SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2053-13T3

JARWICK DEVELOPMENTS, INC., ADA REICHMANN and JOSEF HALPERN,

Plaintiffs-Respondents/ Cross-Appellants,

v.

JOSEPH WILF and THE ESTATE OF HARRY WILF, deceased, individually and as partners in the partnership known as J.H.W. ASSOCIATES; LEONARD A. WILF; ZYGMUNT WILF; MARK WILF; SIDNEY WILF; RACHEL AFFORDABLE HOUSING CO.; HALWIL ASSOCIATES, a partnership and PERNWIL ASSOCIATES, a partnership,

Defendants-Appellants/ Cross-Respondents,

and

MARVIN COHEN; and MIRONOV, SLOAN & PARAZIALE, LLC (f/k/a BECK, WEISS & COMPANY, P.A.),

Defendants.

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Argued April 17, 2018 – Decided June 1, 2018

Before Judges Yannotti, Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C-000184-92.

Peter C. Harvey argued the cause for appellants/cross-respondents (Patterson Belknap Webb & Tyler LLP and Lasser Hochman, LLC, attorneys; Peter C. Harvey, on the briefs; Sheppard A. Guryan and Bruce H. Snyder, of counsel and on the briefs).

Price O. Gielen (Neuberger, Quinn, Gielen, Rubin & Gibber, PA) of the Maryland bar, admitted pro hac vice, argued the cause for respondents/cross-appellants Jarwick Developments, Inc. and Ada Reichmann (Lowenstein, Sandler, LP, and Price O. Gielen, attorneys; Price O. Gielen, Michael B. Himmel, and Michael T.G. Long, on the briefs).

Alan M. Lebensfeld argued the cause for respondent/cross-appellant Josef Halpern (Lebensfeld Sharon & Schwartz PC, attorneys; Alan M. Lebensfeld and David M. Arroyo, on the briefs).

PER CURIAM

This matter is before us a second time. In our prior unpublished opinion, we concluded that defendants Joseph Wilf, the Estate of Harry Wilf, J.H.W. Associates, Leonard A. Wilf, Zygmunt Wilf, and Mark Wilf (defendants or the Wilfs) breached a partnership agreement by excluding plaintiffs Jarwick Developments, Inc. and Ada Reichmann (collectively Jarwick) from

the partnership.[1] Jarwick Devs., Inc. v. Joseph Wilf, No. A-5027-03 (App. Div. Dec. 15, 2006) (slip op. at 11-14). We remanded the matter to the trial court for an accounting of Jarwick's interest in the partnership. Id. at 14.

On remand, the trial court permitted Josef Halpern (Halpern) to join the action as a plaintiff, and granted Jarwick leave to file an amended complaint. Jarwick and Halpern asserted various contract and tort claims, as well as claims for civil remedies under New Jersey's Racketeer Influenced and Corrupt Organizations Act (RICO), N.J.S.A. 2C:41-1 to -6.2.

The trial court conducted a bench trial in the matter, which began on May 9, 2011, and continued for about 200 days over the course of two years. Defendants appeal from the final judgment entered on December 20, 2013. Jarwick and Halpern cross-appeal from the final judgment. For the reasons that follow, we affirm in part, reverse in part, and remand the matter to the trial court for further proceedings.

I.

We begin with a brief recitation of the pertinent facts and procedural history. Ada Reichmann is the sister of Halpern and his

[1] We refer at times to the parties and other individuals by their first names. In addition, although the term "Jarwick" includes two parties, we refer to Jarwick in the singular.

brother Abe. The Halperns had frequent business dealings with the late Harry Wilf and his brother Joseph, who together comprised J.H.W. Associates (J.H.W.). Harry's son Leonard, and Joseph's sons Zygmunt, Mark and Sidney (now deceased) also were involved in these business dealings.

In 1985, the Halperns and the Wilfs formed Halwil Associates (Halwil) in order to purchase property and obtain approvals for Rachel Gardens, a 764-unit garden apartment project in Montville, New Jersey. The parties signed a partnership agreement dated March 1, 1985, which granted J.H.W. a fifty-percent interest, Abe a twenty-five percent interest, and Halpern a twenty-five percent interest in the partnership.

Thereafter, Halwil purchased property for the Rachel Gardens project and entered into an agreement to purchase additional land. By the end of 1986, Leonard, Zygmunt, and Sidney Wilf had acquired half of J.H.W.'s fifty-percent interest in the partnership, with Leonard taking a twelve-and-one-half percent share, and Zygmunt and Sidney equally sharing the other twelve-and-one-half percent.

In 1988, the Wilfs discovered that Abe had improperly diverted monies from certain entities in which the Wilfs and Halperns had ownership interests. Consequently, the Wilfs removed Abe from any role in Halwil's management. Abe eventually paid the Wilfs back the monies he had taken.

J.H.W., Josef Halpern, and the Wilf sons then formed Pernwil Associates (Pernwil) to take title to the Halwil partnership property. J.H.W. had a fifty-percent interest in Pernwil, Josef Halpern had a twenty-five percent interest, Leonard had twelve-and-one-half percent, and Zygmunt, Mark, and Sidney Wilf had equal shares of the remaining twelve-and-one-half percent.

On June 29, 1988, Halwil assigned to Pernwil all of its assets. It appears that Abe did not learn about the assignment until August 1988. By the end of 1988, Abe had made capital contributions of $220,000 to Halwil. Abe also sought financial aid from Ada and her husband Ralph, and they made numerous loans to him. In connection with these loans, Ralph formed Jarwick, with Ada as the company's sole shareholder, and Abe assigned his interest in Halwil to Jarwick.

In August 1989, Joseph Schochet and Michael Rottenberg, acting as representatives for the Reichmanns, met with Harry, Joseph, and Zygmunt Wilf. After this meeting, Harry wrote a letter to Ralph, dated August 3, 1989, which recognized Abe's twenty-five-percent interest in "the Halwil and Pernwil project" and welcomed Ralph's involvement. Harry asked Ralph if he would agree to provide one-third of any funds needed for the Rachel Gardens project, with Harry providing the remaining two-thirds. By letter dated August 4, 1989, Ralph agreed to these terms.

Harry eventually informed Schochet that Pernwil did not require funding from the Reichmanns because the Wilfs had obtained mortgage financing for the project. Harry died in mid-1991. Early in 1992, Schochet contacted Joseph Wilf, seeking financial information about Pernwil. He was referred to Zygmunt, and at a subsequent meeting, Zygmunt informed Schochet "the train had left the station," which meant financing had been obtained and the Reichmanns would no longer be involved in the partnership.

In September 1992, Jarwick filed a complaint in the Chancery Division against defendants, seeking: (1) damages for the diversion of a valuable business opportunity and fraud; (2) a judgment declaring it had a twenty-five-percent interest in Halwil; (3) specific performance treating Jarwick as a partner in the Rachel Gardens project; (4) an accounting; and (5) the appointment of a receiver.

Thereafter, a judge conducted a trial on liability, and in January 2000, found that Jarwick had a twenty-five-percent interest in Halwil, Pernwil, and Rachel Gardens. However, on June 14, 2002, the judge ruled that Jarwick's partnership interest terminated in January 1992, when defendants decided Jarwick would no longer be involved in the Rachel Gardens project. The judge decided that a trial on damages was required, and Jarwick's

partnership interest should be valued as of the date defendants terminated Jarwick's interest in the partnership.

Another judge conducted the damages trial, and on March 22, 2004, filed an opinion finding that as of the valuation date, Jarwick's twenty-five-percent had a negative value. The judge therefore concluded that Jarwick was not entitled to damages. On April 5, 2004, the court entered a judgment dismissing Jarwick's complaint.

Jarwick appealed from the order fixing January 8, 1992, as the valuation date for its partnership interest, and the judgment dismissing its complaint. Jarwick, No. A-5027-03 (slip op. at 2). Defendants cross-appealed, challenging the trial court's determinations that Jarwick had an interest in Rachel Gardens, and that they had breached the partnership agreement by refusing to recognize that interest.

On December 15, 2006, this court filed its opinion reversing the trial court's determination that the August 1989 correspondence between Harry Wilf and Ralph Reichmann created a new and separate partnership between Jarwick and the Wilfs. Id. at 8. The panel found the correspondence "merely served to acknowledge the assignment of Abe's interest, to confirm Jarwick's participation and to secure a personal commitment from Ralph to

fund twenty-five percent . . . of the [p]roject, in addition to partial funding of . . . Halpern." Ibid.

The panel concluded that: (1) Abe Halpern had an interest in the Rachel Gardens project pursuant to the Halwil partnership agreement; (2) "[t]he partners excluded Abe from the partnership" and "attempted to take Abe's interest for themselves without compensating Abe in contravention of both the partnership agreement and the law;" (3) Abe rightfully assigned his interest in the partnership to Jarwick; and, (4) "[b]y virtue of [Abe's] assignment, Jarwick [held] a twenty-five percent . . . interest in the [Rachel Gardens] [p]roject." Id. at 11-14.

As to Jarwick's remedy, the panel found that because the "[p]roject was not a static asset" but "an evolving dynamic venture," valuing Jarwick's "interest at a fixed moment in time [was] inadequate as an appropriate remedy." Id. at 14. The panel decided that Jarwick was entitled to an accounting of its partnership interest, and remanded the matter to the trial court to conduct such an accounting. Ibid.

Defendants then filed a petition for certification with the Supreme Court, seeking review of our judgment. The Court denied certification. Jarwick Devs., Inc. v. Wilf, 190 N.J. 254 (2007).

Thereafter, Jarwick filed a motion in the trial court seeking an order recognizing it as a full partner in Pernwil, and requiring

that Jarwick or Halpern sign all of Pernwil's checks. Halpern joined in the motion, even though he was not then a party to the litigation. The judge assigned to the matter at that time denied the motion, ruling that this court's remand order only required the court to conduct an accounting, which was limited to evaluating Jarwick's interest in the partnership.

Jarwick filed a motion in this court, seeking clarification of the court's opinion and mandate. The court denied the motion. Another judge then was assigned responsibility for the case.

In July 2009, defendants moved to join Halpern as a defendant, arguing that his participation was required to provide complete relief. Defendants also sought leave to file a cross-claim for contribution against Halpern. On August 6, 2009, Halpern consented to his joinder as a party, but as a plaintiff rather than a defendant. On August 14, 2009, the judge permitted Halpern to join the case as a plaintiff.

On October 1, 2009, Halpern filed a complaint in which he alleged, among other things, that defendants had misappropriated "tens of millions of dollars" in partnership funds by "engaging in organized crime type activities." Halpern also alleged that defendants "fraudulently cover[ed]-up their malfeasance and defalcations though the abject falsification of the [p]artnership's books, financial statements and tax returns."

Based on these allegations, Halpern asserted claims against defendants for breach of contract; breach of the implied covenant of good faith and fair dealing; breach of fiduciary duties; violations of the former Uniform Partnership Act (UPA), N.J.S.A. 42:1-1 to -49 (repealed by L. 2000, c. 161, § 59, effective Dec. 8, 2000); common law and equitable fraud; civil remedies under RICO; conversion; and unjust enrichment. Halpern sought an accounting, compensatory and punitive damages, interest, attorneys' fees and costs, and dissolution of the partnership.

On October 1, 2009, Jarwick filed an amended complaint, with new claims. Jarwick asserted claims for breach of fiduciary duties; breach of contract; breach of the implied covenant of good faith and fair dealing; unjust enrichment; common law and equitable fraud; conversion, civil conspiracy, violations of the UPA; and civil remedies under RICO. Jarwick alleged defendants had stolen Pernwil's funds and concealed its actions by falsifying the partnership's financial records and misclassifying expenditures. Jarwick sought an accounting, compensatory and punitive damages, interest, attorneys' fees and costs, and dissolution of the partnership.[2]

[2] Jarwick and Halpern also asserted claims against Pernwil's accountants, Marvin L. Cohen, CPA, and the accounting firm Mironov, Sloan & Parziale, L.L.C. These claims were resolved in May 2011.

In March 2010, defendants moved to dismiss Jarwick's and Halpern's new claims, arguing that they were not permitted by this court's remand order and were barred by the applicable statutes of limitations. The judge did not rule on the motion at that time.

In November and December 2010, defendants filed a motion seeking summary judgment on various grounds. Defendants, again, argued plaintiffs' new claims exceeded the scope of our remand order and were time-barred. They also argued the RICO claims failed as a matter of law, and that there was insufficient evidence to support the fraud claims.

The judge expressed doubt as to whether it should permit Jarwick to add new claims in the remand proceedings, and whether Halpern should be allowed to file his claims almost twenty years after Jarwick commenced the lawsuit. The judge decided, however, that there was no harm in being "over-inclusive." The judge, therefore, denied defendants' motion and permitted the new causes of action to proceed.

In April 2011, the judge granted Jarwick's motion for partial summary judgment, recognized Jarwick as a full partner in the project, and ordered the parties to maintain the status quo in the partnership's operations pending resolution of the case. The judge conducted a bench trial in the matter for 207 days, beginning on May 9, 2011, and ending on May 6, 2013.

In August and September 2013, the judge placed an oral decision on the record, finding that Jarwick and Halpern had prevailed on their claims. Post-judgment proceedings followed, and the judge addressed plaintiffs' applications for attorneys' fees and costs. On December 20, 2013, the judge entered a final judgment and ordered the dissolution of the partnership.[3]

The judge awarded Jarwick $12,624,516 in compensatory damages and prejudgment interest of $19,435,326 on its accounting claim; $20,370,869 in punitive damages; $17,974,491 in trebled damages on the RICO claim; and attorneys' fees and costs in the amount of $10,666,468.

The judge awarded Halpern $6,559,213 in compensatory damages and $10,100,950 in prejudgment interest on his non-RICO claims; $16,396,895 in punitive damages; $16,007,361 in trebled damages on the RICO claims; and attorneys' fees and costs in the amount of $6,861,098.

With respect to both Jarwick and Halpern, the judge ordered that the trebled damages awarded under RICO were not "collectible or payable because [they were] exceeded by the punitive damages

[3] On appeal, defendants do not challenge the dissolution of the partnership. Post-judgment proceedings between the parties, which are the subject of separate appeals in No. A-5752-13 and No. A-2799-14, reveal that the Rachel Gardens property has been sold and the proceeds distributed between the parties in accordance with their respective partnership interests.

awarded." See St. James v. Future Fin., 342 N.J. Super. 310, 335-44 (App. Div. 2001) (holding that a plaintiff may not recover both punitive damages and trebled damages under RICO).

Defendants appeal and argue: (1) the trial judge violated this court's remand order which only directed an accounting of Jarwick's partnership interest; (2) plaintiffs' claims are barred by the applicable statutes of limitations, the entire controversy doctrine, and other principles of law; (3) the trial judge had a disqualifying conflict of interest and should have recused herself sua sponte; (4) the judge erred by finding that they violated fiduciary duties owed to plaintiffs; (5) they were entitled to compensation for their management of and financial contributions to the Rachel Gardens project; (6) the judge erred by finding them liable for the common law torts asserted; (7) the judge erred by awarding plaintiffs punitive damages, and the punitive damages awarded were excessive; (8) the judge's RICO findings are fundamentally flawed; (9) the judge erred by imposing tort and RICO liability upon Mark Wilf, Leonard Wilf, Joseph Wilf, and the Estate of Harry Wilf; (10) the judge erred by requiring public disclosure of their minimum net worth statements; (11) they are entitled to a credit for the monies plaintiffs obtained in their settlements with the accounting defendants; and (12) the attorneys' fees and costs awarded are excessive and unreasonable.

In its cross-appeal, Jarwick argues that the judge erred by: (1) excluding compensatory damages it sustained during the "carve-out" period from June 14, 2002, to December 15, 2006, in calculating punitive damages and damages under RICO; (2) failing to award it the maximum amount of punitive damages permitted by the Punitive Damages Act (PDA), N.J.S.A. 2A:15-5.12; (3) failing to include conduct that pre-dated January 1, 2000, in the RICO claim; (4) imposing a capital contribution upon it for investments made by defendants in 1988; and (5) reducing by twenty-five percent the fees of one of the firms that served as its co-counsel.

In his cross-appeal, Halpern argues that the trial judge erred by: (1) limiting his RICO damages; (2) failing to apply the parties' agreed-upon contractual waiver of the statutes of limitations; and (3) failing to award him the maximum amount of punitive damages permitted by the PDA.

II.

We turn first to defendants' contention that the trial judge was disqualified from handling this case on remand. Defendants did not file a motion in the trial court seeking the judge's disqualification, but argue on appeal that the judge should have recused herself sua sponte.

The record shows that a few days after the judge was assigned to this case, the Lowenstein firm, Jarwick's co-counsel, informed

the judge that it had retained the judge's spouse to represent it in an unrelated matter. In a letter dated August 20, 2009, a member of the Lowenstein firm stated that the judge's spouse was representing the firm in a case in which attorneys' fees and costs had been assessed against the firm. The letter stated, however, that the firm did not believe the judge's recusal was required.

The judge made no ruling at that time, but the issue arose again later. The judge then stated that she thought "somebody was going to ask" her to withdraw from the case, but none of the parties had made such an application. A week later, the judge commented on her spouse's representation of the Lowenstein firm, and stated she did not believe her disqualification was required. The judge noted that the parties had waived any such conflict.

In February 2011, the judge raised another potential conflict of interest involving her spouse. The judge indicated that her spouse thought that a partner in his law firm may have represented one of the Wilfs "on something." Defendants' attorney advised the judge he would speak to his clients about this. In May 2011, the judge discussed this second potential conflict with counsel in chambers and, thereafter, addressed the matter on the record. The judge noted that it had been previously revealed that an attorney in her husband's firm had represented Leonard Wilf at one time.

Defendants' attorney informed the judge that he had checked with Leonard and "there [was] an ongoing relationship."

Defendants' attorney told the judge the relationship did not have anything to do with this case. He stated that the attorney in her husband's law firm occasionally did work for Leonard. The judge noted that her husband's firm also had represented Zygmunt Wilf in a matter some time earlier, but the files relating to that matter were in storage and the firm could not identify the attorney involved.

Jarwick's attorney informed the judge his clients had no objection to the judge's proceeding with the case. It appears that Halpern's attorney later told the judge his client also had no objection.

The judge ruled she was not disqualified from sitting on the case. The judge stated:

> [I] think that you know enough about me at this point to know [I am] totally focused on what is going on in front of me [and] except for thunder and lightning [I am] just not going to be distracted. That is just the way I rule on cases. And I never wanted to be a criminal judge because I just think I would have difficulty with sentencing on a number of different levels, but I think I would have been a good one because I think if somebody was up for the third or fourth time I would be willing to give them a chance. It [does not] matter who owns a football team. It [does not] matter who is in the stadium. It [does not] matter who is a Canadian or United States

> citizen or what religion anybody is or what kind of an accent they have. It [does not] matter to me. That is the way I was raised. I know [I am] not going to have any trouble being fair. I just hope [I am] going to be able to get all of the facts together at [the] end. That is my only worry. But [I] will take it forward and [I] will get it done to the best of my ability.

Rule 1:12-2 allows "[a]ny party, on motion made to the judge before trial" to seek the judge's disqualification. The decision on a disqualification motion is committed to the discretion of the judge whose recusal is being sought. Chandok v. Chandok, 406 N.J. Super. 595, 603 (App. Div. 2009) (citing Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001)). Here, none of the parties filed a motion seeking the judge's disqualification. On appeal, however, defendants argue that the judge's refusal to recuse herself sua sponte was a mistaken exercise of discretion.

Rule 1:18 requires all judges to comply with the New Jersey Code of Judicial Conduct (Code). When the judge presided over this matter, the Code provided in relevant part:

> C. Disqualification (see [Rule] 1:12-1).
>
> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
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> . . . .
>
> (c) the judge knows that . . . the judge's spouse . . . has . . . [any] . . .

> interest that could be affected by the outcome of the proceeding;
>
> . . . .
>
> (e) the . . . judge's spouse . . .
>
> . . . .
>
> (iii) is known by the judge to have an interest that could be affected by the outcome of the proceeding . . . .
>
> [Code of Jud. Conduct, Canon 3C.]

The Code expressly provides that "a judge disqualified by the terms of" Canon 3 "may not avoid disqualification by disclosing on the record the disqualifying interest and securing the consent of the parties." Code of Jud. Conduct, Canon 3D.[4] In addition, Rule 1:12-1 states:

> The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter . . .
>
> . . . .
>
> (g) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

[4] The Supreme Court revised Canon 3 of the Code, effective September 1, 2016. The revised Code superseded the Code in effect at the time of the trial of this matter. Rule 3.17, Disqualification, under the revised Canon 3, in addition to other provisions, now provides that a judge is disqualified if his or her spouse "is a lawyer for a party." Revised Code of Jud. Conduct, Canon 3, Rule 3.17 (B)(3)(b).

The Code "set[s] a high bar by which judges must guide themselves." In re Advisory Letter No. 7-11, 213 N.J. 63, 71 (2013) (citing In re Seaman, 133 N.J. 67, 95-96 (1993)). The principles reflected in the Code "are not just aspirational yearnings but enforceable rules." Ibid. The "overarching objective" of the Code "is to maintain public confidence in the integrity of the judiciary." Ibid.

Furthermore, "[n]either Canon 3C nor Rule 1:12-1 recite an exclusive list of circumstances which [might] disqualify a judge and require recusal from a matter." State v. Kettles, 345 N.J. Super. 466, 470 (App. Div. 2001). Indeed, "[t]he situations in which a judge should grant a motion for recusal are varied." State v. Tucker, 264 N.J. Super. 549, 554 (App. Div. 1993).

Disqualification is not required only where actual bias on the part of the judge is established. Panitch, 339 N.J. Super. at 66-68. Rather, Canon 3 and Rule 1:12-1 require disqualification when a judge's impartiality might reasonably be questioned. In re Advisory Letter No. 7-11, 213 N.J. at 72-73. "Even a 'righteous judgment' will not find acceptance in the public's mind unless the judge's impartiality and fairness are above suspicion." Id. at 75 (quoting State v. Muraski, 6 N.J. Super. 36, 38 (App. Div. 1949)).

In determining whether a judge's disqualification is required under the Code and Rule 1:12-1, the test is "[w]ould a reasonable,

fully informed person have doubts about the judge's impartiality?" DeNike v. Cupo, 196 N.J. 502, 517 (2008). Applying that standard, we conclude the trial judge was not disqualified from sitting on this case.

As we have explained, while the case was pending in the trial court, the judge's spouse represented the Lowenstein firm, Jarwick's co-counsel, in an unrelated matter. Although the judge ultimately ruled in Jarwick's favor and awarded Jarwick attorneys' fees and costs, neither the judge nor her spouse had a direct or indirect financial interest in that award.

Moreover, there is no indication on this record that compensation the judge's spouse's received for his work on the unrelated matter was affected in any way by the judgment entered in this case. We, therefore, conclude that the fact that the judge's spouse was representing the Lowenstein firm in an unrelated matter would not lead a reasonable, fully-informed person to believe the judge could not be fair and impartial in deciding this case.

We also conclude that the judge was not disqualified because a member of her husband's law firm was representing Leonard Wilf in other unrelated matters while this case was pending before the judge. The record indicates only that the attorney in the spouse's firm has an ongoing attorney-client relationship with Leonard.

We must presume that Leonard pays fees for the services the attorney provides to him and that, as a member of the attorney's firm, the judge's spouse has a financial interest in those fees. Nevertheless, the attorney did not represent any of the defendants in this case. Therefore, the judge's spouse had no direct or indirect financial interest in the outcome of this matter.

In addition, we cannot assume the judge was inclined to favor defendants in this case merely because a member of her husband's firm was representing Leonard in unrelated matters. We conclude that under the circumstances, a reasonable, fully-informed person would not believe the judge could not be fair and impartial in deciding this case.

The decision in In re Billedeaux, 972 F.2d 104 (5th Cir. 1992), is instructive. In that case, the defendant sought the disqualification of the trial judge on the ground that the judge's husband was a partner of a law firm that actively represented one of the parties in other matters. Ibid. The court stated that under federal law, a judge is disqualified in any proceeding in which his or her "impartiality might reasonably be questioned" or the judge has "a personal bias . . . concerning a party." Id. at 105 (quoting 28 U.S.C. § 455(a), (b)(1)).

The court pointed out that the test for the judge's disqualification was whether a "'reasonable person, knowing all

the circumstances,' would believe it improper for the judge to sit in the case in question." Id. at 106 (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 861 (1988)). The court determined that the interest that could be attributed to the judge "is so remote and speculative as to dispel any perception of impropriety." Ibid.

Here, as in Billedeaux, the interest that could be attributed to the trial judge is remote and speculative, thereby dispelling any perception that it would be improper for the judge to sit on this case. We conclude the judge was not required to recuse herself sua sponte.

We note that if the recent revisions to the Code had been in effect at the time this matter was pending before the judge, we might reach a different conclusion. As noted, the Supreme Court revised the Code and it now provides that a judge shall be disqualified if his or her spouse "is a lawyer for a party." Revised Code of Jud. Conduct, Canon 3, Rule 3.17 (B)(3)(b).

There is a question as to whether the revised rule requires disqualification if the judge's spouse is a lawyer for an attorney who is representing a party. There also is a question as to whether the revised rule requires disqualification if the judge's spouse is a lawyer for a party in an unrelated matter.

We need not, however, address these issues in this appeal. We hold only that under the Code in effect at the time of the trial of this case, the judge was not disqualified.

III.

Next, defendants argue the judge was disqualified because she had an ex parte discussion with accountants from Bederson & Company (Bederson). The record shows that on May 26, 2010, the judge entered a consent order appointing Bederson as an independent accountant to assist the court in evaluating the conclusions and opinions presented by the parties' accounting experts.

Among other things, the court's May 26, 2010, order required Bederson to prepare a preliminary report, which then would be submitted to the court and the parties for review and comment. The order stated that the judge could communicate with Bederson "at any time" after Bederson had submitted its preliminary report, "and the parties waive[d] any objection to such communications."

It appears that the judge met accountants from the Bederson firm the day before the firm submitted its preliminary report to the court. According to defendants, the judge made notes concerning issues in the case. Defendants later learned of the meeting and filed a motion seeking the judge's and Bederson's disqualification. The judge denied the motion.

We conclude the judge did not abuse her discretion by denying defendants' motion. As noted, the parties consented to the entry of the order appointing Bederson, and the order allowed the judge to have ex parte communications with Bederson's accountants after the preliminary report was submitted.

Here, the judge reviewed a draft of the preliminary report with Bederson's accountants before it was submitted. The attorneys for the parties were not present for the meeting, but the preliminary report that Bederson later submitted to the court was essentially the same as the draft. Moreover, the judge stated on the record that during her meeting with the Bederson accountants, she only briefly reviewed parts of the report.

The judge decided that her ex parte meeting with the Bederson accountants did not affect her ability to be fair and impartial in deciding this case. The record supports the judge's determination.

IV.

We turn to defendants' contention that the trial judge failed to comply with the mandate in our prior opinion. Defendants argue the mandate limited the remand proceedings to an accounting of Jarwick's twenty-five-percent-partnership interest, and the judge erred by allowing Jarwick and Halpern to assert new claims in those proceedings.

When an appellate court orders a remand "the trial court is under a peremptory duty to obey the mandate of the appellate tribunal precisely as it is written." Flanigan v. McFeely, 20 N.J. 414, 420 (1956) (emphasis added). In fact, the "terms and scope of the remand or specific instructions it has issued regarding the litigation bind[s] the court below whether it agrees or not." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 2:9-1 (2018).

"[T]he very essence of the appellate function is to direct conforming judicial action. As such, the trial court has no discretion when a mandate issues from an appellate court. It simply must comply." Tomaino v. Burman, 364 N.J. Super. 224, 233-34 (App. Div. 2003) (citation omitted).

In our prior opinion, we concluded that Abe Halpern had a continuing interest in the partnership, and that under the Halwil and Pernwil partnership agreements, Abe validly assigned his interest to the Reichmanns, who created Jarwick "for the purposes of receiving the assignment." Jarwick, No. A-5027-03 (slip op. at 12-13). We held that Jarwick holds a twenty-five-percent interest in Rachel Gardens, which we characterized as "an evolving dynamic venture." Id. at 14.

We also determined that the valuation of Jarwick's interest "at a fixed moment in time" was not an adequate remedy for

Jarwick's exclusion from the partnership, and held that Jarwick was entitled to an accounting under the former UPA. Ibid. We remanded the matter to the trial court for the accounting. Ibid.

On appeal, defendants argue that our mandate only allowed the trial court to conduct an accounting of Jarwick's partnership interest, and precluded the trial court from allowing Jarwick and Halpern to assert new claims. We disagree. Our mandate did not expressly bar Jarwick from asserting new claims.

Moreover, Halpern was not a party to the appeal and generally court orders do not bind non-parties. N. Haledon Fire Co. v. N. Haledon, 425 N.J. Super. 615, 628-29 (App. Div. 2012). Therefore, our mandate did not bind Halpern and preclude him from asserting claims in the remand proceedings.

V.

Defendants argue that all of Jarwick's new claims were barred on various grounds.

A. Entire Controversy Doctrine.

Defendants contend Jarwick's new claims were barred by the entire controversy doctrine. Our court rules provide that the failure to join claims and parties that are "required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims." R. 4:30A. "The purposes of the doctrine are threefold: (1) the need for complete and final disposition

through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay." Ditrolio v. Antiles, 142 N.J. 253, 267 (1995).

The entire controversy doctrine did not preclude Jarwick from asserting new claims in the remand proceedings. Although the trial court had entered a final judgment in April 2004, dismissing Jarwick's complaint, we reversed that judgment and ordered further proceedings. The remand proceedings did not constitute a new or successive action, but rather the continuation of the proceedings that Jarwick commenced in 1992.

The entire controversy doctrine did not preclude Jarwick from filing an amended complaint asserting new claims in the ongoing litigation. See N.J. Dep't of Envtl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 395 (App. Div. 1995) (holding that the doctrine did not bar claims in an amended complaint because a final judgment had not been entered).

B. Waiver.

Defendants argue that because it did not raise its new claims in the trial court proceedings prior to the entry of the April 2004 judgment, and because it did not assert these claims in the prior appeal, Jarwick waived the new claims. We disagree.

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 152 (1958)). Moreover, "[a]n effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Ibid.

"The party waiving a known right must do so clearly, unequivocally, and decisively." Ibid. (citing Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). In this case, Jarwick did not knowingly, voluntarily, intentionally, and unequivocally relinquish the claims it asserted in the amended complaint.

C. Laches.

Defendants further argue Jarwick's new claims are barred by laches. Again, we disagree. The laches doctrine may be "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Id. at 180-81 (citing In re Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000)).

Jarwick delayed in asserting its new claims, but defendants have not shown they were prejudiced by the delay. Defendants have not shown their ability to defend against the new claims was in any way adversely affected by Jarwick's delay in asserting them.

We conclude the laches doctrine did not preclude Jarwick from raising new claims in the remand proceedings.

VI.

Defendants further argue Jarwick's new non-RICO contract and tort claims are barred by the statute of limitations applicable to such claims. These claims are subject to N.J.S.A. 2A:14-1, which requires, among other things, that an action for the recovery on a contract-based claim or the conversion of personal property be commenced within six years after the cause of action accrued.

Here, the trial judge determined that Jarwick's new non-RICO claims were not time-restricted for several reasons. Defendants contend the judge erred as a matter of law in failing to apply the statute of limitations to these claims, and assert the judge should have dismissed all of the claims.

A. Relation Back.

The judge decided that Jarwick's new non-RICO claims were not barred by the statute of limitations because they related back to the claims Jarwick asserted in its initial complaint. Our court rules permit a party to amend its pleadings when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." R. 4:9-3 (emphasis added).

A claim arises out of the "conduct, transaction, or occurrence" asserted in a prior pleading when it "constitutes the same matter more fully or differently laid, or [when] the gist of the action or the basic subject of the controversy remains the same." Harr v. Allstate Ins. Co., 54 N.J. 287, 299-300 (1969).

If an "amendment asserts a germane claim, it is entitled to relation back." Wimmer v. Coombs, 198 N.J. Super. 184, 187-88 (App. Div. 1985). Nonetheless, a "distinctly new or different claim or defense" will not be permitted if the limitation period for asserting it has expired. Ibid.

Here, the judge erred by applying Rule 4:9-3 to Jarwick's new non-RICO claims. These claims were not germane to the claims that Jarwick initially asserted in 1992. Indeed, the new claims sought "to vindicate wholly different rights and [were] based, at least in respect of damages, on wholly different proofs." Wimmer, 198 N.J. Super. at 188.

In ruling that Rule 4:9-3 applied to Jarwick's new non-RICO claims, the judge found that these claims merely made more specific what was asserted generally in the original complaint. The judge also found that the amended complaint reflected what Jarwick had "come to know" about the manner in which defendants had misappropriated partnership funds. We disagree with the judge's analysis.

In its initial complaint Jarwick essentially challenged its exclusion from the partnership and sought an accounting of its partnership interest. Jarwick's amended complaint included claims for breach of contract, breach of fiduciary duties, fraud, and other tort claims. These new claims had different elements and required different proofs. Jarwick's new claims went well beyond anything that Jarwick raised in the initial complaint.

The judge also reasoned defendants should have known they might have to respond to the new claims in this litigation because they would be required to account if Jarwick was found to have an ongoing interest in the partnership. The judge's analysis is not convincing. Defendants may have known that they might have to account for their use of partnership funds, but the new claims went far beyond merely seeking an accounting and sought to impose liability on a variety of different causes of action.

We conclude the judge erred by applying Rule 4:9-3 to Jarwick's new non-RICO claims. The new claims did not relate back to Jarwick's initial claims and were subject to the statute of limitations.

B. Contractual Waiver of the Statute of Limitations.

Defendants argue that the judge erred by finding that in the Halwil and Pernwil partnership agreements, they waived their right

to assert a statute-of-limitation defense. The agreements both include the following provision:

> No consent or waiver, expressed or implied, by any [p]artner to or of any breach or default by the other in the performance by the other of his obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations of such partner hereunder. Failure on the part of any [p]artner to complain of any act or failure to act of any of the other [p]artners or to declare any of the other [p]artners in default, irrespective of how long such failure continues, shall not constitute a waiver by such [p]artner of his rights hereunder.

The interpretation of a provision of a contract is generally a question of law, for which we exercise de novo review. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)). Therefore, on appeal, we owe no special deference to the trial court's interpretation of an agreement and "look to the contract with fresh eyes." Id. at 223 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The court's objective in construing a provision of a contract is to discern the intent of the parties. Ibid. (citing Mantilla v. N.C. Mall Assocs., 167 N.J. 262, 272 (2001)). The task "is not to rewrite a contract for the parties better than or different from the one they wrote for themselves." Ibid. (citing Zacarias

v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). The court must give the contract terms "their plain and ordinary meaning." Ibid. (quoting M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002)).

As noted, the Halwil and Pernwil agreements provide that notwithstanding a partner's failure to complain about the acts of another partner or to declare a default, the partner does not waive any rights under the agreement. A statute of limitations defense arises under the law, not under the agreements. Indeed, the agreements do not even mention statutes of limitations.

We conclude that in the Halwil and Pernwil agreements, defendants did not waive their right under the law to assert a statute-of-limitations defense in litigation arising under the agreements. The trial judge erred by concluding otherwise.

C. Equitable Tolling.

Defendants contend the trial judge erred by tolling the statute of limitations on Jarwick's new non-RICO contract and tort claims. Defendants contend all of these new claims accrued in the first phase of the litigation and were time-barred when asserted in October 2009.

In general, a cause of action accrues when a plaintiff knew or should have known of his injury. Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 334 (2010). In appropriate cases, however,

the discovery rule may toll the running of the statute of limitations. McDade v. Siazon, 208 N.J. 463, 475 (2011). The test under the discovery rule is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Ibid. (quoting Caravaggio v. D'Agostini, 166 N.J. 237, 240 (2001)).

Moreover, a defendant may "be denied the benefit of a statute of limitations where, by its inequitable conduct, it has caused a plaintiff to withhold filing a complaint until after the statute has run." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 171 (App. Div. 2007). Thus, courts have tolled the running of the statute of limitations on equitable grounds where a plaintiff has in some extraordinary way been prevented from timely asserting its rights. Binder v. Price Waterhouse & Co., 393 N.J. Super. 304, 312 (App. Div. 2007).

Here, there was no extraordinary reason to toll the running of the statute of limitations on Jarwick's new non-RICO claims. In the first phase of this case, Jarwick was afforded the ability to engage in pre-trial discovery and it was provided with an array of information concerning Halwil, Pernwil, and Rachel Gardens. There is no indication that defendants withheld or fraudulently concealed any relevant information in discovery.

Furthermore, for the damages trial in the first phase of the case, Jarwick retained William J. Morrison, a forensic accountant, and Morrison prepared several expert reports. In his 1998 report, Morrison reviewed the reasonableness of Pernwil's accounting expenses and payments to certain Wilf-related entities. In preparing his report, Morrison relied on expense and payment data he obtained from "the tax returns, general ledgers and related financial documents of Halwil, Pernwil" and Rachel Gardens.

In addition, in another report dated August 29, 2001, Morrison identified what he believed were certain accounting irregularities with regard to Pernwil. Morrison stated that defendants had made "payments to partners (other than Jarwick) and related entities in amounts that exceeded the fair market value of services [the partnership] received."

Thus, in the first phase of this case, Jarwick had sufficient evidence to assert claims based on the alleged misappropriation of partnership funds and falsification of records. The judge erred by tolling the statute of limitations on Jarwick's new non-RICO claims and allowing Jarwick to assert those claims based on conduct that occurred as far back as 1988.

The judge also reasoned that equitable tolling was justified, in part, because Jarwick could not have asserted new claims while its appeal was pending from the April 2004 judgment that dismissed

its complaint. However, before Jarwick filed its notice of appeal, it could have sought leave to amend the complaint to preserve any claims for which the statute of limitations might run while the appeal was pending.

Although we conclude the judge erred by tolling the statute of limitations, we reject defendants' contention that all of Jarwick's new non-RICO claims are time-barred. The new claims were based in part on alleged wrongful conduct that dated back to 1988, but continued during the first phase of the litigation and thereafter. The new claims are not entirely time-barred.

Each of these alleged wrongful acts gave rise to enforceable claims and triggered the running of the statute of limitations. See Metromedia Co. v. Hartz Mountain Assocs., 139 N.J. 532, 535 (1995) (holding that under contract for cleaning services, an enforceable right arose on a monthly basis after the services were performed and the right to payment arose). Thus, the statute of limitations does not preclude Jarwick from asserting new non-RICO claims based on conduct that occurred within the six years prior to the filing of the amended complaint.

We therefore conclude N.J.S.A. 2A:14-1 applies to Jarwick's new non-RICO claims and barred it from asserting its new non-RICO claims based on conduct that occurred more than six years before it filed its complaint on October 1, 2009. The trial judge erred

by allowing Jarwick to assert the new non-RICO claims based on conduct that occurred before October 1, 2003.

VII.

Next, defendants argue the trial judge erred by allowing Jarwick to assert its RICO claims in the remand proceedings. Defendants argue these claims accrued during the first phase of the litigation, and the statute of limitations applicable to RICO claims barred Jarwick from asserting these claims in the remand proceedings.

The judge found that Rule 4:9-3, the relation-back rule, did not apply to the RICO claims because those claims were "specific, unusual, and onerous" and the original complaint did not place defendants on notice that such claims would be asserted. The judge determined that Jarwick's RICO claims were subject to a five-year statute of limitations.

The judge also equitably tolled the running of the statute of limitations and allowed Jarwick to assert claims based on injuries sustained after January 1, 2000. The judge reasoned that tolling was required to account for the fifty-four months between June 14, 2002, when the trial court determined that Jarwick was no longer a partner in Halwil or Pernwil, and December 15, 2006, when we reversed the trial court's decision and held that Jarwick had a continuing interest in the partnerships.

A. Limitations Period for RICO Claims.

Defendants argue the judge erred by finding that RICO claims have a five-year statute of limitations. Defendants contend there is a four-year limitations period for RICO claims. In support of that contention, defendants rely upon In re Liquidation of Integrity Ins. Co., 245 N.J. Super. 133 (Law. Div. 1990).

In the Integrity case, the Law Division judge noted that there was no specific limitations period for claims under New Jersey's RICO law, and the judge applied the limitations period for claims under the Federal Racketeer Influenced and Corrupt Organizations Act (federal RICO), 18 U.S.C.A. §§ 1961-1968. Id. at 135 (citing Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 146 (1987)). We are convinced, however, that in this case, the trial judge correctly found that RICO claims are subject to a five-year limitations period.

We must interpret the statute in accordance with the Legislature's intent "and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citing Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)). "Our duty is to construe and apply the statute as enacted." Ibid. (quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)).

N.J.S.A. 2C:1-6(g) states that, "[e]xcept as otherwise provided in [the Code of Criminal Justice], no civil action shall be brought pursuant to this [C]ode more than five years after such action accrues." N.J.S.A. 2C:41-4(c) allows persons to seek civil remedies for damage in his business or property resulting from a violation of N.J.S.A. 2C:41-2.

As the Law Division recognized in Integrity, there is no specific statute of limitations for claims brought under N.J.S.A. 2C:41-4(c). However, the Integrity court erred by applying the limitations period under the federal RICO law. N.J.S.A. 2C:1-6(g) expressly applies in this instance and requires a RICO claim to be asserted within five years after the cause of action accrued.

B. Application of Time-Bar to all of the RICO Claims.

We reject defendants' contention that the statute of limitations barred Jarwick from asserting any RICO claims in the remand proceedings. Like its non-RICO claims, Jarwick's RICO claims were based on a multiplicity of separate and discrete actions, which occurred over time.

Each of the alleged wrongful actions allegedly caused injury to plaintiff's business or property, and gave rise to actionable claims under RICO. A cause of action under RICO accrues for a specific injury when the plaintiff discovers or should have

discovered the injury. See Bankers Tr. Co. v. Rhoades, 859 F.2d 1096, 1103 (2d Cir. 1988) (interpreting the federal RICO law).

Thus, the statute of limitations for RICO claims did not bar all of Jarwick's claims, even though they were based on violations that allegedly occurred more than five years before the amended complaint was filed. Jarwick was not barred from asserting RICO claims for injuries to its business or property that were sustained within five years before the claims were asserted.

The court should only have permitted Jarwick to assert RICO claims based on injuries to its property or business that were sustained after October 1, 2004.

C. Equitable tolling.

Defendants contend the judge erred by allowing Jarwick to assert RICO claims based on conduct that occurred after January 1, 2000. As we stated previously, equitable tolling is only applied in narrowly defined and extraordinary circumstances, and nothing extraordinary prevented Jarwick from asserting its RICO claims earlier than October 1, 2009. The judge erred by tolling the statute of limitations on Jarwick's RICO claims and allowing it to assert claims based on injuries sustained after January 1, 2000.

D. Relation Back.

In its cross-appeal, Jarwick argues that the judge erred by failing to apply Rule 4:9-3 to its RICO claims. Jarwick asserts the judge erred by refusing to allow it to assert claims that accrued any time after 1988. We disagree.

Here, the judge correctly determined that Rule 4:9-3 does not apply to the RICO claims. As the judge found, those claims are substantially different from the claims Jarwick asserted in its initial pleading. The claims do not relate back to the claims that Jarwick asserted in the complaint filed in 1992.

VIII.

Defendants argue that the trial judge erred by allowing Halpern to assert his non-RICO and RICO claims in the remand proceedings.

Here, the judge applied Rule 4:9-3 and determined that Halpern's claims related back to the claims asserted in Jarwick's original complaint. Alternatively, the judge tolled the running of the statutes of limitations on Halpern's non-RICO contract and tort claims and allowed him to assert these claims based on conduct dating back to 1988. The judge reasoned that equitable tolling was warranted because defendants concealed their misuse of partnership funds.

The judge also determined that Halpern's RICO claims are subject to a five-year limitations period, but the court tolled the running of the statute of limitations for a limited period of time. Like Jarwick, the judge allowed Halpern to assert RICO claims based on injuries sustained after January 1, 2000. The judge found that as of that date, Halpern had sufficient information to assert his RICO claims.

A. Relation Back.

Defendants argue that the judge erred by finding that Halpern's non-RICO claims relate back to the claims asserted by Jarwick in its initial complaint. We agree. "[N]othing within the doctrine of relations back would permit claims asserted by litigants in one action to relate back to claims asserted by different litigants in a different action." Fraser v. Bovino, 317 N.J. Super. 23, 34 (App. Div. 1998). Because Halpern was not a party to the action when he filed his complaint, he did not have a previously-filed pleading to which his claims could relate back.

Halpern argues that the judge's decision to allow him to assert claims based on alleged wrongful acts dating back to 1988 was consistent with well-settled principles of equity and partnership law. In her decision, the judge stated that an accounting involves the entire partnership, and the partner will

have to account to all partners, not simply the partner who called for the accounting. We disagree with the judge's reasoning.

Because Jarwick filed its complaint in 1992, it was entitled to an accounting of its interest in the partnership from its inception in 1988 through to its dissolution in 2013. In determining the damages due Jarwick for its interest in the partnership, the court had to consider the interests of the other partners.

This does not mean, however, that a partner who only joined the litigation in October 2009 has a right to same relief as the party that commenced the action in 1992. Therefore, Halpern had the right to assert his non-RICO contract and tort claims, but his claims do not relate back to the original complaint filed by Jarwick. We hold that Halpern's claims are subject to the six-year statute of limitations.

B. Equitable Tolling.

The judge found that Halpern's non-RICO claims accrued sometime after 2006 when we decided the prior appeal because, until that time, Halpern was not aware defendants had been misusing partnership funds. The judge found the accrual date for Halpern's claims was tolled because defendants fraudulently concealed their wrongdoing.

As stated previously, a cause of action accrues when a plaintiff knew or should have known he sustained an injury. Henry, 204 N.J. at 333. Moreover, the discovery rule may be applied in determining when a cause of action accrues. McDade, 208 N.J. at 475. "[T]he discovery rule imposes on plaintiffs an affirmative duty to use reasonable diligence to investigate a potential cause of action, and thus bars from recovery plaintiffs who had 'reason to know' of their injuries." Fauver, 153 N.J. at 110.

Here, the record shows that long before he filed his complaint in October 2009, Halpern had knowledge that defendants were exercising unilateral control of the partnership and might be misusing partnership funds. In 1991, defendants transferred 104 units in Rachel Gardens to a Wilf-owned entity, Rachel Affordable Housing Company.

It is undisputed that Halpern knew of the transfer. Indeed, he testified that he was required to sign papers to effectuate the transfer of title. Halpern claims Zygmunt Wilf told him the transfer was for tax purposes. However, he took no action to determine whether that representation was accurate. He also did not attempt to determine whether he was sharing in the income and tax benefits related to those units.

In 1994, Halpern obtained a copy of a ledger sheet, which showed defendants had transferred $875,000 in partnership funds

to a Wilf-owned entity. Halpern said Zygmunt Wilf told him the $875,000 payment was a loan, but Halpern made no effort to verify whether this was so. He also did not make any inquiry to determine whether defendants were making other, similar uses of partnership funds.

In 1988 and 1989, Halpern received partnership financial statements but he claims he did not thereafter receive such statements. Halpern did not, however, ask defendants why he was no longer receiving the partnership's financial statements. As a partner, Halpern had the right to demand access to all of the partnership's books and records, which would have disclosed the payments and distributions that formed the basis for the claims he asserted in 2009.

Halpern claims he is unsophisticated in financial matters, and would not have understood the financial statements even if defendants had provided them to him. However, Halpern was the manager of Rachel Gardens, and evidence was presented at trial showing he was heavily involved in its construction. In any event, even if Halpern was as unknowledgeable in financial matters as he claimed, he could have sought the advice of an attorney and an accountant. He did not do so.

Halpern asserted that Zygmunt repeatedly provided him with assurances about the manner in which defendants were managing the

partnership. The trial judge found that Halpern's reliance on these assurances was reasonable because Zygmunt had a fiduciary duty to provide Halpern with accurate information about partnership matters.

However, the fact that Zygmunt had a fiduciary duty to Halpern did not relieve Halpern of his duty to investigate defendants' possible misappropriation of funds and falsification of records. Halpern had sufficient information to warrant an inquiry to determine if he had claims against defendants for, among other things, breach of the partnership agreement.

The judge also found that Halpern may not have acted because he was financially dependent upon his income and distributions from the partnership. The record shows that through 2007, Halpern received about $7 million from the partnership in income and distributions. His claimed dependence on this income does not, however, excuse his failure to assert claims in a timely manner.

We conclude that under the circumstances, the judge erred by allowing Halpern to assert his non-RICO claims based on conduct extending back to 1988. We hold the six-year statute of limitations applied to Halpern's non-RICO contract and tort claims, and the trial court should not have permitted him to assert these claims based on conduct that occurred prior to October 1, 2003.

C. RICO Claims.

The trial judge found that Halpern was subject to a five-year limitations period for the assertion of his RICO claims. Like Jarwick, the judge found that Halpern could assert his RICO claims based on injuries sustained after January 1, 2000. The judge found that as of that date, Halpern had sufficient knowledge of defendants' wrongful actions to assert claims under RICO.

We reject defendants' contention that all of Halpern's RICO claims are barred by the statute of limitations. We conclude, as we concluded with regard to Jarwick's RICO claims, that Halpern's RICO claims are subject to a five-year statute of limitations, and the judge erred by tolling the time in which Halpern was required to assert those claims.

We hold that the judge erred by allowing Halpern to assert RICO claims based on injuries to his property or business that pre-dated October 1, 2004.

IX.

We turn to the trial judge's decision to award Jarwick compensatory damages on its accounting claim in the amount of $12,624,516, with prejudgment interest of $19,435,326. The accounting damages were based on the judge's factual findings, which addressed defendants' use of the partnership's funds from its inception in 1988 to its dissolution in 2013. The award

represents the judge's determination of the amount of money Jarwick was entitled to receive for its interest in the partnership.

We note that factual determinations "made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (citing In re Trust Created by Agreement Dated Dec. 20, 1961, ex. rel. Johnson, 194 N.J. 276, 284 (2008)). We will not "disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid. (quoting In re Trust, 194 N.J. at 284).

In reviewing the trial judge's findings, we must "accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon [the judge's] opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare v. Cesare, 154 N.J. 394, 411-13 (1998)). Our task is to determine whether "there is substantial evidence in support of the trial judge's findings and conclusions." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974). The trial court's

decisions on issues of law are, however, subject to plenary review. Manalapan, 140 N.J. at 378.

A. Accounting Damages/Misuse of Partnership Funds.

In the lengthy oral decision placed on the record, the judge determined that from 1989 to 2012, the partnership made cash distributions, partner-salary distributions, and excess related-party payments that totaled $68,439,873. The judge deducted from that amount $14,321,148, which was the amount disbursed to defendants to repay their advances. The balance deemed available for distribution to the partners was $54,118,725.

The judge determined that Jarwick was entitled to twenty-five percent of this amount, or $13,529,683. The judge then deducted Jarwick's contribution obligation and the distributions it had received, arriving at $12,624,516, which was the amount of compensatory damages the judge awarded to Jarwick.

In her decision, the judge made detailed findings of fact regarding defendants' excessive related-party payments and other distributions of partnership funds. The judge found that defendants had paid Wilf-related entities certain management fees. The judge noted that defendants initially paid themselves these funds as management fees, but later reclassified some of these payments as other expenses. The judge pointed out that in his testimony, Zygmunt Wilf could not provide a consistent explanation

for the fees or the reclassifications. The judge found there was no reasonable or economic basis for the management fees that defendants paid to the Wilf-related entities.

The judge also found that defendants improperly recorded payments of interest on certain related-party loans. In one instance, defendants recorded an interest expense of $400,000 on a "phantom" loan to Structural Management, an entity wholly owned by defendants. The judge noted that the Pernwil partners never discussed or agreed upon the amounts of interest that the partnership should pay on these related-party loans.

The judge also observed that defendants had no formula or standard for determining the amount of interest due on these loans, and defendants treated many of their related entities differently with regard to the payment of interest. The judge found that defendants had taken "huge amounts" of money from Pernwil to pay interest and this use of partnership funds lacked any rational basis.

In addition, the judge determined that defendants improperly used Pernwil's monies to pay the salaries of persons who worked for Wilf-related entities and did little or no work for Pernwil. The judge noted that in a response to a statement of facts submitted on a summary judgment motion, defendants had conceded

that, at that time, Pernwil was paying salaries and benefits for persons working at the headquarters for defendants' businesses.

Defendants stated that fifty persons then were working at the headquarters location, managing many of defendants' projects. Defendants charged the salaries and benefits of these workers to the various Wilf entities, including Pernwil, based on what defendants determined to be "a fair allocation." The judge found there was no fixed criteria for the allocation of these expenses to Pernwil and the other defendant-related entities.

The judge further found that defendants improperly used Pernwil's funds for rent and office expenses for defendants' headquarters, and for office space defendants occupied in a building in New York City. The judge stated that the evidence showed that only a dozen of the two hundred projects that defendants managed paid rent. At trial, Zygmunt testified that during the construction and management of Rachel Gardens, he charged Pernwil what he "felt" it should pay.

The judge observed that a person reviewing Pernwil's financial statements would not know the amounts the partnership was paying to defendants or the reasons for which those payments were made. The judge noted that Zygmunt could not identify with specificity the costs that were included in the category of office expenses. The judge found that the manner in which Zygmunt handled

the rent and office expenses was indicative of the way he conducted "all of his businesses."

The judge said that "it could be paper, it could be rent, or it could be something else that was due and owing even from another partnership that was charged." The judge found that it was inappropriate for defendants to take what they thought the partnership owed and to categorize those payments "as rent or [an] office expense."

In addition, the judge found that defendants charged Pernwil more for insurance than they charged other entities they managed. The evidence showed defendants obtained insurance policies which covered numerous projects under defendants' management. Defendants then decided the amounts that the individual projects should pay for the insurance.

The evidence showed that some of the Wilf projects were paying less than Pernwil for insurance coverage. The evidence also showed that defendants were charging Pernwil amounts for insurance that exceeded market rates for comparable coverage.

The judge found that at trial, Zygmunt Wilf essentially testified that he believed he was "entitled to charge" the individual Wilf-managed projects "whatever he want[ed] to charge" for insurance. The judge stated that this was another instance "where [Zygmunt] was simply using Pernwil as his own personal

piggy bank, with no disclosure as to what he was doing[.]" The judge also stated that Zygmunt had not been able to explain "why he had done what he did."

The judge further found defendants improperly used Pernwil's funds to pay so-called commissions, which were end-of-the-month bonuses paid to certain persons employed by other Wilf entities. The judge found that these individuals had little or nothing to do with Pernwil or Rachel Gardens. The judge stated that there appeared to be no rationale for the amounts paid, which were "completely arbitrary" and not reported on the partnership's financial statements. The judge made similar findings with regard to defendants' use of Pernwil's funds for legal expenses, advertising costs, and other expenses.

We are convinced there is sufficient credible evidence in the record to support the trial judge's factual findings and conclusions of law regarding defendants' improper use of partnership funds. The judge's findings of fact were based upon, among other evidence, an extensive array of documents, the testimony of numerous witnesses, and the expert testimony.

We conclude the record fully supports the judge's determination that defendants had misused partnership funds, and Jarwick was entitled to damages for the monies it should have been paid for its interest in the partnership.

B. Management Fees.

On appeal, defendants argue that the judge erred by failing to award them management fees. In our prior opinion, we stated we were confident that on remand the trial court would consider "the disproportionate amount of capital and man-hours" that defendants had put into the project. Jarwick, No. A-5027-03 (slip op. at 15). We did not, however, mandate an award of management fees to defendants.

Here, the judge found that defendants had improperly paid themselves management fees. The judge determined that defendants had no right to those fees under the current Uniform Partnership Law, N.J.S.A. 42:1A-20 to -56. Indeed, N.J.S.A. 42:1A-21(h) states that "[a] partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership."

The judge also found that the partnership agreements made no provision for the payment of management fees to defendants. The judge concluded that in the absence of such an agreement, a partner is only entitled to its share of the partnership's profits.

The judge found that there was no economic or reasonable basis for the management fees defendants had paid to themselves. The judge stated that defendants had withdrawn monies from Pernwil

at the end of each year and classified them as management fees. The judge noted that at trial, Zygmunt could not say "what those fees were taken for." The record, thus, supports the judge's determination that defendants improperly withdrew partnership funds to pay themselves management fees.

C. Defendants' Claims for Other Fees.

The judge also addressed defendants' claims for $19 million in what were termed theoretical management fees and an additional $9 million in so-called hypothetical management fees. The judge found that defendants failed to establish any basis for the award of these fees.

In her decision, the judge noted that the claimed theoretical management fees had never been calculated by anyone, and Zygmunt Wilf did not know whether some or all of these fees were included in defendants' other claims for fees. The judge again pointed out there were no agreements by the partners regarding the payment of these or any other fees.

The judge further noted that Zygmunt also had acknowledged that defendants did not charge theoretical fees to other entities they managed or controlled. The judge found that the amount of work defendants put into the development or management of Rachel Gardens "was never quantified in any way whatsoever." The judge

therefore concluded that there was no basis whatsoever to award defendants the theoretical fees they were seeking.

In addition, the judge rejected defendants' claim for so-called hypothetical management fees. The judge noted that defendants were seeking approximately five percent of the rental revenues at Rachel Gardens. The judge found there was no contractual or statutory basis for these fees, and no rationale to pay them. The judge stated that defendants had performed some activities for Rachel Gardens but "no one was able to specifically quantify or monetize those activities."

We conclude that there is sufficient credible evidence in the record to support the judge's determination that defendants had not shown they were entitled to the hypothetical and theoretical management fees they were seeking.

D. Jarwick's Capital Contribution.

In its cross-appeal, Jarwick argues that the judge erred by finding that they were obligated to make a retroactive capital contribution of $345,000 to Rachel Gardens, which reduced the amount of accounting damages awarded.

The record shows that defendants loaned Pernwil $1,035,000, and in 1989 reclassified the loan as a capital contribution. Jarwick argues that Ralph Reichmann and Harry Wilf only agreed that Ralph would contribute one-third of additional monies for the

project "should the need arise." Jarwick contends that the trial judge never found that the $345,000 was needed for the project. Jarwick also contends defendants should not get the benefit of the retroactive capital contribution because defendants contributed the $1,035,000 to carry out what Jarwick claims was an unlawful scheme to deprive Abe Halpern of his interest in the project.

We are not persuaded by Jarwick's arguments. In our view, the trial judge did not err by ordering Jarwick to make the retroactive capital contribution. As Jarwick concedes, defendants contributed $1,035,000 to the project. It is reasonable to assume that they would not have done so unless there was a need for the monies.

Moreover, the record shows that Ralph Reichmann agreed to contribute one-third of funds that might be needed for the project. Thus, there is sufficient credible evidence in the record to support the judge's determination that Jarwick was obligated to make a retroactive capital contribution of $345,000 to the partnership.

Accordingly, we affirm the award to Jarwick of compensatory damages of $12,624,516, and prejudgment interest of $19,435,326 on Jarwick's accounting claim.

X.

The trial judge also determined that Jarwick and Halpern had presented sufficient evidence to establish their non-RICO contract

and tort claims. The judge found that Jarwick and Halpern had established their claims for breach of fiduciary duties, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, equitable fraud, fraud, conversion, and civil conspiracy.

As noted previously, the judge awarded Jarwick $12,624,516 on its accounting claim. The judge did not award Jarwick additional damages on its non-RICO claims, to avoid what would have been a double recovery for the same damages. Rather, the judge used the damages on the non-RICO claims for the purpose of awarding punitive damages. The judge calculated Jarwick's damages for punitive damage purposes using the accounting damages found for 1989 through 2011.

For punitive damage purposes, the judge eliminated damages for the so-called "carve-out" period. This was essentially the time from June 14, 2002, when the trial court ruled that defendants had excluded Jarwick from the partnership, and December 15, 2006, when we reversed that determination and found that Jarwick had a continuing partnership interest. The judge determined that defendants could not be awarded punitive damages in the "carve-out" period because their actions regarding Jarwick had been taken in reliance upon the trial court's June 14, 2002, ruling.

In addition, the judge awarded Halpern $6,559,213 in compensatory damages on his non-RICO contract and tort claims, along with prejudgment interest. The judge based Halpern's compensatory damages upon the accounting damages found for the period from 1989 to 2011, but included damages for the so-called "carve-out" period because the court's ruling in June 14, 2002, did not apply to Halpern.

On appeal, defendants argue that the trial judge's findings of fact on the non-RICO claims are not supported by sufficient credible evidence in the record. They argue that plaintiffs' tort claims are barred by the economic loss doctrine. Defendants contend they did not have any tortious intent, and they assert the court assigned liability without regard to culpability. Defendants further argue the trial court incorrectly found fraud without the necessary showing of reliance. They claim they owed no fiduciary duty to Jarwick, and violated no duty of disclosure with regard to partnership records.

We are convinced these contentions lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We are convinced there is sufficient credible evidence in the record to support the trial court's findings of fact and conclusions of law on plaintiffs' non-RICO claims.

However, as stated previously, we have determined that the trial judge erred by failing to apply the six-year statute of limitations to Jarwick's and Halpern's non-RICO claims. Accordingly, we remand the matter to the trial court solely for the purpose of recalculating the damages on these claims.

On remand, the trial court shall recalculate the damages on Jarwick's and Halpern's non-RICO claims, which shall be limited to damages incurred in the period from October 1, 2003, through December 31, 2011. The damages shall be recalculated based on the trial court's findings of fact and the accounting damages found by the trial judge for the relevant period, with such additional submissions or evidence the trial court deems necessary.

XI.

The trial judge also found that Jarwick and Halpern had established their claims under RICO. A civil action may be brought under N.J.S.A. 2C:41-4 by "[a]ny person damaged in his business or property by reason of a violation of [N.J.S.A.] 2C:41-2." N.J.S.A. 2C:41-2(c) provides that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in or activity of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Here, the trial judge determined that Jarwick and Halpern had standing to assert claims under RICO, and they established defendants had engaged in a "pattern of racketeering activity," as defined in N.J.S.A. 2C:41-1(d). The judge also found that defendants had engaged in at least two incidents of racketeering conduct, one of which occurred after the effective date of the act, and the last of which occurred within ten years after a prior incident of such activity. N.J.S.A. 2C:41-1(d)(1). In addition, plaintiffs had shown that

> [t]he incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.
>
> [N.J.S.A. 2C:41-1(d)(2).]

The judge further found that plaintiffs had established that defendants committed the predicate acts of theft by unlawful taking, N.J.S.A. 2C:20-3; theft by failing to make the required disposition of property, N.J.S.A. 2C:20-9; misapplication of entrusted property, N.J.S.A. 2C:21-15; theft by deception, N.J.S.A. 2C:20-4; falsification or tampering with records, N.J.S.A. 2C:21-4; and mail and wire fraud, 18 U.S.C. §§ 1341, 1343.

The judge also found that the partnership and the related entities constituted a "racketeering enterprise" under N.J.S.A. 2C:41-1(c), and that defendants had engaged in a conspiracy to violate RICO, which is unlawful under N.J.S.A. 2C:41-2(d). The judge found there had been a high level of coordination with regard to Pernwil, Halwil, and Rachel Gardens. Defendants made decisions by consensus, and they functioned as "a very well oiled machine."

The judge calculated Jarwick's damages for RICO purposes using the accounting damages found by the court for 2000 to 2011. However, the judge did not award Jarwick damages under RICO for the "carve out" period from June 14, 2002, to December 15, 2006. The judge determined that Jarwick's damages under RICO were $5,991,647. The judge trebled those damages pursuant to N.J.S.A. 2C:41-4(c), resulting in an award of $17,974,491.

The judge also calculated Halpern's RICO damages using the accounting damages found by the court for 2000 to 2011. The judge awarded Halpern damages for his RICO claims in the amount of $5,335,787. The judge trebled those damages, pursuant to N.J.S.A. 2C:41-4(c), resulting in an award to Halpern of $16,007,361.

As noted previously, the final judgment provides that Jarwick and Halpern could not collect the RICO damages because the punitive damages awarded to these parties exceeded the RICO damages. That

decision was consistent with St. James, 342 N.J. Super. at 335-44.

On appeal, defendants essentially raise the same arguments they raised with regard to plaintiffs' non-RICO claims. They argue the trial court's factual findings on the RICO claims are not supported by sufficient credible evidence.

Defendants contend Jarwick and Halpern were not actually or proximately damaged under RICO. They assert plaintiffs failed to establish causation under RICO during the "carve-out" period or at any other time covered by the claims. They also argue the trial judge erroneously found they committed fraud even though plaintiffs did not establish reliance.

Furthermore, in its cross-appeal, Jarwick argues that the trial judge erred by refusing to award it damages under RICO for the "carve-out" period. Jarwick contends defendants may have denied it the benefits of the partnership in that period based on the court's June 2002 ruling, but defendants wrongfully retained the partnership benefits even after this court reversed the June 2002, decision.

We are convinced defendants' and Jarwick's arguments regarding the trial judge's findings of fact on the RICO claims lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We conclude there is sufficient credible evidence in the record

to support the trial court's findings of fact and conclusions of law on plaintiffs' RICO claims. The judge did not err by refusing to award Jarwick damages for the "carve-out" period.

However, we have determined that the trial judge correctly found the five-year statute of limitations applies to Jarwick's and Halpern's RICO claims, but erred by tolling the time for filing those claims. Accordingly, we remand the matter to the trial court solely for the purpose of recalculating the damages on those claims.

On remand, the trial court shall recalculate the damages on the RICO claims, which shall be limited to damages incurred from October 1, 2004, through December 31, 2011. The RICO damages shall be recalculated based on the trial judge's findings of fact and the accounting damages found by the judge, with such additional submissions or evidence the court deems necessary.

XII.

On appeal, defendants challenge on various grounds the trial court's decision to award Jarwick and Halpern punitive damages. They dispute the judge's finding that they engaged in conduct that justifies the imposition of such damages. They argue that the punitive damages that the judge awarded are excessive and unconstitutional. In their cross-appeals, Jarwick and Halpern

argue that the court should have awarded them the maximum amount of punitive damages allowed under the PDA.

The PDA defines "punitive damages" to include "exemplary damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future." N.J.S.A. 2A:15-5.10. The PDA specifically excludes both compensatory damages, which "means damages intended to make good the loss of an injured party," and nominal damages, which "are not designed to compensate a plaintiff and are less than $500." Ibid.

To prevail on a claim for punitive damages, a plaintiff must prove by clear and convincing evidence that the party suffered harm as a "result of the defendant's acts or omissions" and that "such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J.S.A. 2A:15-5.12(a). In making that determination, the relevant considerations include:

> (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
>
> (2) The defendant's awareness of reckless disregard of the likelihood that the serious

> harm at issue would arise from the defendant's conduct;
>
> (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
>
> (4) The duration of the conduct or any concealment of it by the defendant.
>
> [N.J.S.A. 2A:15-5.12(b).]

Before entering judgment, the trial judge "shall ascertain that the award is reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct." N.J.S.A. 2A:15-5.14(a). The award amount is also capped so that "[n]o defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater." N.J.S.A. 2A:15-5.14(b). If necessary, "the judge may reduce the amount of or eliminate the award of punitive damages." N.J.S.A. 2A:15-5.14(a).

In addition to these statutory conditions, punitive damages must satisfy due process requirements under the Fourteenth Amendment to the United States Constitution. In State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003), the Court explained that because punitive damages are imposed for retribution and deterrence, states must provide civil defendants

with protections akin to what a criminal defendant would receive. Accordingly, a plaintiff's burden of proof cannot "be satisfied by proof of any degree of negligence including gross negligence." N.J.S.A. 2A:15-5.12(a).

Three "guide posts" shape the analysis: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm, 538 U.S. at 418.

For these purposes, the "reprehensibility" of a defendant's actions will depend on whether

> the harm caused was physical [or] economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.
>
> [Id. at 419.]

However, the court should presume that "a plaintiff has been made whole . . . by compensatory damages" and "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the

imposition of further sanctions to achieve punishment or deterrence." Ibid.

Here, the trial judge found that punitive damages should be awarded to plaintiffs because defendants repeatedly acted with a "willful disregard" of their partners. The judge found defendants acted with actual malice and a reckless indifference to the rights of their partners, because taking money from their partners carried "a hundred percent probability of harm."

The judge awarded Jarwick punitive damages against Zygmunt ($12,222,521), Leonard ($4,074,174), and Mark ($4,074,174) for a total of $20,370,869. The judge calculated Jarwick's punitive damages using the accounting damages found for the period from 1989 to 2011. The judge did not, however, award Jarwick any punitive damages for the "carve-out" period, finding defendants' actions regarding Jarwick in this period did not rise to the level required for the award of punitive damages.

In addition, the judge awarded Halpern punitive damages against Zygmunt ($9,838,137), Leonard ($3,279,379), and Mark ($3,279,379) for a total of $16,396,895. The judge calculated Halpern's punitive damage based on the accounting damages found for the period from 1989 to 2011. The judge awarded Halpern damages for the "carve-out" period.

The punitive damages awards to Jarwick and Halpern must be vacated and the trial court must reconsider whether such damages should be awarded and, if so, in what amounts.

Here, the trial judge awarded plaintiffs punitive damages based upon the damages calculated on their respective non-RICO claims for the period from 1989 to 2011. We have determined that the trial court erred by failing to limit Jarwick's and Halpern's non-RICO claims to the time required by the statute of limitations. Because the punitive damage awards are based on compensatory damages determined for a period beyond the time allowed by the statute of limitations, the punitive damage awards cannot stand.

We note that in its initial complaint, Jarwick sought punitive damages on count one of the complaint filed in 1992, the claim was for a "diversion of opportunity." That claim was based on a singular event, the "diversion" of Halwil's assets to Pernwil. In the remand proceedings, Jarwick sought punitive damages not based on that single act, but rather based on the misappropriation of funds and other wrongdoing alleged to have occurred over many years.

Therefore, any punitive damages awarded to Jarwick must be based on the damages related to its new, non-RICO tort claims which were asserted in the amended complaint, not on the damages found in the accounting. Similarly, any punitive damages awarded

to Halpern must be based on the damages found on his non-RICO tort claims. As noted, those damages must be limited to the period permitted by the applicable statute of limitations.

Reversal of the awards of punitive damages is also required because in assessing whether such damages should be awarded, the judge considered and relied upon the fact that defendants' tortious conduct occurred over time, and was not an isolated incident. In making that finding, which was critical to the decision to award punitive damages, the judge considered acts that occurred outside the period permitted by the applicable statute of limitations for the non-RICO claims.

Accordingly, on remand, the trial court shall reconsider the decisions to award Jarwick and Halpern punitive damages. The court shall determine whether punitive damages should be awarded, and if so, in what amounts. The court shall make its determinations based on the existing trial court record, any relevant findings of fact found by the trial judge, and such additional testimony or evidence the court may deem necessary for its decision.

This should not be viewed as an opportunity to re-litigate any finding of fact or conclusion made by the trial judge, which has been affirmed on appeal. Those findings are binding on remand.

The court shall make specific findings of fact as to each individual defendant: Zygmunt, Leonard, and Mark. The court shall

determine whether each of these defendants engaged in conduct in the period from October 1, 2003, through December 2011, which rises to the level required for the award of punitive damages. The court then shall decide, as to each defendant, whether punitive damages should be awarded and the amounts to be awarded, considering the criteria in the PDA, and the relevant factors under State Farm.

XIII.

Defendants also challenge the awards of attorneys' fees and costs to both Jarwick and Halpern. The trial judge awarded Jarwick $10,666,468 in attorneys' fees and costs, which reflected a twenty-five-percent reduction of the fees for the Lowenstein firm. The judge awarded Halpern $6,861,098 in attorneys' fees and costs, which reflected a twenty-five percent fee enhancement. In making these awards, the judge adopted, with limited exceptions, the recommendations of the court-appointed special master.

In the trial court, defendants argued that plaintiffs' fee applications should be denied in part because the fees and costs were awarded pursuant to RICO, and plaintiffs were seeking awards for fees and costs incurred in litigating other claims. The special master found that all of plaintiffs' "claims were inextricably intertwined with successful [RICO] claims, and [that] plaintiffs were overwhelmingly successful at trial." In addition to the shared

body of facts, the special master noted that plaintiffs relied on the same evidence and expended the same resources to prove their claims. The trial judge agreed, explaining:

> [I]n this case, virtually all of the plaintiff[s'] claims arise from a common core of overlapping and intertwined facts. And those facts revolve around this particular issue or contention by the plaintiffs. The Wilfs [took] in excess of their pro rata share of partnership's profits by conjuring various improper vehicles and ruses, primarily in adjusting journal entries, which were then obfuscated to cover what had been done, to conceal the improper taking of funds.

The judge next rejected defendants' objections regarding counsels' "block billing." The judge found that the time records the attorneys had submitted in support of their applications were sufficiently clear to determine whether the rates were reasonable. According to the judge, the timesheets were "superlative" and "anyone should be able to tell what the attorney was doing and why."

In addition, the judge awarded fees and travel expenses to Jarwick's attorney despite his out-of-state location. The judge reasoned that the attorney had saved "defendants an extraordinary amount of money by charging his billable rate in Baltimore and [that] in order to do that he had to get up to New Jersey to conduct this trial."

With regard to Lowenstein's hourly rates, the special master recommended and the judge agreed that a twenty-five percent across-the-board reduction was warranted. The judge found that although Lowenstein had assumed increasing responsibility as the litigation progressed, its role was still primarily that of supporting counsel.

Finally, with regard to the fee enhancement for Halpern's attorneys, the judge adopted the special master's recommendation that an enhancement was appropriate for Halpern's attorneys because of: (1) the favorable results the attorneys obtained on Halpern's behalf; (2) the "tremendous risk" Halpern's attorneys assumed when they agreed to continue representing Halpern on a contingency basis given his rapidly declining health and precarious financial situation; (3) the uncertain outcome; and (4) the challenges of litigating against wealthy defendants.

The judge observed that Halpern had exhausted his financial resources during the lengthy trial proceedings and that when the contingency agreement was executed, his attorneys could not have known how the litigation would conclude. For those reasons, the judge rejected defendants' contention that the share Halpern's lawyers received from the sale of Rachel Gardens mitigated the need for a fee enhancement.

On appeal, defendants argue that the trial judge erred by failing to limit the award of fees to the successful pursuit of the RICO claims. They contend the judge erroneously awarded counsel fees based on the attorneys' "block billing." Defendants further argue that it was unreasonable for the trial court to permit Jarwick's attorney to recover fees and expenses incurred while traveling.

Defendants also argue that the Lowenstein firm should not have been awarded fees because the judge's spouse was representing the firm in an unrelated matter while the case was pending. Alternatively, defendants challenge the reasonableness of the fees awarded to Lowenstein, arguing that the fees are disproportionate to the work the firm's attorneys actually performed on the case.

Finally, defendants assert the trial judge erred by enhancing Halpern's award. Defendants contend a fee-enhancement was not warranted because the attorneys' compensation was contingency-based and supplemented with a twenty-five-percent share of Halpern's proceeds from the sale of Rachel Gardens.

In its cross-appeal, Jarwick argues that the court erred by reducing Lowenstein's fees. Jarwick argues the across-the-board reduction in Lowenstein's fees was unreasonable.

As noted, plaintiffs sought fees under the fee-shifting provisions of RICO. N.J.S.A. 2C:41-4(c). The starting point in

awarding such fees is the determination of the "lodestar," which is "the number of hours reasonably expended multiplied by a reasonable hourly rate." Furst v. Einstein Moomjy, Inc., 152 N.J. 1, 21 (2004) (quoting Rendine v. Pantzer, 141 N.J. 292, 335 (1995)).

When seeking the award of attorneys' fees, the applicant must address the factors enumerated in Rule of Professional Conduct 1.5(a), which include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

Trial courts are invested "with wide latitude in resolving attorney-fee applications." Furst, 182 N.J. at 25. Furthermore,

the trial court's fee determinations "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine, 141 N.J. at 317.

We reject defendants' contentions that the trial court erred by awarding fees based on the attorney's block billing and by awarding fees and expenses to Jarwick's attorney for traveling. We also reject defendants' contention that the judge erred by awarding Halpern's attorneys a fee enhancement, and defendants' contention that the Lowenstein firm should not have been awarded any fees due to the firm's relationship with the judge's spouse. In addition, we reject Jarwick's contention that the trial judge erred by reducing Lowenstein's fees. All of these arguments lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

We are convinced, however, that the awards of attorneys' fees and costs to Jarwick and Halpern must be reversed and the awards reconsidered. As noted, the trial judge awarded the counsel fees and costs pursuant to RICO, and the judge limited Jarwick's and Halpern's RICO claims to conduct that occurred from 2000 to 2011. The court nevertheless awarded counsel fees and costs based on all of the time counsel devoted to the case.

That included the time spent by Jarwick's and Halpern's lawyers for the pursuit of the non-RICO claims. In Jarwick's case,

this included the time devoted to the pursuit of his accounting damages, which extended back to 1988. In Halpern's case, it included the time devoted to the pursuit of his non-RICO contract and tort claims, which were not time-restricted.

The special master and the judge correctly noted that when a plaintiff presents claims for which fees can be awarded along with claims for which such fees cannot be awarded, attorneys' fees for all of the time devoted by counsel to the case can be awarded if the work on the unrelated claims "can[] be deemed to be part of the pursuit of the ultimate result achieved." Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (citing Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983)). A suit will not be considered a collection of separate discrete claims if it rests on "a common core of facts" or is "based on related legal theories." Ibid. (quoting Hensley, 461 U.S. at 435).

Moreover, "[i]f a plaintiff achieves excellent results in a lawsuit, counsel fees should not be reduced on the ground that the plaintiff did not prevail on each claim advanced." Ibid. (citing Hensley, 461 U.S. at 435). Litigants may in good faith raise alternative legal theories for relief, and the court's "rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Ibid. (citing Hensley, 461 U.S. at 435).

Here, the special master determined that plaintiffs had achieved outstanding results and, therefore, they should be awarded fees for the time their attorneys devoted to presenting the common core of facts that pertained to both the RICO and non-RICO claims. The trial judge agreed.

We are convinced the court erred by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts. That finding ignores the time-limitations that apply to the non-RICO and RICO claims. As we have explained, the plaintiffs' RICO claims were limited to the five years before October 1, 2009, which was the date the RICO claims were first asserted. The resulting awards must be reconsidered for several reasons. The core of operative facts pertains to the claims asserted for this period, whether those claims are asserted under RICO or on some other legal theory.

We recognize that in determining whether plaintiff sustained injuries actionable under RICO, the court may consider RICO violations that occurred prior to the prescribed limitations period. Rhoades, 859 F.2d at 1103. We are not convinced, however, that this justifies awarding Jarwick attorneys' fees based on the time devoted to other claims involving wrongful acts committed as far back as 1988. Moreover, as we have determined, Halpern's non-

RICO claims were limited to conduct that occurred after October 1, 2003.

Accordingly, we vacate the attorneys' fees awards to Jarwick and Halpern and remand the matter for reconsideration of those awards. On remand, the court shall reconsider and re-determine the amount of attorneys' fees and costs to be awarded to plaintiffs. The court must limit its award to the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims.

The court may consider awarding counsel fees and costs for time spent establishing wrongful acts on the part of defendants that pre-dated the time for which the RICO claims could be asserted. However, the court must find that the time devoted to presenting that evidence was reasonably required to establish the RICO claims.

XIV.

Defendants also argue that the trial judge erred by imposing liability upon the Estate of Harry Wilf. They also argue the judge erred by imposing tort and RICO liability upon Mark, Leonard, and Joseph Wilf.

The final judgment awards compensatory damages against the Estate of Harry Wilf, but not punitive damages, RICO damages, or attorneys' fees and costs. Defendants note that Harry Wilf died in February 1992. Halpern agrees that imposition of liability upon

the Estate in the final judgment was a clerical error. On remand, the court should correct the judgment. Compensatory damages should not be awarded against the Estate.

The final judgment also awards compensatory damages against Joseph Wilf, but not punitive damages, RICO damages, or attorneys' fees and costs. Defendants contend damages should not have been assessed against Joseph because the trial court did not specifically identify any tortious conduct on his part.

However, evidence presented at trial shows that Joseph was an active participant in defendants' businesses through the late 2000's, and he was directly involved in the decision to eliminate Jarwick from Halwil and Pernwil. We conclude there is sufficient evidence in the record to award Jarwick compensatory damages against Joseph Wilf. In addition, there is sufficient evidence to award Halpern compensatory damages on his non-RICO claims, for wrongful acts committed after October 1, 2003.

We also conclude there is sufficient evidence in the record to support the award of compensatory, punitive, and RICO damages against both Mark and Leonard. The record does not support defendants' claim that Mark and Leonard only performed ministerial functions and essentially acquiesced in Zygmunt's management of the partnership.

Rather, the record supports the trial judge's finding that Mark and Leonard engaged in conduct that warrants imposition of liability upon these defendants. In her decision, the judge found that the Wilfs had operated their businesses with cooperation and coordination. The judge noted that they worked with their accountants in determining the monies that were and were not available.

The judge stated that Zygmunt was the "self-described master chef" and he was the "overseer" of Rachel Gardens and many other Wilf projects. The judge found, however, that Zygmunt, Mark, and Leonard worked together and operated on consensus.

The judge pointed out that the evidence showed Mark dealt with payroll and benefits, and the hiring of key people. Mark also reviewed the financial statements for Rachel Gardens. Leonard reviewed the project's financial statements and other financial documents.

We therefore reject defendants' contention that there was insufficient evidence for the award of compensatory, punitive, RICO damages, or attorneys' fees against Mark and Leonard.

XV.

Defendants also appeal the trial court's September 11, 2013, order, which denied their motion to seal a stipulation that states the minimum net worth of each Wilf defendant.

The record shows that on July 1, 2013, in advance of a final determination on punitive damages, defendants filed a stipulation in the trial court which sets forth the minimum net worth for each Wilf defendant. In the stipulation, each minimum net worth statement is expressed in a dollar figure. Defendants did not attach any financial statements, bank account numbers, bank balances, or other supporting data.

The stipulation also contains a statement by the Wilf defendants, both individually and collectively, "that their liquidity and ability to pay any punitive damage award is not in issue for the purpose of determining the amount of any punitive damage award to be lodged against them, or any of them." Defendants filed the stipulation conditionally under seal, with the consent of the court and the other parties.

Prior to the start of the punitive damages phase of the trial court proceedings, defendants filed a motion pursuant to Rule 1:38-11 to seal the stipulation. Defendants argued that public release of the information in the stipulation would violate their right to privacy, put them at a competitive disadvantage in business transactions, and jeopardize their safety and the safety of their families.

It is undisputed that defendants are active participants in the real estate market, and a significant part of that market

involves the sale and purchase of real estate. According to defendants, real estate purchase prices are determined, in part, by the parties' economic resources, which influence their tolerance for risk, ability to assume liability, and desire or need to enter into a transaction.

Defendants claimed non-disclosure of financial information facilitates bargaining power. They asserted that public disclosure of their minimum net worth statements would deny them valuable leverage and weaken their positions in future business negotiations because the parties with whom they negotiate will have access to financial information about them, while they will not have similar information about their negotiation counterparts.

Defendants further asserted that wealthy individuals often have been targeted with harassment, kidnapping, and extortion by criminal actors attempting to secure a financial payoff. Although defendants did not claim they have been subject to such acts, they feared that public release of their minimum net wealth statements would attract bad actors. Defendants cited, however, a series of media reports of such criminal activity against other wealthy persons.

Defendants further argued that in light of their concession that they are able to satisfy any amount of punitive damages that might be awarded against them, the stipulation would not play a

significant role in the trial court's decision on punitive damages. Thus, defendants argued, their interest in safeguarding their personal financial information outweighed the public's interest in disclosure of evidence considered by courts. Plaintiffs opposed the motion.

The judge found that defendants were not entitled to relief under Rule 1:38-11. The judge found that public disclosure of defendants' minimum net worth statements is unlikely to have an impact on their business negotiations, and defendants had not identified any specific transaction in which such harm is anticipated.

The judge noted that the public has long known that the Wilfs are wealthy individuals, in part because of their ownership of a professional football franchise. The judge reasoned that disclosure of their minimum net worth statements would not materially alter the public's knowledge of their wealth. In addition, the judge noted that defendants had produced no evidence of prior or anticipated threats to them or their families, and found that this claim of potential harm was speculative.

The judge acknowledged defendants' minimum net worth is so far in excess of what the court would likely award as punitive damages that the stipulation would be of little use to its legal analysis. The judge found, however, that the public's interest in

open court proceedings is paramount to the unproven and speculative harm defendants alleged.

The judge therefore ordered that the public have access to the stipulation, but the judge stayed her order to permit defendants to seek relief in this court. Thereafter, we granted defendants' motion and stayed disclosure of the stipulation pending disposition of this appeal. As a result, the contents of the stipulation have never been disclosed publically.

Public access to court records is firmly established and intended to be broad. According to Rule 1:38-1,

> Court records and administrative records as defined by R. 1:38-2 and R. 1:38-4 respectively and within the custody and control of the judiciary are open for public inspection and copying except as otherwise provided in this rule. Exceptions enumerated in this rule shall be narrowly construed in order to implement the policy of open access to records of the judiciary.

Rule 1:38-2 defines court records include "any information maintained by a court in any form in connection with a case or judicial proceeding."

However, Rule 1:38-3 contains several exceptions to the rule requiring public access to the judiciary's records. One exception is found in Rule 1:38-11, which provides that:

> (a) Information in a court record may be sealed by court order for good cause as defined in this section. The moving party

> shall bear the burden of proving by a preponderance of the evidence that good cause exists.
>
> (b) Good cause to seal a record shall exist when:
>
> (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and
>
> (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court . . . records are open for public inspection pursuant to [Rule] 1:38.

The decision as to whether to seal court records is committed to the sound discretion of the court. Hammock, Jr. ex rel. Hammock v. Hoffmann-Laroche, Inc., 142 N.J. 356, 380 (1995). However, the court's discretion in this area "is not unfettered." Verni ex rel. Burstein v. Lanzaro, 404 N.J. Super. 16, 23 (App. Div. 2008).

Our courts have not yet addressed in a published opinion the question of whether a party's personal financial information may be sealed pursuant to Rule 1:38-11. However, the Court's decision in Herman v. Sunshine Chemical Specialties, Inc., 133 N.J. 329 (1993), is instructive.

In Herman, the Court recognized that a party's financial condition is relevant when punitive damages are to be assessed. Id. at 341-42. Even so, the Court limited the financial information that a party must produce in discovery when faced with a punitive

damages claim. Id. at 343-44. The Court explained that "[t]empering the normal rule favoring wide discovery of relevant issues is a regard for the defendant's interest in maintaining the confidentiality of information about its financial status." Id. at 343.

The Court continued, "[i]n reviewing requests for discovery of a defendant's financial condition, a trial court should balance the plaintiff's need for the information with the burden on a defendant of disclosure, and with an appreciation that a defendant's finances 'are private matters which are normally jealously guarded.'" Id. at 344 (citations omitted).

The Court added that "[s]ensitive balancing by the trial court is essential to the accommodation of a plaintiff's need for discovery and the defendant's right to maintain the confidentiality of information about its financial condition." Ibid. Notably, the Court recognized that "sealing [a] deposition or answers to interrogatories may be essential for striking the right balance of the litigants' interests" on this "sensitive issue." Id. at 345.

The interest in preserving the confidentiality of a party's financial information clearly extends beyond the discovery phase of a trial court proceeding in which a punitive damage claim is asserted. Indeed, once a document containing a party's financial

information is made part of the court's open record, that information is available for public inspection and wide distribution.

In this case, the trial judge mistakenly exercised her discretion by ordering the public disclosure of defendants' net worth stipulation. The judge erred by finding defendants did not meet their burden under Rule 1:38-11(b)(1). They established that disclosure of the stipulation will likely result in a clearly defined and serious injury.

Defendants credibly established that disclosure of their minimum net worth likely would impair their ability to engage in their business activities. Moreover, defendants established that their interest in preserving the confidentiality of their minimum net worth substantially outweighed the presumption that all court records should be open for public inspection. R. 1:38-11(b)(2).

The public's interest in access to the record was diminished here because it was unlikely the trial court would use the information in the stipulation when awarding punitive damages against defendants. As the trial judge noted, defendants' minimum net worth far exceeded any amount of punitive damages that the court might award. Defendants stipulated they had the liquidity and ability to pay any amount of punitive damages the court might award.

We also note that the public has access to the record of this case, which includes the transcripts of about two hundred days of trial proceedings and related court proceedings, and an extensive array of documents. The public also has access to the trial court's findings of fact and conclusions of law, including those pertaining to the award of punitive damages. Sealing the stipulation will not limit public scrutiny of the trial court's record in a meaningful way.

We therefore conclude the trial court's decision to deny defendants' motion to seal the stipulation was a mistaken exercise of discretion. We reverse the court's order of September 11, 2013. The stipulation will remain under seal.

Accordingly, for the reasons stated, we affirm the award of compensatory damages of $12,624,516 and prejudgment interest of $19,435,326 to Jarwick. However, we reverse the awards of RICO damages, punitive damages, and attorneys' fees and costs to Jarwick. We remand the matter to the trial court for recalculation of the damages on Jarwick's non-RICO and RICO claims, and for reconsideration of the awards of punitive damages and attorneys' fees and costs.

We also vacate the awards to Halpern of damages on his non-RICO and RICO claims, as well as the awards of punitive damages and attorneys' fees and costs. We remand the matter to the trial

court to recalculate the damages on Halpern's non-RICO and RICO claims, and for reconsideration of the awards of punitive damages and attorneys' fees and costs.

The trial court shall be guided by the principles in St. James, 342 N.J. Super. at 335-44, in determining whether plaintiffs may collect the RICO damages and any punitive damages that may be awarded.

Affirmed in part, reversed in part, and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.