Superior Court of New Jersey

Appellate Division

Docket No. A-004127-23T4

A-Z VENUE MANAGEMENT, LLC and ZACHARY LUBCHANSKY, *Plaintiffs-Appellants,* vs. JAMES V. VERNOR and JEAN P. VERNOR, *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY DOCKET NO. HUN-L-0045-21 Sat Below: HON. WENDY ALLYSON REEK, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs A-Z Venue Management, LLC ("Plaintiff A-Z Venue Management") and Zachary Lubchansky ("Plaintiff Lubchansky") (collectively "Plaintiffs") appeal the trial court's denial of Plaintiffs' Motion for a New Limited Trial as to Damages Including Additur (the "Motion"). Plaintiffs' Motion followed a jury trial after which the jury returned an incongruous verdict in favor of Plaintiff A-Z Venue Management against Defendants James V. Vernor and Jean P. Venor (collectively "Defendants") but without a lawful basis, offset the award by two hundred forty-five thousand dollars ($245,000.00). In their Complaint, Plaintiffs sought damages for breach of contract and Defendants, in their counterclaims, sought damages for breach of contract and for unpaid rent. Ultimately, the jury found in favor of Plaintiff A-Z Venue Management on their breach of contract claim and denied all of Defendants' counterclaims. Nonetheless, it effectively granted Defendants' Counterclaim by reducing Plaintiff A-Z Venue Management's award to eighty-two thousand dollars ($82,000.00) *without a finding of liability against Plaintiffs*. The jury erroneously reach their award through the following mathematical calculation: $327,000 less $245,000 (amount of the counterclaim for unpaid rent) = $82,000.

Despite the inconsistent jury verdict and award, the trial court entered judgment in favor of Plaintiff A-Z Venue Management for the $82,000.00.

Consequently, Plaintiffs filed the Motion seeking a new trial for damages on the grounds that the jury's verdict was inconsistent (unlawful).

The verdict sheet is self-evident. It shows that the jury moved beyond the interrogatories of the verdict sheet to fashion a reduced damages award based on an alternative theory of liability that the jury was not asked to consider. Pursuant to Question 1 of the verdict sheet, the jury found (unanimously) that A-Z Venue Management had proven by a preponderance of the credible evidence that Defendants breached their contractual obligations to Plaintiff A-Z Venue Management. Despite that, in Question 2 of the verdict sheet, the jury awarded A-Z Venue Management only $82,000.00. Nowhere in the verdict sheet did the jury make any express finding of liability against A-Z Venue Management to justify any reduction of A-Z Venue Management's damages to $82,000.00. In fact, the jury found, in Question 3, that Plaintiff A-Z Venue Management **was not** liable under a breach of contract theory to Defendants. As such, the jury found no liability against either Plaintiff A-Z Venue Management or Plaintiff Lubchansky in any of the counts of the verdict sheet.

The jury's subsequent reduction of Plaintiffs' damages award is evident in the mathematical calculations of Question 5 of the verdict sheet which confirms that the jury improperly substituted Plaintiff Lubchansky with Plaintiff A-Z Venue Management. In doing so the jury purposefully conflated two

distinct, legal identities to reach its desired conclusion. In doing so, the jury moved well-beyond the confines of the jury verdict sheet. This improper offset of Plaintiffs' damages constitutes a miscarriage of justice demanding a new trial.

Notably, the trial court later condoned the jury's manipulation of the jury verdict sheet as part of the trial court's reasoning for denying Plaintiffs' Motion. This forms an additional basis for granting Plaintiffs a new trial.

Both the underlying jury verdict--incongruous, unlawful, and without a legal basis--and the trial court's error in permitting the entry of the inconsistent jury verdict constitute individual, and cumulative, miscarriages of justice requiring intervention by this Appellate Court. This Appellate Court may engage in its own independent review of the factual record before the trial court without due deference to the trial court's "feel of the case" because the issues before this Appellate Court are purely legal. Ultimately, the relief that Plaintiffs seek is simple: since the jury found no liability as to either Plaintiff A-Z Venue Management or Plaintiff Lubchansky, the damages award by the jury shocks the conscience. Therefore, this Appellate Court should remand this matter back to the trial court for a limited trial **only** as to damages.

PROCEDURAL AND FACTUAL HISTORY[1]

A. The Underlying Litigation, Trial, and the Verdict Sheet

The underlying litigation commenced upon an alleged breach of a Real Estate Sales Contract. Pa.11. On or about June 14, 2019, Plaintiff A-Z Venue Management and Defendants entered into a Real Estate Sales Contract (the "Contract") for property located at 16 Mill Road, West Amwell, New Jersey 08530 ("the Property"). Pa. 39. Additionally, Plaintiff Lubchansky, individually, entered into a lease agreement for the Property (the "Lease Agreement"). Pa. 26. Notably, there was never a Lease Agreement between Plaintiff A-Z Venue Management and Defendants. Pa. 26.

Plaintiff A-Z Venue Management and Defendants never completed the sale of the Property. Plaintiffs, thereafter, instituted a lawsuit in the Superior Court of New Jersey for Defendants alleged breach of the Contract seeking $327,000.00 in damages. Pa. 11. Defendants answered Plaintiffs' Complaint and filed a counterclaims seeking: 1) specified damages against Plaintiffs for breaching the Contract and 2) $245,000.00 for non-payment of rent *only* against Plaintiff Lubchansky. Pa. 18. To be clear, Defendants' Counterclaim for breach of the Lease Agreement only named Plaintiff Lubchansky. Pa. 18.

[1] For the Court's convenience and to avoid redundancy, Appellants have combined the procedural history and statement of facts sections, as the contents of both are largely duplicative.

The case was tried before a jury over three (3) days commencing on April 29, 2024 and with a verdict being returned in favor of Plaintiff A-Z Venue Management for $82,000.00 on May 1, 2024. Pa. 56. All other claims were denied. Pa. 56 The verdict sheet in its entirety highlights the jury's errors and movement beyond what it was asked:

> 1. Do you find that the plaintiff AZ Venue Management has proven by a preponderance of the credible evidence that the defendants Vernors breached the their contractual obligations to plaintiffs A-Z Venue Management LLC and that A-Z Venue Management LLC is entitled to a return of any money under the 2019 Contract of Sale for the purchase of 16 Mill Road, West Amwell, NJ?
>
> Yes_____X_____ No_____
> Vote_____8_____
>
> **If you answered No to Question 1 skip to Question 3**
> **If you answered Yes to Question 1 skip to Question 2.**
>
> 2. What is the amount of money if any, which should be returned to A-Z Venue Management?
>
> $_____82,000_____ Vote_____8_____
>
> **Proceed to Question #3**
>
> 3. Do you find by a preponderance of the evidence that A-Z Venue Management, LLC breached the 2019 Contract of Sale, by failing to purchase the Brook Mill farm property?
>
> Yes_____ No_____X_____
> Vote_____8_____
>
> **If Yes please continue to question #4**

If no proceed to question #5

4. What is the amount of damages, if any, that A-Z Venue Management, LLC is obligated to pay to James and Jean Vernor as a result of the breach of the 2019 Contract of Sale for the purchase of 16 Mill Road, West Amwell, NJ.

They claim:
$58,890.00 loss as mortgage carrying costs for the period December 2020 through May 2021
$19,500 paid in fines to West Amwell Township
$11,941.39 in other incidental damages (tree service, electric bill, locksmith)

$_____ Vote_____8_____

5. Do you find by a preponderance of the evidence that Zachary Lubchansky breached the 2015 Lease Agreement by failing to pay rent from November 1, 2016 through November 30, 2020 for 49 months at $5,000/month = $245,000.00?

Yes_____ No_____X_____
Vote_____8_____

If Yes please continue to question 6
If No please skip to question 7

6. What is the amount of damages if any, that Mr. Lubchansky is obligated to pay as a result of the breach of the 2015 Lease Agreement.

$_____ Vote_____ Pa. 56.

As the verdict sheet clearly shows, the jury found no liability against either Plaintiff A-Z Venue Management or Plaintiff Lubchansky. Pa. 56. Despite that, the jury offset Plaintiff A-Z Venue Management's award by $245,000.00, which

matches Defendants' Counterclaim against Plaintiff Lubchansky for unpaid rent. The jury's error is clear in the mathematical calculation: $327,000.00 (amount sought by Plaintiff A-Z Venue Management) minus $245,000.00 (amount sought in Defendants' counterclaim for unpaid rent) equals $82,000.00 (amount jury awarded to A-Z Venue Management) Pa. 56. Notwithstanding these inconsistencies, the trial court entered the jury's verdict ($82,000.00) on May 1, 2024. Pa. 55.

B. The Motion for a New Trial

Thereafter, on May 20, 2024, Plaintiffs timely filed a Motion for a New Trial Including Additur accompanied by a Certification of Counsel and Brief in support of Plaintiffs' Motion. Pa. 60-Pa. 61. The gravamen of Plaintiffs' argument was that the jury's reduction of Plaintiffs' award from $327,000 to $82,000 was a miscarriage of justice because there was no finding of liability against either Plaintiff A-Z Venue Management or Plaintiff Lubchansky. Pa. 61. As a result, the jury moved beyond its charge replacing Plaintiff Lubchansky with Plaintiff A-Z Venue Management; in effect, rewriting the jury verdict sheet on its own volition and entering an improper and unlawful verdict. Pa. 61. To rectify this miscarriage of justice, Plaintiffs requested the trial court employ additur or in the alternative to order a new trial limited to damages. Pa. 61.

On June 12, 2024, Defendants filed an Opposition to Plaintiffs' Motion. Pa. 65. Thereafter, Plaintiffs filed a Reply Brief.

On July 19 2024, the trial court held Oral Argument and thereafter denied Plaintiff's Motion. Pa. 1. In justifying the jury's move beyond the jury verdict sheet, the trial court stated:

> There was a lease agreement, however, which had the name of Mr. Lubchansky. That lease agreement was for one year. After one year Mr. Lubchansky stopped paying rent. Mr. Lubchansky testified very pointedly and very specifically that he did not pay rent for 49 months at a rate of $5,000.00 a month and that he conceded it totaled $245,000.00 in unpaid rent over the course of five years. What the jury had in front of them were eq – were checks and there, there was testimony about the checks that were issued. And the checks were issued by A-Z Venue Management, signed by Zachary Lubchansky as the owner or proprietor of A-Z Venue Management. (T18 9-20).

Judge Reek then condoned the jury's decision making:

> Was there a clear and convincing miscarriage of justice in this case? Absolutely not. The evidence that the Court heard bore out exactly what the jury decided. And the jury verdict sheet, question number five, "Do you have a preponderance – do you find by a preponderance of the evidence that Zachary Lubchansky breached the 2015 lease agreement by failing to pay rent from November 1, 2016, through November 30th for 49 months at $5,000.00 a month equaling $245,000.00?" They came back with a "no" eight to zero because they found that A-Z Venue Management didn't pay that money. He was very, very certain and direct about it wasn't that, that – he's Jef – Zachary Lubchansky and

> then his business was A-Z management. *And so if we were to change the word and put A-Z Venue Management here that question probably would have been answered different and we would be he – at the same result, and we would be at the same result.* **(T20 2-19) (emphasis added).**

Thereafter, the trial court denied Plaintiffs motion. (T20 20-21). Pa. 1. This appeal follows. Pa. 3

LEGAL ARGUMENT

The Trial Court's Denial of Plaintiffs' Motion for a New Trial Including Additur Constitutes a Miscarriage of Justice (Pa1)

A. The New Jersey Standard for Appellate Review of a Trial Court's Denial of a Motion for a New Trial is a Miscarriage of Justice with Limited Deference to the Trial Court (Pa1)

In reviewing the trial court's decision to deny Plaintiffs' Motion, the Appellate Court reviews the record before it, and ultimately the record below, under a miscarriage of justice standard with limited deference to the trial court. Pursuant to R. 2:10-1, in reviewing a trial court's ruling on a motion for a new trial, an appellate court shall not reverse a trial court "unless it clearly appears that there was a miscarriage of justice under the law." Accordingly, the "standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to the [the trial court's] feel of the case, including credibility. Caldwell v. Haynes, 136 N.J. 422 (1994) (finding that a trial court's

decision on a motion for a new trial was improper and subject to review when decision does not appear to have rested on the worth or plausibility of evidence or the credibility or demeanor of witnesses or other intangible factors not clearly reflected in the record)(citing Feldman v. Lederle Lab., 97 N.J. 429 (1984)). However, a trial court is not due unlimited deference. For example, the trial court is "not entitled to any special deference where it rests upon determination as to worth, plausibility, consistency, or other tangible considerations apparent from the face of the record with respect to which is no more peculiarly situated to decide than the Appellate Court." Dolson v. Anastasia, 55 N.J. 2, 7 (1969). Where the written record transmits the necessary criteria of a case, the Appellate Court does not need to apply the more restrictive version of the miscarriage of justice test deferring to the trial judge for intangible considerations. Ibid. Additionally, a "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hayes v. Delamotte, 231 N.J. 373, 386 (2018).

The issues before this Appellate Court do not turn on or even touch on the trial court's feel of the case. Currently before this Appellate Court are two legal determinations: 1) whether the trial court's error allowing an incongruous, inconsistent, and otherwise unlawful jury verdict was a miscarriage of justice entitling Plaintiffs to a new trial limited to damages and 2) whether the jury's

deviation from the jury verdict sheet at the trial court level where the jury, on its own volition, constructively imposed liability upon Plaintiff A-Z Venue Management through a reduction of their damages award constitutes a miscarriage of justice entitling Plaintiffs to a new trial limited to damages. Neither of these issues involve soft factors such as the "feel of the case" or "witness credibility" but instead, like in Hayes, these issues depend on "interpretations of the law and legal consequences that flow from established facts." In this instance, Plaintiffs argue that legal consequences (a miscarriage of justice) flowed from the following, established facts: 1) the trial court erred in entering an incongruous jury verdict that imposed liability upon Plaintiff A-Z Venue Management without a finding of such and 2) the jury pursued a theory of liability it was not asked to consider to reach a compromised damage verdict in favor of Plaintiff A-Z Venue Management.

Even if the Appellate Court gives due deference to the trial court in all instances regarding the "feel of the case" the factual record bears out that this jury moved beyond the questions they were asked to consider and therefore returned an improper jury verdict and damages award. This matter aligns with Caldwell, 136 N.J. 422, see supra, where our Supreme Court conducted an independent review of the record because the lower court's decisions were not within the "peculiar" knowledge of the trial court. Here, like in Caldwell, this

Appellate Court may engage in its own review of the record to reach its own decision on whether the jury's conduct constitutes a miscarriage of justice.

B. The Trial Court Erred When Permitting the Jury to Return an Incongruous Jury Verdict and Accompanying Damages Award (Pa1)

The trial court abused its discretion when the trial court not only permitted the jury to return an incongruous, inconsistent and otherwise unlawful verdict and damages award but also when the trial court denied Plaintiffs' Motion. Individually, and collectively, the jury and the trial court's condoning of the jury's actions constitute a miscarriage of justice. "When the answers [to jury verdict interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial." R. 4:39-2. Generally, even when a jury returns an inconsistent verdict, a trial court may cure the same by reinstructing and resubmitting the questions to the jury "to assur[e] consistent answers accurately reflecting the jury's findings." Mahoney v. Podolnick, 168 N.J. 202 (2001). When faced with a logical incongruity in a jury verdict a trial court is **obligated** to require the jury to reconsider its responses in light of the law and R. 4:39-2. Dubak v. Burdette Tomlin Memorial Hospital., 233 N.J. Super. 441 (1989) (emphasis added).

Here, the jury returned a jury verdict, and accompanying damages award, where the answers to the verdict interrogatories were not only inconsistent with one another and the general verdict but also the factual record before the trial court. The jury did not find either Plaintiff A-Z Venue Management or Plaintiff Lubchansky liable in any of the verdict sheet interrogatories. In fact, in Question's #3 and #5, the jury expressly declined to find any liability against Plaintiff A-Z Venue Management or Plaintiff Lubchansky. Its patently obvious, the jury fashioned an award based on an alternative theory of liability it was not asked to consider. Plaintiff A-Z Venue Management was not a party to the Lease Agreement and was not a named defendant in Defendants' Counterclaim for unpaid rent (breach of the Lease of Agreement). Likewise, Plaintiff Lubchansky was not a party to the Contract. Besides being inconsistent, the jury verdict was procedurally impossible being contrary to the pleadings. The trial court was "obligated" to intervene. In not doing so immediately at the trial court level, and in not identifying this during Plaintiffs' Motion, the trial court's actions constitute a miscarriage of justice.

In fact, the trial court permitted the jury to accept this alternative theory of liability when the trial court set forth their reasons for denying Plaintiffs' Motion. (T20 2-19). At a minimum, the trial court was required to cure the inconsistent verdict by reinstructing the jury and resubmitting the interrogatories

on the verdict sheet. The trial court was not permitted to enter judgment as a matter of law. See R. 4:39-2; see also Dubak supra.

When a [party] presents multiple grounds for relief and the jury returns a general verdict without specifying the ground on which it has relied, a reviewing court should not identify as a matter of law the ground on which the jury necessarily relied." Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130 (1990). The Supreme Court's instruction in Kassick is pertinent in the instant matter because the trial court, by its own admission in denying Plaintiffs' Motion, see supra, identified that the jury returned a general verdict against Plaintiffs. By identifying the alternative theory of liability that the jury found Plaintiff A-Z Management "liable," without the jury expressly stating such, the trial engaged in the exact prohibited conduct that our Supreme Court outlined in Kassick. In effect, the trial court substituted its own findings for that of the jury in confirming the validity of the jury verdict. Like the jury, the trial court purposefully conflated Plaintiff A-Z Venue Management with Plaintiff Lubchansky, individually, to interpose the theory of liability as it pertained to Plaintiff A-Z Venue Management with the theory of liability as it pertained to Plaintiff Lubchansky.

Ultimately, the trial court should have set the matter aside for a new trial due to the incongruous and unlawful jury verdict and accompanying damages

award. Upon receipt of the inconsistent verdict, the trial court should have intervened, reinstructed the jury and resubmitted the questions in accordance with R. 4:39-2. By not doing so, by allowing the entry of an inconsistent verdict and accompanying damages award, and by not rectifying these missteps by denying Plaintiffs motion, the trial court's actions have resulted in Plaintiffs suffering a miscarriage of justice.

C. The Appellate Court's Independent Review of the Record before the Trial Court will Reveal a Miscarriage of Justice (Pa1)

i. Independent Review of the Record (Pa1)

The Appellate Court's independent review of the factual record will reveal that allowing the jury's decision to constructively impose liability upon Plaintiff A-Z Venue Management in the form of reducing A-Z Venue Management's award constitutes a miscarriage of justice. As discussed, supra, when a trial court's decision on a motion for a new trial is not based on the worth or plausibility of evidence or the credibility or demeanor of witnesses or other intangible factors not clearly reflected in the record, an Appellate Court may engage in an independent review of the record. See Haynes, at 433. "The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge." Risko v. Thompson Mueller Auto. Grp., Inc. 206 N.J. 506, 522 (2011). Thus, to determine whether an appellant is entitled to a new trial based on the record before the Appellate Court, the

Appellate Court considers whether "denying a new trial "would result in miscarriage of justice shocking to the conscience of the Court." Ibid. at 521. "[A] 'miscarriage of justice' can arise when there is a 'manifest lack of inherently credible evidence to support the finding,' when there has been an 'obvious overlooking or under-valuation of crucial evidence,' or when the case culminates in 'a clearly unjust result.'" Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521-22 (2011)).

A jury verdict is entitled to considerable deference and "because a verdict sheet constitutes part of the trial court's direction to the jury, defects in the verdict sheet are reviewed on appeal under the same "unjust result" standard of Rule 2:10-2 that governs errors in the jury charge." State v. Galicia, 210 N.J. 364, 388 (2012). In this matter, the Appellate Court's canvassing of the factual record before the trial court will show that further denying Plaintiffs a new trial limited to damages would result in a continued miscarriage of justice. The factual record before the trial court, and now the Appellate Court, confirms that the jury inappropriately deviated from the explicit questions of the jury verdict sheet by substituting the liability of Plaintiff A-Z Venue Management for the liability of Plaintiff Lubchansky in Question #5. Consequently, the jury offset the damages awarded to Plaintiff A-Z Venue Management by $245,000.00 or

the amount that jury declined to find Plaintiff Lubchansky liable to Defendants for unpaid rent under the Lease Agreement. To reach this conclusion, the jury asked and answered a question that **was not** on the verdict sheet, to wit, "*Do you find by a preponderance of the evidence that A-Z Venue Management breached the 2015 Lease Agreement by failing to pay rent from November 1, 2016 through November 30, 2020 for 49 months at $5,000/month = $245,000.00?*. Or as the trial court observed, the jury rewrote Question #5 to substitute Plaintiff A-Z Venue Management as opposed to Plaintiff Lubchansky.

There can be no clearer instance of the "unjust result" flowing from a defective jury verdict (damages award) and defective jury verdict sheet than one where the jury engages in their own decision-making untethered from the trial court's charge and the counsels agreed-upon verdict sheet. The jury was not instructed to decide whether Plaintiff A-Z Venue Management, a limited liability company and a distinct legal entity from Plaintiff Lubchansky, was liable for the unpaid rent in Question #5. Instead, the jury, upon its own volition, decided to move beyond the confines of the jury verdict sheet to reach this conclusion.

This matter is analogous to those instances in which, the Appellate Courts have found that a damages verdict accompanying a no cause for action is not reliable. Johnson v. Salem Corp., 189 N.J. Super. 50 (App. Div. 1983).

These situations are inherently unreliable and in fact contrary to common sense. Ibid. at 59 (stating that "surely a juror of ordinary common intelligence cannot but realize that if the liability verdict is a "no cause," plaintiff will not recover irrespective of what it had concluded would be appropriate damages"). Here, like in cases with a "no cause" such as Johnson, with no liability finding, the jury cannot award damages (in favor of Defendants in the form of an offset of the award to Plaintiff A-Z Venue Management). At no point did the jury make any liability finding as to Plaintiff A-Z Venue Management or Plaintiff Lubchansky. But yet, the jury still allowed damages (in the form of an offset) to flow from a non-finding of liability. This truly is contrary to common sense and thus inherently faulty. Similar to the Appellate Court in Johnson, the next stage is to set this matter for a new trial in respect to damages, which is unavoidable. Ibid. at 58.

ii. The Appellate Court Should Set This Matter Down for a Limited Trial as to Damages and/or Use Additur. (Pa1)

Should the Appellate Court find that this matter, for any of the aforementioned reasons, has resulted in a miscarriage of justice for Plaintiffs, the proper remedy is to set the matter down for a new trial as to damages only and/or use additur. When the court determines that a damages award is either so grossly excessive or grossly inadequate that a new trial on damages is justified, the judge has the option of setting an additur at an amount that a reasonable jury

would award based on the evidence in the case instead of setting case down for a new trial. Orientale v. Jennings, 239 N.J. 569 (2019). While an additur is essentially a settlement figure suggested by the trial court, the amount must be accepted by both parties. Ibid. If an agreement between the parties cannot be reached, following the NJ Supreme Court's decision in Orientale, the new recourse is; a new trial on damages will be set. Ibid.

First, the Appellate Court should consider remanding this case back down to the trial court for additur. If the parties do not agree to the trial court's decision of additur, following the Appellate Court's remanding of the matter, the trial court will be required to set this matter for a new trial as set forth in Orientale.

A new trial may be limited to damage issues, preserving the liability verdict. Risko at 525. A court may further limit the new trial to less than all the components of all damages. Mogull v. CB Commercial Real Estate, 162 N.J. 449 (2000). Ultimately, should the parties not agree on additur, the trial court will set this matter down for a new trial. There is no need to retry the entire matter as it is well within the purview of the trial court to simply limit the new trial as to damages only. The crux of this appeal concerns only the damages portion of the jury verdict. As a result, a remanded trial should only be limited to the damages award to Plaintiff A-Z Venue Management.

CONCLUSION

Based on the foregoing reasons, Plaintiffs request that this Court grant the appeal.

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_____

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DATED: OCTOBER 24, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-Z VENUE MANAGEMENT, LLC and ZACHARY LUBCHANSKY, Plaintiffs/Appellants, v. JAMES V. VERNOR and JEAN P. VERNOR husband and wife, Defendants/Respondents.	Docket No. A-004127-23-T4 CIVIL ACTION On Appeal From: Motion Denying New Trial Law Division, Hunterdon County Docket No. HNT-L-45-21 Sat Below: Hon. Wendy Allyson Reek, J.S.C. Date Submitted: November 25, 2024

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III. PRELIMINARY STATEMENT

By appealing solely from the denial of a new trial based upon their interpretation of the jury verdict sheet, Appellants seek to overturn a jury verdict without any examination of the trial record. Appellants try to circumvent this limitation by relying upon exhibits to the briefing submitted below on their motion for a new trial in order to shoehorn in certain exhibits without which their brief would otherwise be unintelligible. This deprives the exhibits of any testimonial context and discounts entirely other evidence and the testimony of witnesses which, after all, constitutes what the jurors considered. Appellants have not just violated R. 2:6-1(a)(2), they rely upon that violation as the basis for their appeal.

The primary issue on appeal is the status of Appellants, A-Z Venue Management, LLC ("A-Z") and Zachary Lubchansky, as tenants on a commercial property they rented (the "Property"). They operated the Property as a venue for small social events, meetings and family vacations. Lubchansky signed a lease for the Property in 2015 (Pa26). He created and controlled A-Z to operate it. Respondents, James and Jean Vernor, owned the Property. They argued at trial that Lubchansky was a holdover tenant under the lease responsible for paying rent which admittedly went unpaid for 49 months of the tenancy through November 2020. Lubchansky, seeking to avoid a personal judgment, argued that the assetless

A-Z was the tenant. In support of his position, Lubchansky relied upon the fact that when rent was paid during the initial lease period that the rent checks came from an A-Z account (Pa68).

It must be emphasized that Appellants have not appealed the jury verdict directly, and abjure any examination of the trial record. They appeal only from the trial court's decision disagreeing with their interpretation of the jury verdict sheet answers as being inconsistent. The Appellants repeatedly refer to the factual record of this case (Pb13 & Pb15), but that record has not been presented. Appellants deem the denial of their motion to be a Final Order, but any examination of the transcript or brief exhibits related to the motion for a new trial will reveal that the form of a final judgment against the Vernors was simultaneously at issue, and never resolved. See Motion Transcript, T7, ll.1-6; T21, ll.1-14. See also Pa64 (not signed); Pa73 (not signed). No final order or judgment against the Vernors has ever been entered in this matter. See, e. g., Pressler & Verniero, N.J. Court Rules (2024), R. 2:2-3(a), Comment 2.2.2.

As found by the trial court, the jury verdict is entirely consistent with the argument pressed by Appellants at trial that A-Z was the tenant on the subject property for 49 months without paying rent. One of the recurring problems here and below on the motion for a new trial is that Appellants fired their trial counsel

immediately after trial. Appellants' did not bother to order a trial transcript for their motion or this appeal. See Motion Transcript, T7, l.18 - T8, l.12. The new trial motion transcript upon which Appellants rely illustrates this problem. See Motion Transcript, T7-9, T12-16 & T18-19. Appellants continually make arguments without reference to the record without fear of being contradicted by it due to its absence. While the jury found that A-Z was entitled to the return of the "Already paid" amount specified under the Contract of Sale (Pa39) it entered into for the Property, the jury subtracted the amount of A-Z's unpaid rent. Nothing inconsistent about that. The award of $82,000.00 results from the calculation of the amount already paid to purchase the Property ($327,000.00) minus the 49 months of rent which A-Z did not pay ($245,000.00). Without this adjustment, there would be no accounting for the unpaid rent.

In short, Appellants argue before this Court that they occupied and operated a commercial property for profit for 49 months without paying rent to the owners, and that's okay. The jury did not adopt that absurd position. They found that A-Z was the tenant, just as Appellants argued at trial, and should have paid rent.

IV. COUNTERSTATEMENT OF FACTS.

This case involved the business relationship between Plaintiffs/Appellants and Defendants/Respondents, James and Jean Vernor, husband and wife. They

owned a property located at 16 Mill Road, West Amwell, New Jersey (the "Property") where James Vernor operated a rental venue for social events called Brook Mill Farm. The Vernors jointly owed the Property. In 2015, James Vernor agreed to sell the business to Zachary Lubchanscky. For that purpose Lubchansky entered personally into several agreements purchasing the business and leasing the Property (Pa 26, Pa37 & Pa38). Essentially, the deal functioned as a lease with option to purchase with payments under these agreements being a credit towards the ultimate purchase price. Lubchansky created A-Z Venue Management, LLC ("A-Z") to operate the business. Although A-Z entered into a contract to buy the Property in 2019 (Pa39), it refused to close in 2021 (Pa66). Prior to refusing to close, Lubchansky filed the Complaint in this matter in response to a time of the essence notice (Pa49) from the Vernors. Lubchansky sought to recover all money, including rent, paid under the agreements he signed in 2015. The Vernors counterclaimed for various damages inflicted by the plaintiffs.

At trial, the parties presented evidence for their various claims. Relevant to this appeal, A-Z sought to recover the amount of $327,000.00 already paid under the agreements characterizing it as a deposit under the Contract of Sale for the Property (Pa39). The Vernors disputed that claim on the basis that the $327,000.00 was not a deposit, and they sought unpaid rent of $245,000.00. The plaintiffs did

not dispute that rent had gone unpaid for 49 months (e. g., Pa53), but Lubchansky put that burden on A-Z by arguing that it, not him personally, had been the tenant. The jury found for the plaintiffs in virtually all respects. They held that A-Z could recover the $327,000.00 already paid under the agreements with an offset for the unpaid rent of $245,000.00. Dissatisfied with this outcome, the plaintiffs filed a motion for a new trial which the trial court denied as the jury's verdict agreed with the evidence presented. See Motion Transcript T7-9 & T17- 19. The plaintiffs now appeal by attempting to undo the consequences of the position they took at trial as to their respective roles under the agreements they signed.

No Final Order or Judgment has been entered in this case. The parties disputed the form of final judgment at the same hearing as the motion for a new trial. Curiously, the Plaintiffs acknowledged that dispute, but their new counsel hired after the trial took no position on it stating. "We believe that's purely within the purview of previous counsel for their -- they're the ones who filed the final judgment [in dispute]." Motion Transcript T7, ll.3-6. The trial court indicated that it would adopt the form of judgment proposed by the Vernors but add pre-judgment interest. Id. at T21. That never happened.

V. LEGAL ARGUMENT

A. Appellants cannot seek review of the denial of a motion for

a new trial without an examination of the trial record.

As counsel for Appellants did not act as trial counsel and no trial transcript has been provided, they feel free to make a plethora of arguments untethered to the trial record. In short, Appellants simply ignore the evidence adduced at trial and substitute their *post hoc* analysis based upon the disappointment of the plaintiff, Zachary Lubchansky, with the amount of the money awarded by the jury. In reviewing the decision of a trial court to deny a new trial, Appellate Division courts have long recognized the "obligation to accept as true all evidence supporting the jury's verdict and to draw all reasonable inferences in its favor whenever reasonable minds could differ." Bell Atlantic Network Services, Inc. v. P.M. Video Corp., 322 *N.J. Super.* 74, 83 (App. Div. 1999), quoting Harper - Lawrence, Inc. v. United Merchants & Manufacturers, Inc., 261 *N.J. Super.* 554, 559 (App. Div. 1993). While paying lip service to this standard, Appellants completely ignore it.

"The standard of review on appeal from decisions on motions for a new trial is the same as the governing trial judge - whether there was a miscarriage of justice under the law." Dutton v. Rando, 458 *N.J. Super.* 213, 224 (App. Div. 2019), quoting Risko v. Thompson Motor Automobile Group, 206 *N.J.* 506, 522 (2011). This determination cannot be made without a complete review of the

trial record. Appellants take the incomprehensible position that the "record" before the trial court on their motion for a new trial was limited to the motion for new trial record. Of course, the trial court considered the trial itself and the evidence adduced therein, as did the jury. A "trial court should not interfere with a jury verdict unless the verdict is clearly against the weight of the evidence." Caldwell v. Haynes, 136 *N.J.* 422, 432 (1994). Appellants maintain that the jury's verdict shocks the judicial conscience based on their interpretation of the jury verdict sheet without citing to a single line of testimony from the trial or considering all of the evidence. One must note that this position repeats the argument they made before the trial court wherein counsel for Appellants asked "the court to disregard what occurred at trial." Motion Transcript, T8, ll.17-18. To be sure, one has to disregard the trial evidence to understand the position of Appellants who claim some sort of perspicacious ability to read the jury verdict sheet without reference to the facts.

While by no means filling the evidential gap created by Appellants' manner of proceeding, any reference to the transcript of the argument before the trial court on the motion for a new trial will reveal the flaws in the argument which Appellants repeat before this Court. The relevant issue at trial was whether Lubchansky was a holdover tenant for 49 months from November 1, 2016 through

November 30, 2020 with rent being $5,000.00 per month ($5,000.00 x 49 = $245,000.00). The Vernors sought to secure a judgment for that amount against Lubchansky. In turn, he argued vociferously that A-Z was the tenant, and he had no personal obligation to pay rent.

As the trial court noted, Appellants had no basis on a motion for new trial to argue to the contrary of their trial position, and their argument was based upon a reading of the jury verdict sheet absent any reference to the trial testimony. See Motion Transcript, T8-10. The trial court highlighted the fact that the position of Appellants required her " to completely disregard the testimony of Lubchansky who sat here and testified as an individual and who testified as the owner of A-Z Venue Management." Id. at T9, 12-16. The significance of a testimonial context for the jury verdict sheet is clear. There had to be a tenant on this commercial property being operated at a profit by someone other than the owners. The owners claimed it was Lubchansky. He did not want to get stuck with a rent obligation in arrears, so he pointed the finger at the assetless corporation that he had created. Appellants succeeded in convincing the jury on this issue based upon both the testimony of Lubchansky and the evidence of rental checks coming from an account in the name of A-Z, albeit signed by Mr. Lubchansky. Essentially, Appellants on this appeal change their position to argue that no tenant existed for

four years, and therefore no rent obligation may be assessed against either Lubchansky or A-Z. This position lacks any evidential support.

The trial court in denying the motion for a new trial drew attention to the fact that Lubchansky admitted that rent had not been paid to the Vernors for 49 months, and presented no defense to that obligation at any time. See Motion Transcript T18, ll.9 - T19, l.25. The jury adopting the position argued by Appellants that A-Z had been the tenant during that period of time, awarded A-Z the full amount that it sought under the Contract of Sale ($327,000.00) and subtracted the $245,000.00 due in rent, reaching a verdict of $82,000.00. Id. at T19. Specifically with the quantum of a damages award, the award should not be disturbed unless "the award is one no rational jury could have returned, one . . . so wide of the mark, and pervaded by a sense or wrongness that it shocks the judicial conscience." Cuevas v. Wentworth Group, 226 *N.J.* 480, 500 (2016), citing Johnson v. Scaccetti, 192 *N.J.* 256, 279-83 (2007). The trial record must be viewed in the light most favorable to the party not seeking to overturn the verdict. See Besler v. B. of E. West Windsor, 201 *N.J.* 544, 577 (2010). See also Kozma v. Starbucks Coffee Co., 412 *N.J. Super.* 319, 325 (App. Div. 2010).

The trial court stated that the verdict could not be viewed as a miscarriage of justice, and that "the evidence that the court heard bore out exactly what the jury

decided." Id. at T-20, ll.4-5. The trial court expressly found that the jury verdict was not a matter of clear error or mistake, but it had resulted from the precise calculation by a remarkably well educated jury which comported with the trial court's "feel" of the case. T-20, l.21 - T21, l.1.

On a motion for a new trial, "all evidence supporting the verdict must be accepted as true, and all reasonable inferences must be drawn in favor of upholding the verdict." Boryszewski ex rel. Boryszewki v. Burke, 380 *N.J. Super.* 361 (App. Div. 2005). Both the trial court and the Vernors maintain that the jury verdict in this case was based upon reasonable inferences. The record on the motion for a new trial demonstrates that the jury considered the evidence found in favor of Appellants and calculated A-Z's damages based upon the facts.

B. The jury verdict sheet is not inconsistent with the evidence adduced at trial.

Although the absence of a trial transcript and all of the evidence presented at trial prevents a complete review of what the jury considered, the argument presented by Appellants that the jury verdict is flawed may be discarded standing on its own. An analysis of the jury sheet begins with the observation that if Appellants saw a need for an express determination as to whether Lubchansky or A-Z were tenants on the property and for what periods of time, they could have

requested such a question be put on the verdict sheet. They did not. From the Vernors' perspective, they sought to have Lubchansky found to be the tenant, as opposed to A-Z. Consequently, the parties and the court structured the jury verdict sheet to determine that fact - whether Lubchansky had the obligation under the lease he signed to pay rent for 49 months. See Jury Verdict Sheet, Question No. 5, Pa53. The jury rejected that position in favor of Appellant's argument that A-Z was the tenant. No one disputed the amount of the unpaid rent.

The new trial sought by Appellants would necessarily involve A-Z as a tenant with a rent obligation for the period that it occupied and operated the Property without paying rent. If A-Z were to dispute that rent obligation, then the entire contractual relationship from 2015 forward among all the parties and their agreements would have to be revisited in a new trial. If A-Z does not have an obligation to pay rent for 49 months, then that obligation must fall to Lubchansky personally. If he had that obligation, then all potential offsets would have to be reconsidered. This fact demonstrates that no miscarriage of justice occurred at trial.

Given the considerations outlined above with regard to the construction of the jury verdict sheet, it must also be emphasized that Appellants recognized the possibility of the jury finding less than 100% for A-Z under the facts of this case.

Both sides recognized the possibility offsets given the various competing claims that were asserted and the four contracts entered into.

For example, one of the issues at trial was whether A-Z was entitled to the return of $327,000.00 "Already paid" which was to be a credit against its purchase of the Property (Pa39). That amount was not a lump sum deposit or the result of installment payments. The $327,000.00 was a composite of payments made at various times for rent, the purchase of business equipment and the Brook Mill Farm business (Pa 26, Pa37 & Pa38). See Motion Transcript, T12, ll.5-10; T19, ll.6-12. Both parties recognized the possibility of offsets based upon their various claims. At the request of Appellants the jury verdict sheet differed from that submitted by the Vernors (Pa70) in allowing for the return of money "if any" to A-Z. This change at the specific request of counsel for Appellants meant that the jury could have entered an award of zero as to A-Z even in the event of a finding that the Vernors breached the Contract of Sale for the Property. See Motion Transcript, T17, ll.3-23. This, in turn, relates to what the $327,000.00 represented which was highly disputed at the trial. 3-23.

In summary. Appellants argued at trial that A-Z was the tenant without paying rent for 49 months. They could have asked for a specific determination as to the tenant status of A-Z, but did not. They also acknowledged the possibility of

offsets by specifically requesting the inclusion of the language "if any" in question No. 2 on the Jury Verdict Sheet (Pa52). Consequently, doctrines of Invited Error and Judicial Estoppel apply.

The Appellants' request to include the phrase "if any" with regard to the return of money to A-Z in the penultimate jury verdict question No. 2 prevents an appeal from the consequences of that decision. "The doctrine of invited error operates to bar a disappointed litigant from arguing that an adverse decision below was a product of error, when that party urged to the lower court to adopt the proposition now alleged to be error." Brett v. Great American Recreation, 144 *N.J.* 479, 503 (1996). This, of course, goes as well for the argument that the Appellants' championed at trial that A-Z was the tenant on the Property. Overall, the Appellants cannot now complain of a result which they anticipated and allowed for. See N.J. Div. of Youth and Family Services v. N.C. III., 201 *N.J.* 328, 341- 342 (2010). The Appellants argued to the jury that A-Z was a tenant in order to protect Lubchansky and requested a modification to the jury verdict sheet which allowed for unspecified offsets to be assessed against any recovery by A-Z. Appellants cannot complain now about an outcome that they view unfavorably which resulted from those decisions.

The doctrine of Judicial Estoppel applies with equal force. The repeated

argument by Appellants at trial that A-Z was the tenant cannot be upset on appeal by reversing their position. Both Appellants had a full and fair opportunity to contest any rental obligation. They did not. Instead of contesting the obligation overall, Lubchansky passed it on to A-Z over the opposition of the Vernors. The consequences of this decision resulted in the verdict which Appellants now seek to overturn. A change of attorneys does not justify a change of position. The failure to review the testimony and documentary evidence presented at trial cannot serve as a blanket to hide what occurred from this Court.

The doctrine of Judicial Estoppel bars a party from asserting an inconsistent legal position in either a different case or "in different proceedings in the same litigation." Bell Atlantic Network Services, Inc. v. P.M. Video Corp., 322 *N.J. Super.* at 95, citing Cummings v. Bahr, 295 *N.J. Super.* 374, 385 (App. Div. 1996). The doctrine applies when it is asserted against the party who successfully asserted the inconsistent position in the prior proceeding. Id. Appellants successfully argued below that A-Z was the tenant on the Property for the 49 months during which rent was not paid. They cannot now assert that A-Z was not a tenant. If A-Z was the tenant on the Property, then its obligation to pay the undisputed rent in arrears logically follows. This analysis highlights the flaw in Appellants' position to the effect that they must argue there was no tenant on the Property, or that A-Z

as a tenant had no obligation to pay rent. Neither of these positions were asserted at trial for the obvious reason that they make no sense.

Furthermore, Appellants' inconsistent arguments call into question the precise nature of the remedy they purport to seek. They want a new trial limited to "damages." What damages? Lubchansky was not found liable for any damages because he used A-Z as a shield. A-Z prevailed, albeit with an offset against its otherwise total recovery. Any new trial on damages would necessarily involve the separate roles of Lubchansky and A-Z in their contractual obligations to the Vernors, and a consideration of the various offsets that could have been applied to any recovery. In short, it cannot be assumed that A-Z is entitled to the recovery of $327,000.00 if a trial is to be held as to its right to recover money, "if any" at all. It is not the verdict which is inconsistent. It is the reversed position of Appellants that is inconsistent. The doctrine of Judicial Estoppel prevents Appellants from procedural maneuvering to escape the reality of the trial of this matter. Appellants successfully argued that A-Z was the tenant on the Property in order to avoid a judgment against Lubchancsky. That outcome cannot be reversed by now changing their position. Judicial Estoppel protects "the integrity of the judicial process" from this type of maneuvering. Cummings v. Bahr, 295 *N.J. Super.* at 387.

Any new trial would have to be a do over of the entire case for no purpose other than Appellants' hope of a bigger award (i. e., to be excused from paying rent for 4 years). See VonBorstel v. Campan, 255 *N.J. Super.* 24, 30-31 (App. Div. 1992). A damages award "should not be disturbed unless it clearly and convincingly appears to the judge that the jury's award is plainly wrong, constitutes a manifest injustice, or is so disproportionate to the injury as to shock the judge's conscience." Anderson v. A.J. Friedman Supply Co., Inc., 416 *N.J. Super.* 46, 70 (App. Div. 2010). Believing that an award is lower than expected does not suffice. Id. See also Chattin v. Cape May Greene, Inc., 234 *N.J. Super.* 590, 620 (App. Div. 1990); Brown v. Allied Plumbing & Heating, Co., *N.J.L.* 442, 446 (Sup. Ct.), affirmed 130 *N.J.L.* 487 (E. & A. 1943). The evidence must be viewed "in a light most favorable to the non - moving party." Anderson, 416 *N.J. Super.* at 70, citing Mahoney v. Podolnick, 168 *N.J.* 202, 229-30 (2001). A Jury's award of damages is "cloaked with the presumption of correctness." Cuevas v. Wentworth Group, 226 *N.J.* 480, 501 (2016), quoting Baxter v. Fairmont Food, Co., 74 *N.J.* 588, 598 (1977).

C. No Final Judgment Has Been Entered in This Case.

Appellants have proceeded in the absence of a final judgment. There exists no Final Order or Judgment in any amount enforceable against the Vernors. This oversight is inexplicable. Finality for the purpose of appealing does not

exist "until all issues as to all parties are resolved." Triffin v. Southeastern PA Trans. Authority, 462 *N.J. Super.* 172, 177 (App. Div. 2020) (citations omitted). Any reference to the post trial submissions and the transcript from the hearing on Appellants' motion for a new trial will demonstrate that there was a dispute over the form of the Final Judgment to be entered. The trial court indicated that it would enter the Order for Final Judgment proposed by the Vernors with "an addition to it that pre-judgment interest shall be calculated as is normal with a Final Judgment." Motion Transcript, T-21, ll.5-7. The trial court also denied an application for attorney's fees. That Final Judgment was not entered, and no calculation of the pre-judgment interest to be added was provided to the parties.

By not appealing from a Final Judgment, Appellants seek to avoid a review of the trial record and limit any consideration of their position to the denial of a motion for a new trial. As explained above, that effort should be rejected as improper.

VI. CONCLUSION

For the reasons stated above, this appeal should be denied.

RUBIN, EHRLICH, BUCKLEY & PRZEKOP, P.C.

By: _____
Robert L. Grundlock, Jr.

Dated: Nov. 25, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-004127-23T4

A-Z VENUE MANAGEMENT, LLC and ZACHARY LUBCHANSKY, *Plaintiffs-Appellants,* vs. JAMES V. VERNOR and JEAN P. VERNOR, *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY DOCKET NO. HUN-L-0045-21 Sat Below: HON. WENDY ALLYSON REEK, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT IN REPLY

Plaintiffs A-Z Venue Management, LLC ("Plaintiff A-Z Venue Management") and Zachary Lubchansky ("Plaintiff Lubchansky") (collectively "Plaintiffs" or "Appellants") appeal the trial court's denial of Plaintiffs' Motion for a New Limited Trial as to Damages Including Additur (the "Motion"). Defendants James V. Vernor and Jean P. Vernor (collectively "Defendants" or "Respondents") filed a Brief in Opposition on November 25, 2024. Respondents oppose the appeal on three unfounded grounds: 1) the appeal is procedurally improper because Appellants did not appeal a final order or judgment, 2) the Jury's calculation of damages in the Jury Verdict Sheet is not inconsistent, and 3) the doctrines of invited error and judicial estoppel bar Appellants' arguments.

First, it is well-settled in New Jersey that a trial court's denial of Motion for a New Trial is final and appealable whereas a trial court's granting of Motion for a New Trial is not final and interlocutory.

Second, Respondents' arguments reinforce Appellants' argument that the Jury improperly answered a question they were not instructed to consider on the Jury Verdict Sheet: whether Plaintiff A-Z Venue Management breached the 2015 Lease Agreement. The Jury Verdict Sheet only instructed the Jury to decide whether Plaintiff Lubchansky breached the 2015 Lease Agreement and

subsequently owed $245,000.00 in unpaid rent. The Jury unanimously decided he did not.

Finally, Respondents' reliance on the doctrine of invited error is misplaced because a clear reading of the Jury Verdict Sheet shows that the qualifying language of "if any" in Question 2 was contingent upon whether the Jury answered Question 1 in the affirmative or the negative. Regardless, New Jersey courts are reluctant to apply the doctrine of invited error when such will result in a fundamental miscarriage of justice. Appellants have argued the Jury's offset of Plaintiff A-Z Venue Management's damages award was a miscarriage of justice and the trial court's denial of the Motion for a New Trial was a miscarriage of justice. In lock-step, if the Appellate Division finds that Appellants' previous counsel included this so-called improper qualifying language, the Appellate Division should not apply the doctrine of invited error because upholding prior counsel's error would result in a fundamental miscarriage of justice to Appellants because that would subject Appellants to a liability finding without the Jury finding such liability. In this regard, it is important to emphasize that the Jury found no liability against either Plaintiff Lubchansky or Plaintiff A-Z Venue Management.

Respondents' reliance on judicial estoppel is also misplaced. Ironically, it is the Respondents who should be estopped from arguing that Plaintiff A-Z

Venue Management breached the 2015 Lease Agreement. A clear reading of the Jury Verdict Sheet, and Respondents' own admissions, show that Respondents sought to impose liability against Plaintiff Lubchansky not Plaintiff A-Z Venue Management for the $245,000.00 in unpaid rent. The Jury did not agree with Respondents' theory of the case. Consequently, Respondents cannot change their theory of liability to justify the impropriety of the Jury Verdict Sheet.

PROCEDURAL HISTORY & STATEMENT OF FACTS[1]

Appellants incorporate by reference Appellants' previously submitted combined procedural history and statement of facts. (Pb4-8).

LEGAL ARGUMENT

I. THE TRIAL COURT'S ORDER DATED JULY 19, 2024 DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL IS A FINAL, APPEALABLE ORDER. (Pa1)

Respondents argue that Appellants have filed the instant appeal absent a Final Judgment or Order. (Db16). Respondents allege that Appellants' motive is to side-step the trial record. (Db17). As a result, Appellants cannot introduce and/or rely on the exhibits submitted in support of their Appeal in accordance with R. 2:6-1(a)(2). (Db17). Respondents' arguments are contrary to established jurisprudence in this jurisdiction as well as common logic.

[1] The factual background and procedural history of the matter are intertwined and therefore presented together.

Respondents engage in the same side-stepping that they accuse Appellants of by trying to avoid the Jury's plain error of returning an incongruous and incorrect verdict sheet.

First, it is well-settled that a trial court's order *granting* of a Motion for a New Trial is not final and interlocutory whereas a trial court's order *denying* of a Motion for a New Trial is final and appealable. *See Pressler & Verniero, N.J. Court Rules (2024), R. 2:2-3, Comment 2.3.3.*(Emphasis Added); see also Iacano v. St. Peter's Med. Ctr., 334 N.J. Super. 547, 550 (App. Div. 2000) (holding that a trial court's granting of remittur is also final, and appealable). This legal standard conforms with the well-accepted principle that orders are only final when "all issues as to all parties are resolved." Triffin v. Southeaster PA Trans Authority, 462 N.J. Super. 172, 177 (App. Div. 2020).

Logically this is consistent. A Motion for a New Trial pursuant to R. 4:49-1 follows a court's conclusions in nonjury actions or the return of a jury verdict. If the trial court were to *grant* a party's Motion for a New Trial after a court's conclusion or the return of a jury verdict, such relief would invariably raise germane issues making interlocutory appeal the only mechanism for a disgruntled party. Conversely, the court's denial of a Motion of a New Trial after a court's conclusion or the return of a jury verdict does not raise any new issues therefore that order is final and thus appealable.

Respondents' argument that Appellants were obligated to appeal the Final Judgment is just a convenient way for the Respondents to once again side-step the incongruous Jury Verdict Sheet that was the subject of Appellants' Motion for a New Trial. Respondents consistently accuse Appellants of avoiding the trial record. Respondents' allegations are pure obfuscation. It is the Respondents not the Appellants who want to avoid the factual record. Simply put, Respondents want to avoid the plainly incorrect and incongruous Jury Verdict Sheet.

Appellants' argument is straightforward: 1) there was a miscarriage of justice when the Jury 'asked' and 'answered' a question they were not instructed to consider on the Jury Verdict Sheet and 2) the trial court's denial of Plaintiff's Motion for a New Trial constituted a miscarriage of justice. Respectfully, the Appellate Division only needs to look at the Jury Verdict Sheet to recognize the Jury's impropriety.

Finally, since this Appeal is procedurally appropriate, any exhibits submitted by Appellants at the underlying motion are also properly introduced in the instant appeal. Ultimately, Respondents' arguments in this vein are without merit.

II. RESPONDENTS' ARGUMENTS REINFORCE APELLANTS' ARGUMENT THAT THE JURY VERDICT SHEET IS INCONSISTENT AND INCONGRUOUS. (Pa1)

Respondents engage in the same improper factual substitution as the Jury by repeatedly pointing to the trial record to justify the Jury's improper movement beyond the questions the Jury was instructed to consider. Respondents' arguments and references to the trial record only serve to substantiate Appellants' main contention: the returned Jury Verdict Sheet is incongruous and inconsistent because the Jury impermissibly found Plaintiff A-Z Venue Management "liable" by offsetting Plaintiff A-Z Venue Management's damages award without ever making an express finding of liability.

Respondents repeatedly present factual evidence that shows the Jury inappropriately moved beyond what it was permitted to consider:

1. *"The award of $82,000.00 results from the calculation of the amount already paid to purchase the Property ($327,000.00) minus the 49 months of rent which A-Z did not pay ($245,000.00). Without this adjustment there would be no accounting for unpaid rent." (Db3);*

Contrary to Respondents' argument, the jury was not instructed to account for unpaid rent. The Jury Verdict Sheet only instructed the Jury to decide whether Plaintiff Lubchansky owed $245,000.00 in unpaid rent under the 2015 Lease Agreement not Plaintiff A-Z Venue Management. (Pa56). The Jury was not instructed or permitted to make an adjustment or offset against Plaintiff A-Z

Venue Management damages. The Jury moved beyond Its permissible scope as contained in the Jury Verdict Sheet when It did so. It moved beyond what It was duty bound to follow.

2. *The jury "awarded A-Z the full amount that it sought under the Contract of Sale ($327,000.00) and subtracted the $245,000.00 due in rent, reaching a verdict $82,000.00." (Db9);*

Respondents admit that the jury awarded Plaintiff A-Z Venue Management the full amount of the $327,000.00 that it sought under the Contract of Sale. The Jury was not permitted to reduce that award ($327,000.00) by $245,000.00 to $82,000.00. The Jury Verdict Sheet did not allow the Jury to consider if Plaintiff A-Z Venue Management owed $245,000.00 in unpaid rent under the 2015 Lease Agreement. The Jury Verdict Sheet only instructed the Jury to decide if Plaintiff Lubchansky owed $245,000.00 in unpaid rent under the 2015 Lease Agreement. And the Jury decided he did not.

3. *"From the Vernors' perspective, they sought to have Lubchansky found to be the tenant, as opposed to A-Z. Consequently, the parties and the court structured the jury verdict sheet to determine that fact-whether Lubchansky had the obligation under the lease he signed to pay rent for 49 months. The jury rejected that position in favor of Appellant's argument that A-Z was the tenant." (Db11).*

Respondents admit that at trial Respondents sought only to impose liability on Plaintiff Lubchansky not Plaintiff A-Z Venue Management. Consequently, the Jury Verdict Sheet never instructed the Jury to decide whether Plaintiff A-Z

Venue Management owed $245,000.00 in unpaid rent under the 2015 Lease Agreement. The Jury Verdict Sheet did not permit the jury to move beyond the express questions of the Jury Verdict Sheet.

4. *"Lubchansky was not found liable for any damages because he used A-Z as a shield. A-Z prevailed, albeit with an offset against its otherwise total recovery." (Db15).*

Respondents are correct, the Jury found that Plaintiff Lubchansky was not liable for any damages. Conversely, Plaintiff A-Z Venue Management prevailed on its claim for $327,000.00. However, the jury was never instructed to consider an offset against Plaintiff A-Z Venue Management's award based on a substituted theory of damages. The Jury did this on their own accord. This was impermissible and constitutes a miscarriage of justice.

Interrogatories in a Jury Verdict Sheet are meant to serve a particular purpose "to require the Jury to specifically consider the essential issues of a case, to clarify the courts' charge to the Jury, and to clarify the meaning of the verdict and to permit error to be localized." Wenner v. McEldowney & Co., 102 N.J. Super. 13, 19, certif. denied. 52 N.J. 493 (1968).

In short, the Jury was not allowed to reduce Plaintiff A-Z Venue Management's damages without a finding of liability. The interrogatories in the Jury Verdict Sheet instructed the Jury on the essential issues of the case. The Jury was never instructed in the Jury Verdict Sheet to decide whether

Plaintiff A-Z Venue Management breached the 2015 Lease Agreement. This was not an issue of the case that the Jury was instructed to decide upon when rendering Its verdict. As such, the Jury's offset in Question 2 was a miscarriage of justice. Similarly, the trial court's denial of Appellants' Motion for a New Trial was also a miscarriage of justice.

III. RESPONDENTS ERRONEOUSLY RELY ON THE DOCTRINE OF INVITED ERROR AND JUDICIALL ESTOPPEL. (Pa1)

Respondents cite to the doctrine of invited error and judicial estoppel as bars to the instant Appeal.

A. Doctrine of Invited Error (Pa1)

Respondents argue that the doctrine of invited error precludes the instant Appeal because Appellants included the qualifying words of "if any" in Question 2 of the Jury Verdict Sheet and because Appellants argued at trial that Plaintiff A-Z Venue Management was the tenant under the 2015 Lease Agreement. Generally, the doctrine of invited error prevents litigants on appeal "from arguing that an adverse decision below was a product of error, when that party urged to the lower court to adopt the proposition now alleged to be error." Brett v. Great American Recreation, 144 N.J. 479, 503 (1996). However, our Supreme Court is clear, "We would not apply the doctrine of

invited error where to do so would cause a fundamental miscarriage of justice." Ibid. at 508.

Here, a clear, objective reading of the language "if any" in Question 2 reveals that the language was contingent on the Jury's liability decision in Question 1: whether Defendants Vernors breached their contractual obligations and whether Plaintiff A-Z Venue Management was entitled to a return of any money. Question 1 and Question 2 of the Jury Verdict Sheet must be read in tandem since Question 2 is dependent on the Jury's answer in Question 1. It would be beyond a clear reading of the Question to accept Respondents' premise that the language was included to accommodate for a potential offset by the Jury (when in fact the jury was not asked to consider an offset against Plaintiff A-Z Venue Management).

Assuming arguendo that Appellants' previous counsel invited this error in the Jury Verdict Sheet and at trial, this Court should not apply the doctrine of invited error to prevent Appellants' appeal because doing so would result in a fundamental miscarriage of justice. There can be no more paradigmatic example of a fundamental miscarriage of justice than a Jury's assessing liability against a party (here Plaintiff A-Z Venue Management) when that Jury was not asked to consider whether that party (here Plaintiff A-Z Venue Management) was liable on the Jury Verdict Sheet. Allowing a Jury to operate

outside the court rules and established law constitutes a fundamental miscarriage of justice thereby making the doctrine of invited error inapplicable in this instant appeal.

B. Doctrine of Judicial Estoppel (Pa1)

Similarly, Respondents argue that the doctrine of judicial estoppel prevents Appellants from now arguing that Plaintiff Lubchansky was the tenant under the 2015 Lease Agreement when at trial Appellants argued that Plaintiff A-Z Venue Management was the tenant. "The doctrine of judicial estoppel is well entrenched in New Jersey's jurisprudence. It is 'an equitable doctrine precluding a party from asserting a position in a case that contradicts or is inconsistent with a position previously asserted by the party in the case or a related legal proceeding.'" Newell v. Hudson, 376 N.J. Super. 29, 38 (App. Div. 2005) (citing Tamburelli Properties v. Cresskill, 308 N.J.Super. 326, 335, 705 A.2d 1270 (App.Div.1998))

First, in this appeal, Appellants do not argue that Plaintiff Lubchansky was the tenant under the 2015 Lease Agreement. Appellants only argue that the jury was never asked in the Jury Verdict Sheet to determine whether Plaintiff A-Z Venue Management was the tenant under the 2015 Lease Agreement or breached the 2015 Lease Agreement. As a result, there could be

no damages assessed against Plaintiff A-Z Venue Management absent a finding of liability against Plaintiff A-Z Venue Management.

Ironically, Respondents should be estopped from arguing that Plaintiff A-Z Venue Management breached the 2015 Lease Agreement. A clear reading of the Jury Verdict Sheet, and by Respondents' own admissions in their brief, show that Respondents sought to impose liability against Plaintiff Lubchansky not Plaintiff A-Z Venue Management. At trial, Respondents sought to impose liability upon Plaintiff Lubchansky. Now they argue vociferously to the contrary to justify their opposition. They are barred by the same doctrine that they rely upon (judicial estoppel) from doing so here.

CONCLUSION

Based on the foregoing reasons set forth in this brief and Appellants' original brief, Appellants respectfully request that the Appellate Division set aside the trial court's denial of Appellants' Motion for a New Trial and remand this matter back to the trial court a New Trial Limited to Damages.

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