney acknowledges that it failed to send a courtesy copy to Judge Russo's Chambers (Da21). Notwithstanding the foregoing, Adverse Possession Defendants' Answer and Motion to permit the counterclaims were filed through the eCourts system and was received by the Court (Da64, Da94, Da176). The return date of the Adverse Possession Defendants' Motion to permit the counterclaims was scheduled by the Trial Court to be heard on July 18, 2025 (Da131).

On June 30, 2025, Chambers contacted Defendants' Attorney regarding his appearance for the June 30th hearing (Da131, Da135). Defendants' Attorney spoke to Judge Russo's law clerk and advised that Adverse Possession Defendants were not notified of the June 30, 2025 hearing date, but Defendants' Attorney was available to appear via telephone or virtual appearance (Da131). The law clerk advised that she could not interrupt the Judge on the bench (Da136). She advised Defendants' Attorney to file correspondence immediately regarding Defendants' Attorney's non-appearance for the hearing on June 30, 2025, which Defendants' Attorney did immediately (Da131). However, at the hearing conducted by Judge Russo on June 30, 2025, not having before him any appearance from Defendants' Attorney, Judge Russo entered an Order for Possession dated June 30, 2025 ejecting all of the Defendant's entities from the Property in this action (Da138 – Da140).

Adverse Possession Defendants immediately filed a Motion for reconsideration of the Order for Possession entered on June 30, 2025, alleging, among other points, that Judge Russo failed to consider and apply the order at the Virtual Hearing granting the Defendants a two-week adjournment of all return dates on the OTSC, and made his decision without consideration of the merits of Adverse Possession Defendants' rights, but only by reason of the failure of the

Adverse Possession Defendants to appear at the hearing on June 30, 2025 (Da133 – Da140). The return date of the Motion for reconsideration was scheduled for July 18, 2025 (1T).

On July 10, 2025, Plaintiff filed opposition to both Adverse Possession Defendants' Motion to permit the counterclaims (Da150 – Da168) and the Motion for reconsideration of the Order for Possession (Da169 – Da186). Plaintiff's opposition, in part, argues the merits of the Adverse Possession Defendnats' motion and counterclaims, once again seeking to argue whether on the merits the Adverse Possession Defendants should be granted (Da171).

On July 18, 2025, oral argument was heard on the Adverse Possession Defendants' Motion to permit counterclaims of adverse possession and the Motion of reconsideration of the Order for Possession entered on June 30, 2025 (1T).[4] Judge Russo denied both motions and entered the Orders dated July 18, 2025 (Da1 – Da4). Defendants filed a Notice of Appeal to this Court on August 13, 2025 (Da5 – Da9).

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4 During oral argument, Defendants' Attorney incorrectly claimed, and provided to Judge Russo exhibits that were actually part of Plaintiff's pleadings. Defendants' Attorney only realized this error after the hearing and the Orders had

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ARGUMENT

PROCEDURAL ISSUES

POINT I

A. THE TRIAL COURT MADE AN ERROR IN FAILURE TO APPLY THE ADJOURNMENT GRANTED BY JUDGE RUSSO FOR THE OTSC RETURN DATE AND ALL OTHER DATES COMMENCING JUNE 12, 2025 (Raised below: Da3; 1T6)

There is an error between the OTSC return dates that the Adverse Possession Defendants were granted by Judge Russo at the Virtual Hearing and the return dates that the Trial Court utilized. The Trial Court made an error in the application of the two-week adjournment. A two-week adjournment applied as of the Virtual Hearing date of June 12, 2025 would have been June 26, 2025 for Defendants to file a written response to the OTSC Complaint <u>and all other return dates</u> pursuant to the OTSC Order.

Defendants requested a two-week adjournment of the OTSC and all other return dates set forth in the OTSC Order. The adjournment was granted by Judge Russo (2T5). Defendants reasonably believed that they would receive a full two-week adjournment of all of the return dates; however, the error of the Trial Court's application of the two-week adjournment granted by Judge Russo affected all of the return dates under the OTSC Order.

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been entered.

B. THE TRIAL COURT'S ERROR PRECLUDED THE FILING OF THE ANSWER WITH COUNTERCLAIMS (Raised below: Da3; 1T6)

Judge Russo realized that there was no urgency and Plaintiff would not be adversely affected by an adjournment of the return dates (1T6; 2T). Therefore, Judge Russo granted a two-week adjournment of the return date set forth in the OTSC Order and all related return dates. The procedural error that occurred was that the Trial Court improperly assumed that the two-week adjournment began retroactively on June 6, 2025 instead of commencing as of June 12, 2025, the date that Judge Russo granted the two-week adjournment at the Virtual Hearing.

The Trial Court applied the two-week adjournment request retroactively commencing from June 6, 2025 and the original return dates as set forth in the OTSC Order dated May 13, 2025. Based upon the original return dates, the return date for Defendants to file a written response would have been June 20, 2025 instead of the original return date of June 6; the return date for Plaintiff to file a written reply to Defendants response would have been June 27, 2025 instead of the original return date of June 13; and the return date of the OTSC order would have been June 30, 2025 instead of the original return date of June 16. However, the Trial Court should have applied the two-week adjournment request commencing June 12, 2025, the date that Judge Russo granted the adjournment

request.

The new return dates should have commenced on June 12, 2025, in accordance with the granted two-week adjournment by Judge Russo. The new return dates should have been as follows: the return date for Defendants to file a written response should have been June 26, 2025 instead of the original return date of June 6; the return date for Plaintiff to file a written reply to Defendants response should have been July 3, 2025 instead of the original return date of June 13; and the return date of the OTSC Order should have been July 7, 2025 instead of the original return date of June 16.

Once this error of application of the two-week adjournment was made by the Trial Court, both the Adverse Possession Defendants and the Court were operating under two different timelines as to the return dates set forth in the OTSC Order. Both the Adverse Possession Defendants and Plaintiff were innocently utilizing different return dates based upon the Trial Courts error in not applying the two-week adjournment set forth by Judge Russo in the Virtual Hearing for a two-week adjournment commencing on June 12, 2025 and for all other return dates.

Further, the Adverse Possession Defendants were unaware of the Trial Court applying the adjournment request retroactively as eCourts requires that a

responsive pleading or Notice of Appearance be filed prior to the eCourts system notifying a party of any scheduled dates or Court communications. Defendants did not file an Answer, or a Notice of Appearance, until June 24, 2025. Therefore, any notices that the Court would have sent alerting the Adverse Possession Defendants to the error in application of the adjournment request were not received.

Assuming, arguendo, that the two-week period began retroactively as of June 6, 2025, the new return date for Defendants to file a written response to the OTSC would have been June 20, 2025. If the return date for filing a response was June 20, then half (one week) of the requested two-week adjournment had already been ***lost*** due to June 12, 2025 only being one week and a day before June 20,2025. Further, Defendants would have only had one week to (i) file a response to the OTSC Complaint, (ii) to obtain the requested transcript of the hearing that occurred before Hon. Cynthia Santomauro on March 14, 2025 under docket no. ESX-C-93-24, and (iii) file the Motion to allow counterclaims of adverse possession that Judge Russo requested in the Virtual Hearing. Had Defendants understood that the adjournment request was going to be applied retroactively to the return date of June 6, 2025 then Defendants would have requested a three-week adjournment due to one week had already passed as of June 12, 2025, and

only one week was impractical for the Adverse Possession Defendants to meet Judge Russo's requests. Applying the adjournment request retroactively was never contemplated nor intended by the Adverse Possession Defendants.

C. ADVERSE POSSESSION DEFENDANTS FILING OF THE ANSWER TO THE OTSC AND MOTION WAS WITHIN THE TIME PERIODS GRANTED BY JUDGE RUSSO (Raised below: Da3; 1T6;1T9)

Both the Adverse Possession Defendants and Plaintiff were innocently utilizing different return dates. The Adverse Possession Defendants were in compliance with the new return dates assuming that the Trial Court applied the granted two-week adjournment commencing as of June 12, 2025. The Adverse Possession Defendants filed their Answer to the OTSC Complaint before the return date for Defendants to file a written response, and filed the Motion to permit the counterclaims, which motion was required by Judge Russo, on the return date for Defendants to file a written response.

Rule 4:67-4(a) states, "…the defendant shall…within such further time as the court may allow, serve and file either an answer, an answering affidavit, or a motion returnable on the return date…".

Judge Russo granted the adjournment request, which altered the return dates

under the OTSC Order. The OTSC was absolutely opposed by the Adverse Possession Defendants in the filing of an Answer to the OTSC Complaint. The Adverse Possession Defendants followed the additional provisions of the Order by providing Plaintiff with a Certificate of Insurance on June 13, 2025. The Adverse Possession Defendants sent courtesy copies to Plaintiff pursuant to the provisions of the OTSC; however, the Adverse Possession Defendants acknowledge that they failed to send a courtesy copy to Judge Russo's Chambers, pursuant to the provisions of the OTSC. Notwithstanding the foregoing, the Adverse Possession Defendants' Answer was filed through the eCourts system and was received by the Court. The Answer, taken together with the Motion to permit the counterclaims as directed by the Trial Court, constitutes an opposition to the OTSC.

SUBSTANTIVE ISSUES

POINT II

A. THE TRIAL COURTS MISAPPLICATION OF JUDGE SANTOMAURO'S DECISION UNDER DOCKET NO. ESX-C-93-24 (Raised below: Da1; Da3; 1T16)

Judge Russo misunderstood and misapplied the decision of Judge Santomauro under docket number ESX-C-93-24, which, among other decisions,

clearly permitted all Defendants except Theodore Fiore individually to assert a claim of adverse possession and other defenses (1T12; Da125). Judge Santomauro's decision of lack of adverse possession claims did not apply to the Adverse Possession Defendants but only to Theodore Fiore individually. Judge Santomauro stated:

> "But the fact is there is no standing for Theodore Fiore, Sr., to bring this action…in adverse possession on this property. <u>His companies may. I don't know. That's for another day, though, because I don't need to reach that</u> (Emphasis added)." (Da125)

Further, Judge Santomauro stated:

> "Now, I leave it to another day…as to whether – if you were to file a lawsuit in the name of those other companies, right, <u>whether there's other – all kinds of defenses the defendant may have</u> (Emphasis added)." (Da125)

By reason of the foregoing, Judge Santomauro's decision permits the claims of adverse possession by the Adverse Possession Defendants under the applicable statutes, or any other rights they may assert (Da.126). Judge Russo acknowledged, and Judge Santomauro specifically ruled, that the rights of the Adverse Possession Defendants were preserved for further litigation, which was exactly why Plaintiff filed the OTSC Complaint and exactly why the rights of the Adverse Possession Defendants should be granted and the Answer and counterclaims filed to protect the rights of the Adverse Possession Defendants

(1T12; Da125-126).

During the oral argument that occurred on March 14, 2025, Judge Santomauro stated:

> "But the fact is there is no standing for Theodore Fiore, Sr., to bring this action…in adverse possession on this property. His companies may. I don't know. That's for another day, though, because I don't need to reach that." (Da125)

Further, Judge Santomauro stated:

> "Now, I leave it to another day…as to whether – if you were to file a lawsuit in the name of those other companies, right, whether there's other – all kinds of defenses the defendant may have. I leave that for another day." (Da125)

Further, Judge Santomauro stated:

> "As to the other companies, I leave that for another day and another lawsuit. Right? And again, there might be defenses if that other lawsuit is brought. I don't know. They might be winning or not. All right? So, that is my ruling." (Da126)

By reason of the foregoing, Judge Santomauro's decision permits the claims of adverse possession by some or all of the Fiore Defendants under the applicable statutes, or any other claims they may assert.

B. JUDGE RUSSO ERRED IN PREJUDGEMENT OF THE SUCCESS OR FAILURE OF DEFENDANTS COUNTERCLAIM INSTEAD OF ALLOWING DEFENDANTS THEIR RIGHT OF DUE PROCESS (Raised below: Da1; Da3; 1T12-13)

Judge Russo misunderstood the decision of the Judge Santomauro under docket number ESX-C-93-24 (1T12). Judge Santomauro's decision was that the Adverse Possession Defendants would have a difficult time proving the claim of adverse possession, not that she does not believe that they have an adverse possession claim (1T12). The Motion to permit counterclaims filed by the Adverse Possession Defendants was in accordance with Judge Russo's order at the Virtual Hearing to determine whether Judge Santomauro's decision that the lack of adverse possession applied only to Theodore Fiore individually or to all of the Defendants. Judge Santomauro specifically ruled that the rights of the Adverse Possession Defendants were preserved for further litigation which was what caused the Plaintiff to file the OTSC, and why the Adverse Possession Defendants answered the OTSC with an adverse possession counterclaim (1T13; Da125).

Judge Russo requested the Adverse Possession Defendants to obtain the transcript of the oral argument that occurred before Judge Santomauro on March 14, 2025 (Da99 – Da130). Judge Russo did not initially agree with Adverse

Possession Defendants' understanding that Judge Santomauro only dismissed the claim of adverse possession against Theodore Fiore and therefore insisted upon a full transcript of her decision. Judge Russo did not request any additional documentation from prior docket ESX-C-93-24 except for the transcript of Judge Santomauro's decision on March 14, 2025 (2T6-7). Judge Russo <u>only</u> requested the transcript of the oral argument to clarify if Judge Santomauro dismissed the claim of adverse possession only against Theodore Fiore individually.

Judge Russo did, after review of the full transcript of Judge Santomauro's decision, concede that Judge Santomauro's ruling only barred an adverse possession claim by Theodore Fiore, individually, and did not involve the Adverse Possession Defendants(1T15).

Similarly, Plaintiff sought to defeat the Adverse Possession Defendants' motions by pre-judging the rights of the Adverse Possession Defendants to litigate the action as required by law.

POINT III

A. JUDGE RUSSO ERRED IN DENYING DEFENDANTS MOTION TO PERMIT THE FILING OF COUNTERCLAIMS AND THE MOTION FOR RECONSIDERATION OF THE ORDER ENTERED JUNE 30, 2025
(Raised below: Da1; Da3; 1T16)

Under New Jersey law, adverse possession is established so long as the requirements of the governing statute are met. N.J.S.A. 2A:14-30 states:

> "Thirty years actual possession of real estate…uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate… and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for recovery of any such real estate, woodlands or uncultivated tracts."

The Adverse Possession Defendants have been in possession of a portion of the Property since at least 1982, when Theodore Fiore's family's bar, Frickey's Hideaway, Inc., was on the Property. As set forth in the counterclaim by the Adverse Possession Defendants, the Adverse Possession Defendants were formed and operated out of the Property both before and after the deed conveyed the Property to Plaintiff; additionally, Defendant Theodore Fiore's family's bar also continued to operate on the Property after the deed conveyed the Property to Plaintiff (Da64 – Da86).

The Adverse Possession Defendants continued actual, open, and notorious occupancy of a portion of the Property before and after the demolition of Theodore Fiore's family's bar. The physical occupancy of an office trailer utilizing the address of the Property for the purposes and conduct of the Adverse Possession Defendant's business, as well as the physical usage of a portion of the Property, were at all times open and notorious, including but not limited to placement of fencing around a portion of the Property to segregate the Adverse Possession Defendants' claims of ownership and operation of the Property. This actual, open, and notorious display of the Adverse Possession Defendants' occupancy of a portion of the Property for over thirty years satisfies the requirement of N.J.S.A. 2A:14-30 for the Adverse Possession Defendants claim of adverse possession of a portion of the Property, if not the whole Property.

In fact, it could be suggested that had it not been for Plaintiff's proposed sale of the Property in 2024, then the Adverse Possession Defendants, if not all the Defendants, would continue to enjoy their actual, open, and notorious occupancy of the Property forever. Further, Plaintiff has not brought any prior action before a Court during the period of adverse possession against any of the Adverse Possession Defendants related to Plaintiff's alleged claim of trespass on the Property; even the prior Docket no. ESX-C-93-24 was commenced not by

Plaintiff but by Theodore Fiore rather than Plaintiff.

B. THE MOTION TO ALLOW COUNTERCLAIMS IS NOT MOOT
(Raised below: Da1; Da3; 1T39)

The Motion to allow counterclaims is not moot as opposition to the OTSC was filed by the Adverse Possession Defendants (Da64 – Da86). The Adverse Possession Defendants' Answer filed on June 24, 2025, when taken together with the Motion to permit the counterclaims, provide the facts required for the Adverse Possession Defendants the right to claim adverse possession (1T39; Da64 – Da86). Based on the foregoing, if the Trial Court's decision of denying the Motion for reconsideration is reversed by this Court then the Defendants' motion to permit the counterclaims is not moot, and in fact the Adverse Possession Defendants have the right in the litigation to assert adverse possession of a portion of the Property.

POINT IV

A. THE TRIAL COURT ERRED IN NOT PERMITTING THE FILING OF THE ANSWER WITH COUNTERCLAIMS AS IT FOREVER BARS THE DEFENDANTS AND CAUSES A MISCARRIAGE OF JUSTICE
(Not raised below)

The Adverse Possession Defendants are not barred by res judicata. The theory of *res judicata* rely on the following factors: (1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties and (4) identity of the cause of action. See Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 742 A.2d 1007 (App. Div. 2000).

First: the final judgement entered under Docket no. ESX-C-93-24 was a dismissal of only Theodore Fiore's claim of adverse possession. This final judgment does not apply to the Adverse Possession Defendants.

Second: Judge Santomauro's decision on March 14, 2025 made it abundantly clear that Plaintiff never litigated any of the issues under Docket no. ESX-C-93-24, including the claims of adverse possession, against the Adverse Possession Defendants. Plaintiff litigated only against Theodore Fiore. Further, Judge Santomauro stated:

> "…since I ruled that [Theodore Fiore] is not in possession of the property right now, you have to bring an ejectment action against the proper parties who are in possession."
> (Da128)

Third: as previously asserted, the Adverse Possession Defendants were not involved in the action under Docket no. ESX-C-93-24. Plaintiff's actions and claims under Docket no. ESX-C-93-24 were only against Theodore Fiore personally. Further, Judge Santomauro stated:

> "Individuals do not have the right to bring a lawsuit on behalf of their LLC or their corporation. I mean, there are – probably are some exceptions in the law, but none that would apply here. Those companies have – as entities as the State of New Jersey, have the right to bring lawsuits." (Emphasis added.)
> (Da117)

Further, Judge Santomauro stated:

> "But [Theodore Fiore] is alleging here – [Theodore Fiore] is alleging here that he – he is the person – he, not his companies – on behalf of his companies…We know there's LLCs and – and corporations, right? And they are the only ones that could have brought this action." (Da124)

Fourth: as previously asserted, Plaintiff's actions and claims under Docket no. ESX-C-93-24 were not litigated against the Adverse Possession Defendants, contrary to Plaintiff's claims. The action under Docket ESX-C-93-24 was between Theodore Fiore and Plaintiff only; it did not name the Adverse Possession Fiore Defendants, nor did it include any of any of the other

Defendants. Further, Plaintiff never brought an action against any of the Adverse Possession Defendants, never sought an ejectment of the Adverse Possession Defendants, nor ever asked the Adverse Possession Defendants to vacate the Property prior to 2024 when Theodore Fiore commenced the action under Docket no. ESX-C-93-24, which was long after the rights of the Adverse Possession Defendants accrued for adverse possession claims pursuant to the Statute.

CONCLUSION

Defendants therefore respectfully request that this Court reverse Judge Russo's Orders dated July 18, 2025 denying Defendants' motion to permit counterclaims and Defendants' motion to reverse the Order entered on June 30, 2025, in the interest of justice, and hold that Defendants have the right to claim adverse possession and all other defenses and this Court must remand the matter to be litigated to its full extent. If this Court does not reverse the trial court's decision, then this Court will forever bar the Adverse Possession Defendants from their right to due process and will cause a miscarriage of justice.

Respectfully submitted,

Dated: October 17, 2025 MICHAEL S. GOODMAN, ESQ.

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NEWARK HOUSING AUTHORITY, Plaintiff-Respondent, v. IRONMAN ROAD SERVICES LLC; GUILLERMO BENALCAZAR; OSCAR BENALCAZAR; THEODORE FIORE; RUFFINO HOLDINGS LLC; TED FIORE SERVICES LLC; FIORE HOLDINGS LLC; FIORE HOLDINGS II LLC; Defendants-Respondents, T. FIORE DEMOLITION INC.; T&C AUTO SALES LLC; T. FIORE RECYCLING CORP., Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003976-24 DOCKET NO. IN COURT BELOW: ESSEX COUNTY LAW DIVISION DOCKET NO.: ESX-L-3639-25 Sat Below: Hon. Aldo J. Russo, J.S.C.

PLAINTIFF-RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION OF APPEAL

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PRELIMINARY STATEMENT

Plaintiff-Respondent Newark Housing Authority (the "NHA") submits this Memorandum of Law in Opposition to Defendant-Appellant T. Fiore Demolition Inc.; T&C Auto Sales LLC; and T. Fiore Recycling Corp.'s (the "Defendants") appeal of the Law Division's denial of Defendants' Motion for Reconsideration and Motion to Permit the Filing of a Counterclaim of Adverse Possession (the "Motion to Permit Counterclaims").

Defendants' entire basis for its Motion for Reconsideration, and now this appeal, is that Defendants' counsel claims he was unaware of the Order to Show Cause's return date despite a clear and unequivocal record. No rule, statute, or case law provides that such an excuse is a basis for reconsideration. Moreover, Defendants never filed opposition to the Order to Show Cause, and therefore, their failure to appear is irrelevant. Thus, the Order to Show Cause was unopposed and the Law Division properly granted NHA's relief sought. Therefore, there was no basis to grant the Motion for Reconsideration.

Defendants' Motion to Permit Counterclaims was also properly denied since Defendants were barred by res judicata and collateral estoppel from asserting any cause of action for adverse possession against the NHA due to previous litigation. Defendants were in privity with Fiore in the previous litigation and relied on the same factual basis as the previous litigation. Defendants made a deliberate choice

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not to include the entities when he filed the Adverse Possession Action, but now Defendants seek to take another bite of the apple. Defendants already had their day in court and are barred from relitigating any claims of adverse possession.

The Law Division properly denied both the Motion for Reconsideration and Motion to Permit Counterclaims. Defendants now appeal, despite asserting no new facts or identifying an error by the Law Division.

PROCEDURAL HISTORY

On May 12, 2025, Plaintiff-Respondent Newark Housing Authority (the "NHA") filed an Order to Show Cause for Writ of Possession Summary Action (the "Order to Show Cause") to regain possession of the NHA's property located at 457-463 Wilson Avenue, Newark, New Jersey (the "Property"). Da24-Da63. The NHA filed the action against Defendant-Respondent Theodore Fiore and his entities ("Defendant Fiore"): Defendant-Respondent Ruffino Holdings LLC; Defendant-Respondent Ted Fiore Services LLC; Defendant-Respondent Fiore Holdings LLC; Defendant-Respondent Fiore Holdings I LLC; Defendant-Appellant T. Fiore Demolition Inc.; Defendant-Appellant T&C Auto Sales LLC; and Defendant-Appellant T. Fiore Recycling Corp (collectively the "Defendants"). Da25.

The NHA also filed the action against Defendant-Respondent Ironman Road Services LLC; Defendant-Respondent Guillermo Benalcazar; and Defendant-Respondent Oscar Benalcazar (collectively the "Ironman Defendants"). Id. Defendants were illegally renting the Property to the Ironman Defendants. The Ironman Defendants entered into a consent order under which they voluntarily vacated the Property. Pa9-12.[1]

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[1] Pursuant to New Jersey Court Rule 2:6-8, "Pa___" refers to Plaintiff-Respondent's Appendix in Opposition of Appeal.

On May 13, 2025, the Law Division entered the Order to Show Cause setting the return date for June 16, 2025, and ordering Defendants to file any opposition by June 6, 2025. Da19-Da23. On June 11, 2025, Defendants requested a two-week adjournment, which was granted by the Law Division, and the return date was set for June 30, 2025. Da87-Da88. On June 24, 2025, Defendants filed an Answer to Complaint, Affirmative Defenses and Counterclaims, and a Motion to Permit the Filing of a Counterclaim of Adverse Possession (the "Motion to Permit Counterclaims"). Da64-Da86; Da94-Da98. Defendants did not file any opposition to the Order to Show Cause.

Defendants failed to appear on the June 30, 2025 return date, and the Law Division granted the NHA's relief. Da139-Da140. On June 30, 2025, Defendants filed a Motion for Reconsideration of the June 30, 2025 Order arguing that they were unaware of the return date despite multiple notices with the date. Da133-Da137. On July 18, 2025, the Law Division held oral argument on Defendants' Motion for Reconsideration and Motion to Permit Counterclaims. See 1T. The Law Division denied both motions. See Da1-Da4.

On August 13, 2025, Defendants filed this appeal. Da5-Da16.

STATEMENT OF FACTS

On April 22, 2024, Defendant Theodore Fiore ("Defendant Fiore") filed a complaint in the Superior Court of New Jersey, Chancery Division, Essex County under docket number ESX-C-93-24 asserting a claim for the property located at 457-463 Wilson Avenue, Newark, New Jersey 07105 (the "Property") through adverse possession (the "Adverse Possession Action"). Da156-Da163. On January 16, 2025, Defendant Fiore's complaint was dismissed without prejudice pursuant to R. 4:23-5(a)(1). Pa1-Pa4. On January 29, 2025, the NHA filed a Motion for Summary Judgment in the Adverse Possession Action to recover possession of the Property and requested the Chancery Division enter a Writ of Possession. Pa5-Pa7. On February 7, 2025, Defendant Fiore filed a Cross-motion to restore his complaint. Id.

The Chancery Division held oral argument on the NHA's summary judgment motion and Defendant Fiore's cross-motion to reinstate his complaint on March 14, 2025. Da100-Da130. Throughout oral argument, Defendant Fiore's counsel reiterated multiple times that he made a conscious choice to only bring the Adverse Possession Action on behalf of Defendant Fiore rather than including the affiliated entities. See Da103-Da104 at 6:25-7:4 ("I could have added every single entity, of which there are probably at least half a dozen entities of which Mr. Fiore, Sr., is the sole member. So we filed it under the name of Ted Fiore, Sr."); see also Da104 at 8:1-3 (" . . . and the reason I didn't want to list every one of those LLCs is because

he is the sole owner.") (emphasis added); Da115 at 30:23-25 (". . . I could have named all of the entities. I didn't because there were at least five or six different entities.").

While the Chancery Division stated in its decision that Defendant Fiore's entities **may** have standing to bring an adverse possession case, it cautioned that:

> [n]ow, I leave it to another day, perhaps another judge . . . as to whether – if you were to file a lawsuit in the name of those other companies, right, whether there's other – **all kinds of defenses the [NHA] may have** . . . Those defenses could include all kinds of things - - controversy, (indiscernible)[2], who knows?

Da125 at 50:15-23 (emphasis added); see also Da126 at 51:8-11 ("As to the other companies, I leave that for another date and another lawsuit. Right? And again, there **might be defenses if that other lawsuit is brought.**") (emphasis added). The Chancery Division went on to warn Defendant Fiore of the success of any subsequent lawsuit brought on behalf of the entities stating:

> [b]ased upon the evidence that your client has produced, the chances of him succeeding in this lawsuit - - when I say him, the companies - - very difficult, right?

Da127 at 53:11-14.

Following oral argument, the Chancery Division entered an Order denying Defendant Fiore's cross motion to reinstate his complaint, and a second order

[2] The indiscernible transcript reference clearly refers to the "Entire Controversy."

granting in part the NHA's Motion for Summary Judgment ordering that "Plaintiff's Complaint is dismissed due to lack of standing since the Court finds that the plaintiff has not personally been in possession or occupancy of the subjected property." Da16; Da48-Da49.

On May 12, 2025, the NHA commenced an ejectment action in the Law Division against Defendant Fiore and associated entities (the "Defendants"), as well as Ironman Road Services LLC, Guillermo Benalcazar, and Oscar Benalcazar, to whom Defendants were illegally renting the Property. Da24-Da63. On May 13, 2025, the Law Division entered an Order to Show Cause setting a return date for June 16, 2025. Da19-Da23. The Order to Show Cause required Defendants to file any opposition by June 6, 2025. Id. On June 11, 2025, Defendants filed a letter requesting a two-week extension of the return date. Da87-Da88. The adjournment request was granted over the NHA's objection, and a Clerk Notice was entered on eCourts stating: "A hearing in this matter will take place before Judge Aldo J. Russo on Monday, June 30, 2025 at 9:00am in the Historic Courthouse, Courtroom 400." Da141; Da175.

On June 12, 2025, the Court held a conference via Zoom with counsel for NHA and Defendants' counsel. See 2T. At the conference, the Law Division confirmed on the record that the adjournment request was granted. 2T 5:22-24. Additionally, NHA filed and served subsequent letters that reflected the June 30,

2025 return date. Da178-Da186. Specifically, the NHA letter served on Defendants on June 24, 2025, stated "[t]he pending Order to Show Cause in this matter is returnable on June 30, 2025." Da184. The letter further stated that:

> Under the Court's Order to Show Cause entered on May 13, 2025, Defendant Theodore Fiore and his related entities' (the "Fiore Defendants") opposition was due on June 6, 2025, ten (10) days prior to the original return date. No opposition was filed on June 6, 2025. Your Honor granted the Fiore Defendants' adjournment request setting the return date for June 30, 2025. Even treating this as a typical motion, pursuant to R. 1:6-5, any opposition was due eight (8) days prior to the return date. To date, no opposition has been filed by the Fiore Defendants.

Id.

On June 24, 2025, Defendants filed an Answer to Complaint, Affirmative Defenses and Counterclaims. Da64-Da86. Despite the Chancery Division's previous ruling on adverse possession, Defendants counterclaim for possession of the NHA's Property relied on the same exact facts as those relied on in the Adverse Possession Action. Compare Da74-Da80 with Da156-Da162. Defendants also filed a Motion to Permit Counterclaims. Da94-Da98.

On June 30, 2025, Defendants failed to appear at the scheduled return date for the Order to Show Cause. The Court granted NHA's relief sought. Da139-Da140. Defendants then filed a Motion for Reconsideration Pursuant to R. 4:49-2 (the "Motion for Reconsideration") on the unsupported and illogical basis that they were unaware of the return date. Da133-Da137.

On July 18, 2025, the Law Division held oral argument on Defendants' Motion for Reconsideration and Motion to Permit Counterclaims. See 1T In considering Defendants' argument regarding the two-week adjournment, the Law Division correctly pointed out that Defendants' opposition would have been due on June 20th under the adjournment request and Defendants failed to file any opposition:

> [f]orget about you not appearing on June 30th. Forget about that. Because, like I said before, if you had appeared on June 30th you didn't file opposition. Your opposition pursuant to your own admission was – should – should have been in on June 20th because the original order with the return date required you to file your opposition to his order to show cause by June 6th. You asked for a two week adjournment which would require you to file the opposition to his order to show cause by June 20th. And, you didn't.

1T 8:4-14.

The Law Division went on to explain that Defendants had failed to provide any basis on which the June 30, 2025 Order should be reconsidered. 1T 11:23-25 ("Your motion for reconsideration doesn't have any attachments which would indicate that I did anything wrong."); 1T 12:12-15 (" . . . with respect to your motion for reconsideration you don't attach anything which would lead me to believe I may have been premature in granting their order to show cause."); 1T 16:5-6 ("—not a scintilla of evidence – which would force me to vacate my order. . .").

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Following oral argument, the Law Division denied both the Motion for Reconsideration and Motion to Permit Counterclaims. Da1-Da4. Regarding the Motion for Reconsideration, the Law Division found:

> [t]hat certification does not tell this Court that it based its decision on palpably incorrect or an irrational basis or that this Court either did not consider or failed to appreciate the significant of [sic] of the probative, competent evidence. **No evidence was submitted and no legal or factual basis was given in the motion for reconsideration**.

1T 37:1-7 (emphasis added). Additionally, the Law Division found that Defendants' argument that it was their failure to appear that caused the Order to Show Cause to be entered is irrelevant since no opposition was filed. 1T 37:13-20. Based on there being no grounds to grant the Motion for Reconsideration, the Law Division denied the Motion to Permit Counterclaims as moot. 1T 39:13-16.

On August 13, 2025, Defendants filed a Notice of Appeal appealing the Law Division's decision on the Motion for Reconsideration and the Motion to Permit Counterclaims. Da5-Da16.

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STANDARD OF REVIEW

The standard of review for denials of motions for reconsideration is whether the trial court "abused its discretion." Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996); see also Matter of Est. of Jones, 477 N.J. Super. 203, 216 (App. Div. 2023), aff'd as modified, 259 N.J. 584, 328 ("[W]e review a trial court's decision on a motion for reconsideration under an abuse of discretion standard."). An "abuse of discretion" occurs when a decision is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015); see also Kornbleuth v. Westover, 241 N.J. 289, 302 (2020).

LEGAL ARGUMENT

POINT I

DEFENDANTS FAIL TO IDENTIFY ANY MISAPPLICATION OF THE "PALPABLY INCORRECT OR IRRATIONAL BASIS" OR FAILURE TO CONSIDER "PROBATIVE, COMPETENT EVIDENCE" BY THE COURT BELOW THAT WOULD SUPPORT RECONSIDERATION.

The Law Division properly denied Defendants' Motion for Reconsideration since Defendants failed to assert any of the requisite grounds under R. 4:49-2. New Jersey Court Rule 4:49-2 provides that a motion for reconsideration must "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred." R. 4:49-2; see also D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Reconsideration is within the sound discretion of the court and should only be granted under "very narrow circumstances." D'Atria, 242 N.J. Super. at 401; Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). Reconsideration should only be used where either "the Court has expressed its decision based on palpably incorrect or irrational basis," or where "it is obvious that the Court either did not consider or failed to appreciate the significance of probative, competent evidence." D'Atria, 242 N.J. Super. at 401. More plainly stated, the

movant must demonstrate that the Court's prior ruling was arbitrary and capricious. Id.

Although the court should consider new information that could not be provided in the initial application, the court has been clear that "motion practice must come to an end at some point and if repetitive bites at the apple are allowed the Court will quickly sour." Id. at 401. In determining a motion for reconsideration, the court is obligated to engage in a "sensitive and scrupulous" analysis. Cummings, 295 N.J. Super. at 384 (quoting id. at 401-02). The mere fact that a litigant is displeased with the court's decision does not justify reconsideration. D'Atria, 242 N.J. Super. at 401.

A. Defendants' Motion Failed to Provide Any Basis for Reconsideration

Here, not only did Defendants not comply with R. 4:49-2, but the Motion for Reconsideration was bare of any material for the Law Division to even reconsider. In the oral decision, the Law Division correctly opined that Defendants' Motion

> does not tell this Court that it based its decision on palpably incorrect or an irrational basis or that this Court either did not consider or failed to appreciate the significant of [sic] of the probative, competent evidence. **No evidence was submitted and no legal or factual basis was given in the motion for reconsideration.**

1T 37:1-7 (emphasis added). Moreover, Defendants in this appeal yet again fail to present any legal or factual basis to support how the Law Division abused its discretion by denying the Motion for Reconsideration. Instead, Defendants attempt

to once again assert that their own failure to appear on the adjourned return date, despite adequate notice, somehow transforms into an error by the court. See Db6. Defendants' failure to cite to any legal authority to support this theory is due to the fact that this is not a legal basis to grant a motion for reconsideration. See 1T 3:9-13 ("The letter brief that's attached to the motion simply recites the certification which puts forth no facts or law that [the] Court overlooked when it decided to grant the order for possession.").

Defendants' Motion for Reconsideration did not include any attachments which would indicate that the court improperly granted the Order of Possession. 1T 12:13-15. As the Law Division aptly stated, Defendants presented

> **not a scintilla of evidence which would force [the court] to vacate [the] order** because all [it has] is a motion for reconsideration that says, 'Judge, reconsider your position because I didn't show up on the 30th.' That's not a basis for reconsideration.

1T 16:5-10 (emphasis added).

The Law Division considered the March 14, 2025 transcript of the oral argument before the Chancery Division with respect to the Motion for Reconsideration because it was "the only thing [Defendants] attached" and "actually the motion for reconsideration didn't have the transcript. [Defendants'] motion to allow the counterclaim had the transcript." 1T 11:7-9; 1T 11:17-20. The transcript "offers this Court no guidance as to the corporate defendants" because it was decided

on the issue of standing as to Defendant Fiore individually. 1T 38:19-24. Moreover, the Chancery Division cautioned the Defendants with respect to a claim of adverse possession that "[b]ased upon the evidence that your client has produced, the chances of him succeeding in this lawsuit - - when I say him, the companies - - very difficult, right?" Da127 at 53:11-14. In considering the transcript, the Law Division correctly gleaned from the decision of the Chancery Division that Defendants do not "meet the threshold of adverse possession as to the corporate Fiore defendants." 1T Tr. 39:2-7.

The Law Division properly considered the transcript from the oral argument before the Chancery Division, and Defendants put forth no new evidence to support its Motion for Reconsideration or this appeal. Defendants are required to point to some evidence for the basis of their motion for reconsideration pursuant to Rule 4:49-2, and they failed to do so here. Thus, the court properly acted within its discretion in denying the Motion for Reconsideration. <u>See generally</u> <u>Palombi v. Palombi</u>, 414 <u>N.J. Super.</u> 274, 289-90 (App. Div. 2010) (finding the trial court was not required to engage in the reconsideration process because Appellant failed to identify any arbitrary, capricious or unreasonable error by the court and did not present any new evidence that could be a basis for reconsideration.). Furthermore, the Defendants fail to argue that there was either a palpable error or a failure by the court to consider the significance of probative evidence. Defendants do not cite to

any basis that the Law Division overlooked or misapplied when granting the order of dispossession. In this case, Defendants did not present any new evidence in their motion to reconsider or in this appeal. 1T 37:5-7 ("No evidence was submitted and no legal or factual basis was given in the motion for reconsideration."). Thus, the Law Division correctly denied Defendants' Motion for Reconsideration.

B. Defendants' Argument That It Was Unaware of the Return Date Is Illogical and Contradicted by the Record

Defendants' entire basis for this appeal of the Law Division's denial of the Motion for Reconsideration is that it was unaware of the return date for the Order to Show Cause. Defendants' nonsensical argument is that the Law Division misapplied the adjournment that it granted. See Db9. Notably, Defendants argue that the Law Division granted a two-week adjournment commencing on June 12, 2025, at the conference held on June 12, 2025. Db11. Defendants, however, fail to cite to where in the transcript this occurred; that is because this is not an accurate recitation of the facts. The only discussion by the Law Division regarding the adjournment request at the June 12, 2025 conference was the following:

> Mr. Goodman, your adjournment request was granted. I read the letter. I granted it yesterday. I'm not changing it, so it's adjourned.

2T 5:22-24.

The Law Division's intention stated plainly in its oral decision on the Motion for Reconsideration that the two week adjournment was of the dates set forth in the

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Order to Show Cause, and thus, Defendants' opposition would have been due on June 20, 2025:

> Your opposition pursuant to your own admission was – should – should have been in on June 20th because the original order with the return date required you to file your opposition to his order to show cause by June 6th.

1T 8:7-11. This is the only logical interpretation of the adjournment request.

Additionally, any argument by Defendants that it was unaware of the June 30, 2025 hearing date is contradicted by the clear record. First, the parties were notified of the adjournment by a Clerk Notice posted on eCourts on June 11, 2025, stating "A hearing in this matter will take place before Judge Aldo J. Russo on Monday, June 30, 2025 at 9:00 am in the Historic Courthouse, Courtroom 400." Da175. Then, on June 12, 2025, the NHA filed a letter with the Law Division, which was served on Defendants' counsel, in which the header stated, "Adjourned Return Date: June 30, 2025." Da178-Da179. Additionally, the Law Division held a conference via Zoom on June 12, 2025, where Judge Russo confirmed the two-week adjournment was granted. 2T 5:22-24 ("Mr. Goodman, your adjournment request was granted. I read the letter. I granted it yesterday."). Also, the Order entered by the Court that day included in the caption "Return Date: June 30, 2025." Da181-Da182.

The adjourned return date was also reflected in a subsequent letter filed by the NHA and served on Defendants on June 24, 2025. Da184-Da185. Specifically, the

letter stated "[t]he pending Order to Show Cause in this matter is returnable on June 30, 2025." Id. The letter goes on to state that:

> Under the Court's Order to Show Cause entered on May 13, 2025, Defendant Theodore Fiore and his related entities' (the "Fiore Defendants") opposition was due on June 6, 2025, ten (10) days prior to the original return date. No opposition was filed on June 6, 2025. Your Honor granted the Fiore Defendants' adjournment request setting the return date for June 30, 2025. Even treating this as a typical motion, pursuant to R. 1:6-5, any opposition was due eight (8) days prior to the return date. To date, no opposition has been filed by the Fiore Defendants.

Id.

Moreover, Defendants' counsel's certification demonstrates he was aware of the June 30th return date. Defendants' counsel claims he was unaware of the return date, but that cannot be accurate because he was the one who requested that the initially scheduled return date of June 16th be moved two weeks. Da136. As the Law Division noted, "you have paragraph four saying he was unaware of the June 30th because he didn't know of the new dates. And then paragraph five stating he requested two week adjournments from the original dates." 1T 35:10-14; see also Da136. Based on the numerous communications of the return date and Defendants' own statements, Defendants cannot claim to have been unaware of the June 30, 2025 return date. Relying upon the same record, Defendants now appeal and attempt to once again improperly argue that Defendants' misunderstanding of the adjournment dates constitutes an error by the Law Division, which it does not.

Additionally, Defendants' misunderstanding of the adjournment dates does not meet the excusable neglect standard necessary for an order to be vacated. Motions to vacate are considered as motions to amend under R. 4:49-2. See Baumann v. Marinaro, 95 N.J. 380, 390 (1984). Pursuant to R. 4:50-1(a), a final order may be vacated for "excusable neglect." Specifically,

> [a]s a general rule, the negligence of an attorney is imputable to his client, and the latter cannot be relieved from a default judgment taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of the former, unless the neglect was excusable under the circumstances. The negligence of an attorney may be excusable when attributable to an honest mistake, an accident, **or any cause which is not incompatible with proper diligence**.

Williams v. Knox, 10 N.J. Super. 384, 389-90 (Law Div. 1950) (emphasis added). Defendants' counsel was notified of the June 30th return date on multiple occasions and his failure to appear cannot be attributable to excusable neglect under the circumstances. See generally Schulwitz v. Shuster, 27 N.J. Super. 554, 557 (App. Div. 1953) (finding defendants' conduct, which included procrastination in filing required pleadings, failure to appear in court, and delay in filing a trial brief with the court, was inexcusable).

As detailed above, the June 30, 2025, return date was clearly provided to Defendants multiple times and Defendants' failure to appear is inexcusable neglect. Here, the facts and pleadings, or the lack thereof, fully supports the Law Division's

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denial of Defendants' Motion for Reconsideration. See Cummings, 295 N.J. Super. at 384 (finding the court correctly applied R. 4:49-2 and denied the motion for reconsideration where appellant did not present new facts or "point to decisions that the motion judge had overlooked or misapplied when he granted defendant summary judgment.").

C. Defendants' Alleged Misunderstanding of the Return Date is Irrelevant Due to Defendants' Failure to Ever Oppose the Order to Show Cause

Not only did Defendants' Motion for Reconsideration fail to present evidence supporting their position, but Defendants also failed to file an opposition to the Order to Show Cause. By failing to file any opposition, Defendants' argument as to the June 30, 2025 return date becomes irrelevant. Despite Defendants' attempt to argue that the Answer to Complaint, Affirmative Defenses and Counterclaims filed on June 24, 2025 served as an opposition to the Order to Show Cause, Defendants never filed any opposition to the NHA's Order to Show Cause. Thus, whether or not Defendants appeared on the June 30, 2025 return date is irrelevant since the Order to Show Cause was unopposed.

Even accepting Defendants' argument that the new return dates should have commenced on June 12, 2025, Defendants' opposition (under their analysis) would have been due on June 26, 2025. Db11. Defendants did not file any opposition by

this alleged due date it was operating under. Thus, even accepting Defendants' logic, the Order to Show Cause was unopposed.

The hearing was adjourned to June 30, 2025, at Defendants' request, and Defendants failed to appear. Thus, even if Defendants appeared on June 30, 2025, Defendants never filed any opposition. The Law Division properly granted the Order to Show Cause, and Defendants' argument that its confusion as to the return date entitles it to reconsideration is irrelevant because no opposition was ever presented to the Law Division. Therefore, there was nothing for the court to consider in the first instance, let alone reconsider.

POINT II

DEFENDANTS' MOTION TO PERMIT COUNTERCLAIMS WAS PROPERLY DENIED BY THE LAW DIVISION.

The Law Division properly denied Defendants' Motion to Permit Counterclaims. Defendants once again attempt to misconstrue the Chancery Division's decision regarding the Adverse Possession Action as some form of guarantee that it was allowed to attempt to pursue adverse possession on behalf of the entities. See Db14-Db16. The Chancery Division's oral decision actually cautioned Defendant Fiore against bringing another adverse possession action on behalf of the entities due to the lack of evidence that could support any claim by the entities. Da127 at 53:11-14 ("Based upon the evidence that your client has produced, the chances of him succeeding in this lawsuit - - when I say him, the companies - - very difficult, right?").

Additionally, the Chancery Division foreshadowed the exact arguments raised here - that Defendants are barred from attempting to bring another adverse possession action. Da125 at 50:15-23 ("[I]f you were to file a lawsuit in the name of those other companies, right, whether there's other – all kinds of defenses the [NHA] may have . . . Those defenses could include all kinds of things - - controversy, (indiscernible)[3], who knows?"); see also Da126 at 51:8-11 ("As to the other

[3] The indiscernible transcript reference clearly refers to the "Entire Controversy."

companies, I leave that for another date and another lawsuit. Right? And again, there **might be defenses if that other lawsuit is brought.**") (emphasis added).

As the Chancery Division alluded to, any adverse possession claim brought by Defendants is barred by res judicata and collateral estoppel. Defendants' arguments regarding these bars notably fall short due to the failure to recognize that they do not require the same parties in the second action, but rather can also be applied when parties are in privity with each other.

Defendants' Motion to Permit Counterclaims was clearly an attempt to have a second bite at the apple regarding its initial failed Adverse Possession Action. This is illustrated by the fact that Defendants rely on the same exact facts in its Answer as were in its Verified Complaint in the Adverse Possession Action. Compare Da74-Da80 with Da156-Da162. Defendants did not present any new facts, evidence, or theories as to how there would be a claim for adverse possession by the entities rather than Defendant Fiore. Instead, Defendants attempted to utilize its Motion to Permit Counterclaims as an opportunity to redo its own decision to bring the Adverse Possession Action only on behalf of Defendant Fiore rather than all the entities operated by Fiore.

The doctrines of res judicata and collateral estoppel are closely related and often overlap. Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000) (". . . collateral estoppel overlaps with and is closely related to res judicata.").

Collateral estoppel bars re-litigation of issues in suits that arose from different causes of action, while res judicata bars causes of action that have already been litigated between the same parties or their privities in a prior action. Velasquez v. Franz, 123 N.J. 498, 505 (1991); Selective Ins. Co., 327 N.J. Super. at 173.

Under res judicata, a cause of action that was decided on the merits by a court with jurisdiction cannot be relitigated by those same parties or their privities in a new proceeding. Walker v. Choudhary, 425 N.J. Super. 135, 150 (App. Div. 2012). The initial matter must have been fairly litigated and determined so it is not still open for relitigation. Garvey v. Township of Wall, 303 N.J. Super. 93, 98 (App. Div. 1997). In order for res judicata to apply, there must be (1) a final judgment by a court of competent jurisdiction; (2) identity of issues; (3) identity of parties; and (4) identity of the cause of action. Brookshire Equities LLC v. Montaquiza, 346 N.J. Super. 310, 318 (App. Div. 2002). In order to determine whether two causes of action are the same the court must consider:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.

Garvey, 303 N.J. Super. at 98-99 (quoting Culver v. Insurance Co. of North America, 115 N.J. 451, 461-62 (1989)).

In order for collateral estoppel to bar a claim, the doctrine requires the party asserting the bar to show:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Selective Ins. Co., 327 N.J. Super. at 173-74.

Both res judicata and collateral estoppel apply when a party in the second action was in privity with a party in the first action. See Olds v. Donnelly, 291 N.J. Super. 222, 232 (App. Div. 1996) (stating that res judicata applies "if a party in the second action is in privity with a party in the first action."); see also State v. K.P.S., 221 N.J. 266, 277 (2015) ("A fundamental tenant of collateral estoppel is that the doctrine cannot be used against a party unless that party either participated in or was 'in privity with a party to the earlier proceedings.'").

The New Jersey courts have stated that for purposes of res judicata and collateral estoppel, privity requires "[a] relationship is usually considered 'close enough' only when the party is a virtual representative of the non-party, or when the

non-party actually controls the litigation. State v. Brown, 394 N.J. Super. 492, 503 (App. Div. 2007); see also K.P.S., 221 N.J. at 278. When determining whether privity applies "the question to be decided is whether a party has had his day in court on an issue." K.P.S., 221 N.J. at 278; see also Zirger v. General Acc. Ins. Co., 144 N.J. 327, 338 (1996).

In Allen v. V and A Bros., Inc., the court discussed the issue of whether privity can be established between an individual and a corporation. Allen v. V and A Bros., Inc., 208 N.J. 114, 125 (2011). The Court held there was no basis of privity because of the individuals' lack of control over the prior litigation involving the corporation. Id. at 446. The court defines control as having "effective choice as to the legal theories and proofs to be advanced [on] behalf of the party to the action [as well as] control over the opportunity to obtain review." Id. at 139 (quoting Restatement (Second) of Judgments § 39).

Unlike the defendants in Allen, Defendants here are entities that are 100% owned and controlled by Fiore, which establishes a clear existence of privity between the previous and present litigants. See Da75 ("The Adverse Possession Fiore Defendants are and have been for a period of at least thirty (30) years, either managed and/or owned by Fiore."). This privity is further illustrated by the fact that all the discovery produced by Defendant Fiore in the Adverse Possession Action were documents related to these entities. In addition, Defendant Fiore brought the

initial litigation using the same attorney and allegations as the present action, further displaying his control over that litigation and the parties involved. Da156-Da162. Most notably, it was conceded by Defendant Fiore in the Adverse Possession Action that "I could have added every single entity," but "the reason I didn't want to list every one of those LLCs is because he is the sole owner." Da103 at 6:25; Da104 at 8:1-3. Defendants attempted to utilize this Motion to Permit Counterclaims to have a second chance after its initial legal theory failed.

Furthermore, judicial economy supports barring Defendants' counterclaim because Defendants have already had their day in court regarding their alleged claim of adverse possession. See Pivnick v. Beck, 326 N.J. Super. 474, 486 (App. Div. 1999) ("Some of the factors favoring application of issue preclusion are: conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency."). Defendant Fiore deliberately chose not to include the corporate entities when he filed the Adverse Possession Action in April of 2024. This was conceded during the March 14, 2025 oral argument when Defendant Fiore's counsel described the reasoning behind his deliberate choice to not name Defendants in the Adverse Possession Action. In responding to the Chancery Division's question regarding why Defendant Fiore, himself, was named as the only plaintiff, Defendants' counsel stated:

> I could have added every single entity, of which there are probably at least a half a dozen entities of which Mr. Fiore,

> Sr., is the sole – sole member. So we filed it under the name of Ted Fiore, Sr.

Da103-Da104 at 6:25-7:4; see also Da115 at 30:23-25 (". . . I could have named all of the entities. I didn't because there were at least five or six different entities.").

As evidenced by the record, Defendants already had their day in court to assert any cause of action for adverse possession against the NHA and failed to establish any claim. Defendant Fiore deliberately chose not to include the entities when he filed the Adverse Possession Action. Additionally, the entire basis for the Adverse Possession Action was documents almost exclusively regarding the Defendants. Thus, Defendants' counterclaim is barred pursuant to res judicata and the doctrine of collateral estoppel because they were in privity with Fiore in the previous litigation.

CONCLUSION

For the reasons set forth herein, the Newark Housing Authority respectfully requests that the Court deny Defendants' appeal and uphold the July 18, 2025 Orders denying Defendants' Motion for Reconsideration and Motion to Permit Counterclaims.

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Attorney for Plaintiff-Respondent,
Newark Housing Authority

Dated: November 17, 2025

By: ______________________
RICHARD D. TRENK, ESQ.

FILED, Clerk of the Appellate Division, December 01, 2025, **A-003976-24**

Superior Court of New Jersey

Appellate Division

Docket No. A-003976-24

NEWARK HOUSING AUTHORITY, *Plaintiff-Respondent,* vs. IRONMAN ROAD SERVICES LLC; GUILLERMO BENALCAZAR; OSCAR BENALCAZAR; THEODORE FIORE; RUFFINO HOLDINGS LLC; TED FIORE SERVICES LLC, *Defendants-Respondents,* T. FIORE DEMOLITION INC.; T&C AUTO SALES LLC, *Defendants-Appellants,* FIORE HOLDINGS LLC; FIORE HOLDINGS II LLC, *Defendants-Respondents,* T. FIORE RECYCLING CORP., *Defendant-Appellant,* JANE and JOHN DOES #1-10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-3639-25 Sat Below: HON. ALDO J. RUSSO, J.S.C.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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PROCEDURAL HISTORY

The Adverse Possession Defendants-Appellants repeat and restate their reliance on the procedural history as set forth more fully in their brief filed on October 17, 2025 ("the Appellants' brief"), as if fully set forth at length herein. Notwithstanding the foregoing, the Adverse Possession Defendants emphasize that opposition to the OTSC was filed through the filing of their Answer to the OTSC on June 24, 2025 (Da64-86) and, as required by Judge Russo, the Motion to permit the counterclaims for adverse possession on June 26, 2025 (not June 24, 2025 that Plaintiff incorrectly stated) (Da94-130).

STATEMENT OF FACTS

The Adverse Possession Defendants repeat and restate their reliance on the statement of facts as set forth more fully in the Appellants' brief, as if fully set forth at length herein. Notwithstanding the foregoing, the Adverse Possession Defendants set forth the following in response to Respondent's statement of facts set forth in Plaintiff-Respondent's brief filed on November 17, 2025. The Plaintiff's statement of facts includes a historical basis of the prior docket no. ESX-C-93-24 (Pa5). The only relevant portion of docket no. ESX-C-93-24 that should be considered is the decision of Judge Santomauro under that docket

(Da99-Da130). Judge Santomauro's decision was the only portion of the proceeding from docket no. ESX-C-93-24 that Judge Russo sitting below required in this action (2T6). Accordingly, it is submitted that the only significant matter to be decided in this Appeal relates to the decision of Judge Santomauro.

STANDARD OF REVIEW

The standard of review when it comes to motions for reconsideration is whether the Court abused its discretion. The Trial Court abused its discretion when it applied the two-week adjournment granted by Judge Russo beginning retroactively on June 6, 2025, when it should have applied the two-week adjournment as of June 12, 2025 when Judge Russo granted the adjournment request. The Trial Court further abused its discretion by blatantly ignoring the opposition filed by the Adverse Possession Defendants. As a result of the Trial Court's abuse, the decision on the motion for reconsideration was not made on the merits. Further, Judge Russo completely and absolutely misunderstood the ruling of Judge Santomauro. This misunderstanding led Judge Russo to incorrectly rule the motion to permit the counterclaims as moot.

ARGUMENT

POINT I

THE TRIAL COURT'S ERRORS WHICH MANDATES RECONSIDERATION
(Raised below: Da1; Da3; 1T6; 1T39)

A. THE TRIAL COURT FAILED TO PROPERLY APPLY THE ADJOURNMENT GRANTED BY JUDGE RUSSO COMMENCING JUNE 12, 2025
(Raised below: Da3; 1T6)

The decision that the Court overlooked/erred is that the Court did not schedule the two-week adjournment of the OTSC and all return dates granted by Judge Russo. Judge Russo granted the request for a two-week adjournment of the return date for the OTSC and all other return dates set forth in the OTSC Order (2T5). A two-week adjournment granted by Judge Russo as of the Virtual Hearing date of June 12, 2025 should have been June 26, 2025 for the Adverse Possession Defendants to file a response to the OTSC Complaint and all other return dates required under the OTSC Order. As set forth more fully in the Appellants' brief, the Trial Court made an error in the application of the two-week adjournment granted by Judge Russo. Due to this error of the Trial Court, all the return dates under the OTSC Order were affected and ultimately the Court and the Adverse Possession Defendants were operating under two different timelines as to the return dates. Further, as set forth more fully in the Appellants' brief, the Adverse

Possession Defendants were unaware of the Trial Court applying the adjournment request retroactively, as no notice of the scheduled dates for the response to the OTSC were ever received from eCourts or by notice from the Plaintiff or the Trial Court.

After a review of New Jersey law, there appears to be no statute or case law that controls when an adjournment should be applied procedurally, nor is there any statute stating that the adjournment dates should apply retroactively if the original return date has passed. Therefore, it is left up to the discretion of the Judge as to application of the adjournment. At the Virtual Hearing on June 12, 2025, Judge Russo granted the request for a two-week adjournment of the OTSC <u>and all other return dates</u>. Judge Russo never specified at the Virtual Hearing that the request would be applied retroactively from the dates on the OTSC Order (2T), nor was there a revised OTSC Order setting forth the new return dates. The Adverse Possession Defendants reasonably believed that they would receive a full two-week adjournment of all of the return dates. Instead, the Trial Court incorrectly applied the two-week adjournment retroactively; as a result of the error, the Court and the Adverse Possession Defendants were operating under two different timelines as to the return dates. Both Plaintiff and the Adverse Possession Defendants were innocently utilizing two different timelines due to the

Trial Court's error in applying the adjournment request.

B. THE TRIAL COURT FAILED TO ACKNOWLEDGE THE OPPOSITION TO THE OTSC FILED BY THE APPELLANTS (Raised below: Da3; 1T6)

Further, the Court overlooked the Answer to the OTSC that was filed by the Adverse Possession Defendants. Under Rule 4:67-4(a), "…the defendant shall…within such further time as the court may allow, serve and file either an answer, an answering affidavit, or a motion returnable on the return day... (Emphasis added.)" The Adverse Possession Defendants filed an Answer to the OTSC thereby complying with R. 4:67-7 and stating their opposition to the OTSC. The Answer to the OTSC was filed within the two-week adjournment time period on June 24, 2025; however, the Court ruled that the OTSC was unopposed. The OTSC was clearly opposed as the Adverse Possession Defendants filed both an Answer and a Motion to permit the counterclaim of adverse possession, as required by Judge Russo. By reason of the foregoing, the Adverse Possession Defendants did file opposition to the OTSC. Judge Russo's and Plaintiff's claim that the Adverse Possession Defendants did not file opposition is incorrect.

Plaintiff argues that the Adverse Possession Defendants fail to identify any misapplication or failure of the Trial Court that would support reconsideration. Plaintiff further incorrectly claims that reconsideration should only be granted

under narrow circumstances pursuant to D'Atria v. D'Atria. In D'Atria, the Court ruled that, "Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice. (Emphasis added.)" D'Atria v. D'Atria, 242 N.J. Super. 392, 576 A.2d 957 (Ch. Div. 1990). The Adverse Possession Defendants filed the motion for reconsideration, and this appeal, in the interest of justice, on behalf of the Adverse Possession Defendants. If this Court does not reverse the Trial Court's decision, then the Adverse Possession Defendants will be barred from their right of due process and the bar will ultimately cause a miscarriage of justice. As set forth in D'Atria, reconsideration should be exercised in the interest of justice.

C. THE TRIAL COURT MADE AN ERROR IN RULING THAT THE MOTION TO PERMIT THE COUNTERCLAIMS WAS MOOT (Raised below: Da1; Da3; 1T39)

The Adverse Possession Defendants repeat and restate their reliance on Argument Point III (B), with regards to the improper ruling that the motion to permit counterclaims was moot, set forth more fully in the Appellants' brief, as if fully set forth at length herein. If this Court reverses the Trial Court's decision regarding reconsideration, then the Adverse Possession Defendants' motion to permit the counterclaims would no longer be considered moot, and the Adverse

Possession Defendants will have the ability to assert adverse possession of a portion of the Property through their right to due process in the litigation of the complaint.

POINT II

THE TRIAL COURT ERRED IN NOT PERMITTING COUNTERCLAIMS BY PREJUDGEMENT OF THE ADVERSE POSSESSION DEFENDANTS SUCCESS OR FAILURE
(Raised below: Da1; 1T12; 1T39)

Plaintiff incorrectly claims that Judge Santomauro's decision does not allow the Adverse Possession Defendant's right to file counterclaims to the complaint. However, Judge Santomauro clearly stated:

> "As to the other companies [such as the Adverse Possession Defendants], I leave that for another day and another lawsuit. Right? And again, there might be defenses if that other lawsuit is brought. I don't know. They might be winning or not. All right? So, that is my ruling."
> (Da126; T51-8)

Plaintiff argues that Judge Santomauro's decision "allegedly" (Plaintiff's language) suggested that the Adverse Possession Defendants should be barred from asserting their rights; however, the transcript never denies the Adverse Possession Defendants from claiming adverse possession or any other rights which may accrue to them or to the Fiore Defendants, other than Defendant Theodore Fiore. In fact, just the opposite. If Plaintiff wanted to preclude the rights of the Adverse Possession Defendants, then the Plaintiff must file an action to prevent the Adverse Possession Defendants from doing so – exactly what Judge

Santomauro said in her decision. Once again, Plaintiff and Judge Russo are prejudging the rights of the Adverse Possession Defendants, without affording the Adverse Possession Defendants their due process rights or their day in court.

Plaintiff alleges that the claims of the Adverse Possession Defendants are barred by reason of *res judicata*. As set forth at length in the Appellants' brief, the Adverse Possession Defendants addressed why the doctrine of res judicata does not bar this action.

Plaintiff additionally alleges that the claims of the Adverse Possession Defendants are barred by reason of collateral estoppel. Collateral estoppel is a "branch of the broader law of *res judicata*." Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 742 A.2d 1007 (App. Div. 2000). As such, collateral estoppel often overlaps with *res judicata*. Similar to the Adverse Possession Defendants not being barred by *res judicata*, the Adverse Possession Defendants are not barred by the doctrine of collateral estoppel. As set forth in Plaintiff's brief, there are five factors needed for collateral estoppel to bar a claim:

> "(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding."
> Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 742 A.2d 1007

(App. Div. 2000).

Theses five factors needed to bar the Adverse Possession Defendants' claim are not met as set forth below.

First: the issue raised under this action is not identical, as the issue decided under docket no. ESX-C-93-24 was against Defendant Theodore Fiore, not the Adverse Possession Defendants, nor the other Fiore Defendants.

Second: the issue was not litigated against the Adverse Possession Defendants under docket no. ESX-C-93-24. While discovery was produced by Plaintiff and Defendant Theodore Fiore under the prior docket, the issues were never litigated by reason of Judge Santomauro's decision. The Adverse Possession Defendants never had their day in court as further described in Judge Santomauro's decision.

Third: Judge Santomauro issued her decision, and the related Order, not based on the merits of adverse possession, but rather that Defendant Theodore Fiore lacked standing to bring the prior action before that Court. The issue of claims for adverse possession by the Adverse Possession Defendants were never litigated or decided under the prior docket.

Fourth: as set forth above, the decision of Judge Santomauro was made not on the merits of the issue but rather the lack of standing of Defendant Theodore Fiore. Therefore, there was no determination of a complaint by the Adverse Possession Defendants of adverse possession. Judge Santomauro ruled that the Fiore Defendants, including the Adverse Possession Defendants, needed to commence an action to assert their rights of adverse possession, among any additional rights they may assert, in support of their claim of adverse possession or any other rights they may have.

Fifth: the Adverse Possession Defendants were not in privity with Defendant Theodore Fiore. Under prior docket no. ESX-C-93-24, Defendant Theodore Fiore believed he personally had a right of adverse possession to a portion of the Property. Judge Santomauro ruled that Defendant Theodore Fiore personally does not have a claim for adverse possession of the Property; however, Judge Santomauro did not rule that the Adverse Possession Defendants were prevented from claims of adverse possession or, for that matter, that all of the Fiore Defendants had, or may have had, many rights to assert with respect to their interest in the Property. During oral argument, Judge Santomauro stated:

> "But he [Defendant Theodore Fiore] is alleging here – the plaintiff [Defendant Theodore Fiore] is alleging here that he – he is the person – he, not his companies – [not] on behalf of his companies…We know there's LLCs and – and corporations, right? And they are the only ones that could have brought this action." (Emphasis added.)
> (Da124)

Further, Judge Santomauro stated:

> "But the fact is there is no standing for Theodore Fiore, Sr., to bring this action…in adverse possession on this property. His companies may. I don't know. That's for another day, though, because I don't need to reach that." (Emphasis added.)
> (Da125)

With respect to the issue of privity, Judge Santomauro made clear by the foregoing decisions that no privity existed to bar the Adverse Possession Defendants from filing their claim. In fact, Plaintiff does not raise the issue of privity in their filing of the OTSC. See Da24 through Da63. If Plaintiff is now making the argument that Judge Santomauro's decision barred the Adverse Possession Defendants from filing a counterclaim for adverse possession, then why did Plaintiff file this action of ejectment to cut off the rights of the Adverse Possession Defendants, which follows exactly the procedure set forth by Judge Santomauro? If Plaintiff truly believed that Defendant Theodore Fiore and the Fiore Defendants, including the Adverse Possession Defendants, were connected through privity, then Plaintiff should have appealed Judge Santomauro's decision.

Plaintiff did not appeal Judge Santomauro's decision, including her position regarding the lack of privity between Defendant Theodore Fiore and the LLCs and corporations, and the time to potentially appeal Judge Santomaruo's decision has lapsed.

Further, with regard to the doctrine of collateral estoppel, this doctrine must be "applied equitably not mechanically." Pivnick v. Beck, 326 N.J. Super. 474, 741 A.2d 655 (App. Div. 1999). Collateral estoppel is not a "rigid application" but should only be applied where "fairness requires such application."

As previously asserted, the Adverse Possession Defendants were not named in the action under docket no. ESX-C-93-24 and did not have an opportunity to litigate the issues and actions related to their claims of adverse possession. Judge Santomauro's decision made it abundantly clear that Plaintiff never litigated any of the issues under docket no. ESX-C-93-24, including the claims of adverse possession, against the Adverse Possession Defendants. Plaintiff's actions and claims under docket no. ESX-C-93-24 were only against Defendant Theodore Fiore personally, not against Theodore Fiore on behalf of any companies he may manage or operate. Judge Santomauro ruled that:

> "Individuals do not have the right to bring a lawsuit on behalf of their LLC or their corporation. I mean, there are – probably are some exceptions in the law, but none that would apply here. Those companies have – as entities as[of] the State of

> New Jersey, have the right to bring lawsuits." (Emphasis added.)
> (Da117)

By reason of the foregoing, the Adverse Possession Defendants' claim of adverse possession is not barred either by the law or by Judge Santomauro's decision.

Further, Plaintiff never brought an action against, nor ever sought an ejectment of the Adverse Possession Defendants to vacate the Property before Defendant Theodore Fiore commenced the action under docket no. ESX-C-93-24 in 2024. Before docket no. ESX-C-93-24 was litigated between Plaintiff and Defendant Theodore Fiore, personally, the rights of the Adverse Possession Defendants had already accrued for adverse possession claims pursuant to N.J.S.A 2A:14-30, as set forth more fully in the Appellants' brief.

FILED, Clerk of the Appellate Division, December 01, 2025, **A-003976-24**

CONCLUSION

By the reasons set forth above, in addition to Appellants' brief, the Adverse Possession Defendants respectfully request that this Court, in the interest of justice, (i) reverse Judge Russo's Orders dated July 18, 2025 denying Defendants' motion to permit counterclaims and denying reversal of the Order entered on June 30, 2025; (ii) rule that the Adverse Possession Defendants have the right to claim adverse possession and all other defenses; and (iii) remand the matter back to the Court below to be litigated to its full extent.

Respectfully submitted,

Dated: December 1, 2025 MICHAEL S. GOODMAN, ESQ.