JOHN FENDT, ALAN WOZNIAK MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC, Plaintiffs/Appellants, v. NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; MICHAEL BORINI; 322 WEST ASSOCIATES, LLC; JAMES WALLS; THERESA MENAS; TNM DEVELOPMENT CONSULTING, LLC; JOSEPH ROCCO, ESQ.; PEPPER HAMILTON, LLC; and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000354-22 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Docket No. Below: MON-L-3782-15 Sat Below: Hon. Katie A. Gummer, J.S.C. Hon. Lourdes Lucas, J.S.C. Hon. Linda Grasso Jones, J.S.C.

PLAINTIFFS-APPELLANTS' BRIEF

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INTRODUCTORY STATEMENT

In this eight-year-old case alleging fraud, conversion, tortious interference, New Jersey RICO, aiding and abetting, conspiracy to commit same (hereinafter collectively referred to as "Tort Claims" or "Tort Counts") and legal malpractice, the Law Division made numerous serious legal errors. Plaintiffs John Fendt ("Fendt"), Alan Wozniak ("Wozniak"), Monroe Township Development Company, LLC ("MTDC"), and PCH Associates, LLC ("Plaintiffs") seek to appeal each of those errors and respectfully request that they be reversed in the interest of justice.

First, the Law Division dismissed legal malpractice claims against Defendants Nicholas Menas, Esq. ("Menas") and Cooper Levenson (hereinafter collectively referred to as "M&C") for failure to provide an affidavit of merit ("AOM"), pursuant to the governing statute, N.J.S.A. 2A:53A-26, et seq., despite the fact that said claims fit under the "common knowledge" exception of the AOM statute. Point I, infra. In addition, the Law Division dismissed the Tort Claims against M&C for a lack of an AOM when no AOM is required to state claims for intentional torts, as a deviation from a professional standard of care is not at issue. Point II, infra.

Within the context of a commercial transaction, M&C received Plaintiffs' money for the transaction, sent said money to certain Defendants, and said

Defendants divided said money among all Defendants, unbeknownst to Plaintiffs. Plaintiffs' Tort Claims could not possibly be considered legal malpractice, and Plaintiffs never disputed the appropriateness of the transactional legal work performed by M&C. Rather, Plaintiffs alleged and provided proof that M&C, like any of the non-attorney Defendants, committed the blatant, simple, and wrongful acts of essentially "stealing" Plaintiffs' money by committing civil law theft. These serious allegations, under this factual predicate which is separate and apart from any facts which give rise to legal malpractice claims, do not implicate a professional standard of care and are not legal malpractice claims. To label claims arising from facts which implicate civil law theft as "legal malpractice" is offensive to the integrity of the profession and the entire judicial system.

The same Tort Counts which were dismissed against M&C through an abusive and unjust misapplication of the AOM statute, remained alive and well against all the other non-attorney co-conspirators Defendants, proceeded to trial, and settled. As such, since M&C have a license to practice law in the State of New Jersey, an improper use of the AOM statute shielded them from liability while all the non-attorney co-conspirator Defendants faced liability under Plaintiffs' allegations arising out of the same, single conspiracy. M&C, who just so happen to be attorneys, were co-conspirators in the torts committed by all Defendants. The mere fact that M&C are attorneys should not shield them from liability for the Tort

Claims that survived against all other non-attorney co-conspirator Defendants. Besides clearly frustrating the purpose of the AOM statute to weed out meritless claims, such a result is exceptionally unjust and troubling on its face. Your Honors are ultimately being asked to hold that allegations which amount to civil law theft by way of fraud, conversion, tortious interference, New Jersey RICO, aiding and abetting, and conspiracy, do not implicate the professional work of an attorney, is not legal malpractice, and therefore does not require an AOM.

Thereafter, despite the fact that newly discovered evidence led to newly discovered claims against M&C, the Law Division erred in denying Plaintiffs leave to amend the complaint to state said newly discovered claims. Point III, infra. Finally, the Law Division erred in granting summary judgment to Defendants Joseph Rocco, Esq., ("Rocco") and Pepper Hamilton (hereinafter collectively referred to as "R&P") despite evidence in the record clearly demonstrating R&P's misrepresentations, fraudulent omissions, and integral role and participation in the conspiracy to steal Plaintiffs' money. Point IV, infra.

This Court should reverse all said errors of the Law Division.

STATEMENT OF PROCEDURAL HISTORY

Plaintiffs filed the Complaint on June 12, 2015. 1a[1]. M&C filed an

[1] "1a" denotes the accompanying appendix. Transcript references are as follows:
1T = November 10, 2016 Transcript of Motion to Vacate the Order of 1/19/16
2T = March 29, 2018 Transcript of Motion to Vacate Prior Orders

Answer on July 20, 2015. 26a. On November 24, 2015, M&C filed a motion to dismiss the Complaint against them for failure to file an AOM. 39a. The Honorable Katie A. Gummer, J.S.C., granted M&C's motion on January 19, 2016. 41a. Plaintiffs did not oppose M&C's motion to dismiss for the reasons expressed in detail in the Certifications of Alberico De Pierro, Esq., attorney for Plaintiffs (43a), in support of Plaintiffs' Motion to Vacate the Order of January 19, 2016, filed on September 1, 2016. 47a.

Essentially, the attorney Certification set forth an explanation of the exceptional and extraordinary circumstances that caused Plaintiffs' inability to timely file an opposition to M&C's motion to dismiss, and the subsequent inability to timely file a motion to reconsider the Order of dismissal. 43a. Nevertheless, Plaintiffs timely filed a Motion to Vacate the dismissal Order of January 19, 2016 , under Rule 4:50-1. 47a. Judge Gummer erroneously denied Plaintiffs' Motion on November 10, 2016. 50a. When newly discovered evidence was uncovered which further justified that said Orders be vacated, Plaintiffs filed a Motion to Vacate on

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3T = January 24, 2020 Transcript of Motion to Amend Complaint
4T = December 8, 2020 Transcript of Motion to Reconsider Order of 1/24/20
5T = December 16, 2020 Transcript of Decision of Order of 12/16/20
6T = December 3, 2021 Transcript of Motions for Summary Judgment
7T = January 21, 2022 Transcript of Motion to Reconsider Order of 12/9/21
8T = January 10, 2022 Transcript of Decision of Order of 1/10/20

February 28, 2018. 187a. Judge Gummer erroneously denied said Motion on April 3, 2018, though the Order is signed March 29, 2018. 188a.

Thereafter, newly discovered facts were uncovered during the course of discovery and led to newly discovered claims against M&C, so Plaintiffs moved to amend the complaint to state said newly discovered claims on December 4, 2019. 320a. The Honorable Lourdes Lucas, J.S.C., erroneously denied said Motion on January 24, 2020. 376a. Plaintiffs' filed Motion to Reconsider the Order of January 24, 2020, on October 28, 2020 (378a), and Judge Lucas erroneously denied said Motion on December 16, 2020. 379a. Finally, The Honorable Linda Grasso Jones, J.S.C erroneously granted summary judgment to R&P, on December 9, 2021. 381a. Plaintiffs filed a Motion to Reconsider the Order of December 9, 2021, on December 29, 2021 (418a), and Judge Grass Jones erroneously denied said Motion on January 21, 2022. 419a.

The Tort Claims survived against all of the non-attorney Defendants – Defendants Pulte Homes ("Pulte"), Eric Ford ("Ford"), KDL Realty Management, LLC ("KDL"), TNM Development Consulting, LLC ("TNM"), Theresa Menas, Michael Borini ("Borini"), and James Walls ("Walls") – and Plaintiffs ultimately reached a settlement at trial with said Defendants on August 18, 2022. 465a. Plaintiffs timely filed a Notice of Appeal on October 1, 2022 (465a), and timely filed an Amended Notice of Appeal on October 14, 2022. 472a.

STATEMENT OF FACTS

Menas was an attorney licensed to practice law in the State of New Jersey with Cooper Levenson. 726a (13:3-13). In March/April 2006, Fendt met with Menas and Ford, a representative of Pulte. 237a (694:17–695:4). Menas and Ford represented to Fendt that the real estate opportunity in Monroe Township would be rezoned and developed as a "free market" development of approximately four hundred (400) townhouses and that Plaintiffs could purchase said real estate and either develop it or sell the eventual delineated lots "approved and improved" to Pulte at a certain price. 238a (698:23–701:15).

Menas and Ford explained that the aforesaid real estate would consist of an assemblage of various adjacent properties located in Williamstown, Monroe Township ("Pork Chop Hill Assemblage"). 238a (697:23–698:4). Menas and Ford explained that Plaintiffs would enter into agreements of sale for the purchase of said real estate and hire the requisite professionals. 238a (700:17-24). Menas and Ford had a second meeting with Plaintiffs and discussed the Township's affordable housing issues in conjunction with another real estate opportunity in Monroe Township ("Duncan Farms"). 239a (702:2–703:17). At a third meeting, Menas and Ford represented to Plaintiffs that Duncan Farms should be rezoned for affordable housing to create coverage for the affordable housing obligation of the intended Pork Chop Hill Assemblage development, thus pushing said obligation onto the

Duncan Farms offsite. 239a (703:18–704:20).

Menas and Ford assured Plaintiffs that they would ultimately convey Duncan Farms to an affordable housing developer. 239a (704:21–705:9). Based on Menas's and Ford's representations that Pulte would purchase the Pork Chop Hill Assemblage from Plaintiffs approved and improved at a certain price, eventually set forth in a Letter of Intent and Memorandum of Understanding, Plaintiffs decided to pursue the proposed real estate opportunities. 561a–563a; 617a–620a. Plaintiffs retained M&C as counsel in the pursuit of the purchase and development of the Pork Chop Hill Assemblage and the Duncan Farms transaction. 481a–483a.

On August 31, 2006, Menas formed MTDC and was listed as the registered agent of MTDC on the Certificate of Formation, with Cooper Levenson's office listed as the registered office. 484a – 487a. On September 14, 2006, Menas formed PCHA and was listed as the registered agent of PCHA on the Certificate of Formation, with Cooper Levenson's office listed as the registered office. 488a. The primary portion of the Pork Chop Hill Assemblage which would provide for approximately 200 of the intended 400 townhouse development was certain real estate owned by the McTague family ("McTague Property"). 496a–513a. Menas and Ford, unbeknownst to Plaintiffs, directed Walls to execute on behalf of PCHA the Agreement of Sale, dated September 6, 2006, to purchase the McTague Property, which was amended on September 21, 2006 ("McTague-PCHA

Agreement"). 496a– 13a. The McTague-PCHA Agreement required a deposit of only $2,000.00, called for a minimum of 200 free market units, $16,500.00 per unit, thus requiring a minimum purchase price of $3.3 million. 496a–513a. Thereafter, on October 3, 2006, pursuant to the representations of Menas and Ford, Plaintiffs signed the Assignment and Assumption of the McTague-PCHA Agreement of Sale ("PCHA-MTDC Assignment"). 489a–495a. Pursuant to the PCHA-MTDC Assignment, PCHA would assign the McTague-PCHA Agreement to Plaintiffs and Plaintiffs were to make deposit payments totaling $500,000.00. In addition, the PCHA-MTDC Assignment called for a minimum of 200 free market units, $23,500.00 per unit, thus a minimum purchase price of $4.7 million. 489a–495a.

On October 23, 2006, Menas presented Walls a finalized Operating Agreement of PCHA and directed Walls to execute same. 138a–140a. Pursuant to said Operating Agreement, Walls was the Sole Member of PCHA. 138a–140a. However, on October 24, 2006, one day later, Menas presented Walls a finalized Amended and Restated Operating Agreement of PCHA, whereby Walls, pursuant to the direction of Menas and Ford, signed same relinquishing 99% of his ownership interest in PCHA to Brestle, another long-time friend of Menas and Ford, for no consideration. 141a–168a; 196a (108:21–109:3). Said Amended and Restated Operating Agreement of PCHA was executed by Brestle as General

Manager. 141a–168a. In January 2007, Menas directed Brestle to execute the Second Amendment to the McTague-PCHA Agreement. 514a–525a. Though Walls and Brestle were the only Members of PCHA, neither ever saw nor executed, on behalf of PCHA, the PCHA-MTDC Assignment. 199a (178:9–179:14); 299a–300a (30:24–34:10). However, Plaintiffs, pursuant to the representations of Menas and Ford, were made to spend substantial funds in contractual payments in pursuit of the PCHA-MTDC Assignment. 489a–495a.

Notwithstanding that Menas and Ford contacted Plaintiffs and had in person meetings with Plaintiffs months prior to the formation of PCHA and the execution of the McTague-PCHA Agreement, Menas and Ford had Walls (a long-time friend of Menas and Ford) on behalf of PCHA, the "flipper", enter into the McTague-PCHA Agreement. 496a–513a. Menas and Ford set in place this contract flip in Plaintiffs' pursuit to purchase the McTague Property, creating a mechanism by which the co-conspirator Defendants would wrongfully take and receive a substantial financial gain. 489a–513a. That is, instead of negotiating on behalf of Plaintiffs directly with McTague to enter into an agreement of sale for the McTague Property (as was done with owners of the other real estate that comprised the Pork Chop Hill Assemblage), Menas and Ford, in concert with the other co-conspirator Defendants, created the flip transaction of the McTague Property pursuant to which Plaintiffs' payments for the PCHA-MTDC Assignment

purportedly paid to Defendant PCHA, unbeknownst to Plaintiffs, were to be ultimately transferred and divided between the co-conspirator Defendants. 662a–664a.

Pursuant to the representations and direction of Menas and Ford, Plaintiffs signed, pertaining to the PCHA-MTDC Assignment, the General Release of April 25, 2008, the Amended General Release of September 2008, and the Second Amendment and Restatement of the General Release of January 2009 ("Releases"). 564a–569a; 591a–595a; 611a–615a. However, neither Walls nor Brestle ever saw or executed the PCHA-MTDC Assignment or Releases. 195a (83:15–85:10); 197a (122:21–124:19); 198a (158:18-23); 199a (178:9–179:14); 200a–201a (189:10–190:16); 201a (191:12–193:8); 301a–302a (49:14–52:4); 307a–308a (106:17–111:7); 309a–310a (119:10–122:5); 310a–311a (124:12–127:15). Walls and Brestle testified they never opened any bank accounts on behalf of PCHA and were never aware of any money paid by Plaintiffs to PCHA or of any money paid by PCHA to the Defendants or anyone else. 194a (53:19-22); 303a–304a (89:10–90:20); 309a (120:24–121:9); 311a (127:16–128:10); 313a (165:5-10); 315a (191:9–192:8). Said PCHA-MTDC Assignment and Releases required Plaintiffs to make certain payments on specified dates as were allegedly negotiated by Menas and Ford. 564a–569a; 591a–595a; 611a–615a. In total, as a result of this conspiracy, Menas and the other co-conspirator Defendants transferred and divided

among themselves approximately $1.4 million. 662a–684a.

In accordance with the conditions of the PCHA-MTDC Assignment and Releases, and pursuant to the representations of Menas and Ford, at certain times Plaintiffs were made to make payments. 662a–684a. Initially, payments were deposited into and transferred from the Cooper Levenson Attorney Trust Account, usually via wire transfers to KDL. 713a–717a. Subsequently, pursuant to the representations of Menas and Ford, Plaintiffs were made to make payments via wire transfer and checks made payable to the Cooper Levenson Attorney Trust Account, PCHA and William Russo ("Russo). 665a–684a. Subsequently, said funds transferred or deposited in the Cooper Levenson Attorney Trust Account, PCHA bank accounts, or Russo bank account, were thereafter transferred via checks and account-to-account transfers to and among Menas and the co-conspirator Defendants. 628a–661a; 689a – 699a.

Russo and PCHA

On May 15, 2008, Menas filed a "Certificate of Change-Registered Agent or Address, or Both" regarding PCHA, whereby the registered agent was changed from Menas to Rocco and the registered office was changed from the office of Cooper Levenson to the office of Pepper Hamilton. 577a. Menas manipulated Russo and opened bank accounts in the name of PCHA for the co-conspirator Defendants' wrongful use and benefit. 739a (73:1-11); 739a–740a (76:19–77:4);

741a (89:2-11); 750a (208:21–209:7); 751a (210:1-2); 572a (227:20–228:6). Russo testified he never owned PCHA and the banking activity, checks, deposit slips, and endorsement of checks, done in his name or through his personal bank account on behalf of PCHA, was actually done by Menas. 753a (334:22–336:2); 755a (407:9-12, 407:21-23); 737a (65:18–66:21, 67:3-14, 68:19-20); 738a–739a (69:6-17, 70:8–73:11, 75:5-14); 742a–743a (102:6–105:4); 744a–745a (124:17 – 126:10); 746a (181:15 – 182:10); 750a–751a (207:20–209:7, 209:10–213:17). Further, Russo explicitly testified that his purported handwriting and signature for banking activity pertaining to PCHA were not his own, but rather were forgeries by Menas. 755a (407:24–408:4).

Almost the entirety of the aforesaid payments, both initially held in Cooper Levenson's Attorney Trust Account, the wire transfer to the aforesaid PCHA bank account, and other checks made payable to PCHA and Russo and negotiated through their respective bank accounts, were thereafter immediately (or within days) transferred to the bank accounts of KDL and TNM, via wire transfers or checks made payable to KDL and TNM. 628a–644a; 700a–723a. After KDL and TNM received said wire transfers or checks, KDL and TNM initially transferred part of the funds between and among themselves. 628a–661a; 689a–699a; 700a – 723a. A substantial amount of the funds transferred to the bank account of TNM was ultimately transferred to the personal bank account of Menas, via account-to-

account transfers. 645a–661a. Neither prior to nor after the execution of the Agreements of Sale for the Pork Chop Hill Assemblage, including the PCHA-MTDC Assignment and Releases, were Plaintiffs ever told that the aforementioned payments they were instructed by Menas and Ford to make, either through Cooper Levenson's Attorney Trust Account, wire transfer to PCHA, or with checks made payable to PCHA or Russo, were ultimately going to be transferred into the bank accounts of KDL, TNM, Menas, and other co-conspirators. 228a–229a (566:19–572:15); 230a–232a (607:10 – 615:16); 258a (158:5-24); 265a (369:1–370:6); 275a (513:14–514:2); 276a (534:18 – 535:16); 278a (555:12–556:17); 283a (632:11–634:21).

Newly Discovered Evidence of Menas's role in TNM and PCHA

During the course of discovery in this matter and three years after the dismissal with prejudice of M&C, it was discovered that Menas was the Sole Member of TNM. 570a; 622a; 625a–627a. Plaintiffs discovered a TNM Mortgage ("Mortgage") dated May 7, 2008, executed by Menas as Sole Member of TNM. 570a. In opposition to Plaintiffs' Motion to Vacate the Order of November 10, 2016, filed as a result of this discovery, M&C presented a certain Collateral Assignment (96a) to the Trial Court and represented that "a debt owed from Teddy Menas to Nicholas Menas in the amount of $250,000.00. . . . was [memorialized] in an assignment between Nicholas and Teddy Menas (Exhibit "S".) One of the

consequences to that assignment required Nicholas Menas to sign certain mortgage documents . . . .” 52a.

In August 2019, after continued obstructionist tactics by M&C despite the Trial Court’s Orders of May 24, 2019 (293a–296a), checks were uncovered that proved the Collateral Assignment, assuming arguendo it was ever real, was extinguished long before May 7, 2008. 625a–627a. The alleged subject $250,000.00 debt of the Collateral Assignment was more than paid by January 10, 2008, since from May 4, 2007 to January 10, 2008, funds were transferred via account-to-account transfers from the TNM bank account to Menas’s personal bank account totaling $151,107.41, and two KDL checks totaling $152,000.00, made payable to TNM were deposited into Menas’ personal bank account, amounting to $302,107.41. 625a–627a; 645a–650a. In addition, after continued obstructionist tactics by M&C, in November 2019, Plaintiffs discovered an Affidavit of Title related to the Mortgage, identifying Menas as the Sole Member of TNM. 622a. Thus, Menas executed the Mortgage and related required Affidavit of Title as the Sole Member of TNM because Menas was the Sole Member of TNM, as the Collateral Assignment had been extinguished by January 10, 2008 570a; 622a; 625a–627a.

Rocco’s Role in PCHA

In 2006, Menas provided Rocco the PCHA-MTDC Assignment. 730a

(167:20–168:23). Rocco collaborated with Menas on the preparation of the Releases. 218a (20:16–21:7); 220a (35:20–36:10). Said Releases listed Rocco as the attorney for PCHA and set forth that all notices to PCHA were to be sent to Walls and/or Rocco. 564a–569a; 591a–595a; 611a–615a. Walls never conveyed any of his interest in PCHA to anyone other than the 99% he conveyed to Brestle pursuant to the instructions and direction of Ford. 192a (34:15 – 35:4); 193a–194a (49:22 – 51:1); 204a (202:16-19); 205a (213:20-25); 206a (216:20–217:25). Walls testified that he never heard of, knew, or communicated with Rocco. 199a (179:18–180:21).

Rocco testified that prior to being served with the Complaint in this matter, he never heard of, knew, or communicated with Walls despite claiming to be the attorney for PCHA and despite the fact that Walls' name appeared in the PCHA-MTDC Assignment and Releases. 224a (143:1-6); 564a–569a; 591a–595a; 611a–615a. Similarly, Rocco never heard of, knew, or communicated with Brestle despite claiming to be the attorney for PCHA and Brestle owning 99% of PCHA. 759a–760a (45:22–46:4); 224a (143:7-22); 139a; 142a. Finally, Rocco never recalled ever meeting Russo, and Rocco "stipulated" that he never spoke or communicated with Russo despite claiming to be the attorney for PCHA and Defendants claiming, with a forged and unexecuted document, that after the death of Teddy Menas PCHA was owned by Russo. 763a–764a (164:3–167:1); 291a

(770:12–773: 11); 616a. However, Russo never owned PCHA, never heard of PCHA, never heard of, knew, or met Rocco, never heard of Pepper Hamilton, and was never at the offices of Defendant Pepper Hamilton. 755a (407:9-23); 754a (334:22–336:1); 737a (409:7-13).

Brestle specifically testified that he never heard of, knew, or communicated with Rocco, and he never met or communicated with Walls. 305a (97:3-14); 308a (112:6-8); 312a (138:3-13); 316a (204:16-19); 308a (112:9 – 113:1). Further, Brestle never heard of, knew, or communicated with Russo, despite Defendants claiming that at some point in time PCHA was owned by Russo. 310a (122:6-23); 316a (203:19 – 204:9).

In addition, Rocco testified that PCHA was owned by Teddy Menas, and that prior to the death of Teddy Menas, Rocco dealt with only Teddy Menas regarding PCHA. 760a (47:16–48:1); 761a (120:9-12); 762a (139:22–140: 10). However, Walls and Brestle both testified that neither one of them ever conveyed their membership interest in PCHA to Teddy Menas or anyone else. 306a (104:23–105:1, 105:22-25); 313a (162:16–163:8, 164:4-22); 314a (166:22-25); 316a (202:1–203:7); 317a (207:2-13); 318a (214:21–215:8); 192a (34:15–35:4); 193a–194a (49:22 – 51:1); 204a (202:16-19); 205a (213:20-25); 206a (216:20–217:25). Menas and Rocco staged the April 2009 meeting, at the office of Pepper Hamilton, where Rocco misrepresented to Wozniak that he was the

attorney for PCHA. 253a (39:21–40:8); 253a–254a (40:21–41:1). In addition, Wozniak testified that Rocco misrepresented that the other person at the meeting in the office of Pepper Hamilton who was there to accept the $250,000.00 check on behalf of PCHA, was William Russo. 254a (43:3-9); 263a–264a (349:10–353:21). Finally, Rocco authored and forwarded a default letter dated December 17, 2009 to Plaintiffs, acting as the attorney for the sham entity PCHA in furtherance of Defendants' conspiracy. 621a; 221a–223a (86:1–94:14).

POINT I

THE COURT ERRED IN FINDING THAT THE LEGAL MALPRACTICE CLAIMS AGAINST M&C DID NOT FALL UNDER THE COMMON KNOWLEDGE EXCEPTION TO THE AOM STATUTE (1T37).

The Complaint against M&C was dismissed for lack of an AOM when no AOM was required, since M&C's legal malpractice fits plainly under the "common knowledge exception." In Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590, 945 A.2d 120, 122-23 (App. Div. 2008) the Court stated:

> An affidavit of merit is not required in a case where the "common knowledge" doctrine applies and obviates the need for expert testimony to establish a deviation from the professional's standard of care. Hubbard, supra, 168 N.J. at 390, 774 A.2d 495. "[T]he purpose of the [affidavit of merit] statute [is] to weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that Plaintiffs with meritorious claims will have their day in court." Id. at 395, 774 A.2d 495. To that end, "the statute requires Plaintiffs to provide an expert opinion, given under oath, that a duty of care existed and that the defendant breached that duty." Id. at 394, 774 A.2d 495. In a "common knowledge" case, expert opinion is not required to establish the duty or its breach. Ibid. For that reason, expert opinion is not needed to "weed out" claims that lack probable merit. Id. at 395, 774 A.2d

> 495. The "common knowledge" doctrine applies where "juror" common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts." Id. at 394, 774 *A*.2d 495 (internal quotations omitted).

The Court below held that Plaintiffs' claims do not fit under the common knowledge exception because of "the importance of legal expert testimony in cases involving complex commercial transactions, the structure of those transactions" 1T 37:9-11. The Court arrived at this holding by citing 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 640 A.2d 346, 353 (App. Div. 1994) and analogizing that case to the present matter. 1T 37:5-11. Respectfully, the Trial Court misunderstood the facts of this case and misapplied the holding of Lemoine. As the Lemoine Court explained:

> Expert testimony may not be appropriate or necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's legal malpractice and the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge. However, such is not the case here. In our view, legal expert testimony was necessary to show that the complex commercial transaction involving the Lemoine Avenue property could have been legally structured to permit Finco to receive the option and the partnership interest.
>
> Id. at 489-90.

The facts of this matter are glaringly different from those in Lemoine, and the Trial Court's analogy was palpably incorrect. In Lemoine, the Court held that legal expert testimony was necessary to show that the complex commercial transaction involving the Lemoine Avenue property could have been legally

structured to permit Finco to receive the option and the partnership interest. Plaintiffs' legal malpractice claims against M&C do not allege that any of the legal work of the transaction was structured inappropriately or negligently as in Lemoine. Plaintiffs simply allege that within the context of a well-structured transaction, M&C received Plaintiffs' money for the transaction, sent said money to certain Defendants, and said Defendants divided said money among all Defendants, unbeknownst to Plaintiffs. Lemoine is only relevant to show that the facts of the present matter are completely different from the facts in Lemoine which implicated a professional standard of care and therefore required legal expert testimony, because in Lemoine the issue was whether the attorney structured the transaction negligently. Here, this is not the case.

No expert testimony is required to demonstrate that the scheme devised and implemented by M&C with the other co-conspirator Defendants intended and resulted in Defendants wrongfully taking approximately $1,400,000.00, and also generating legal fees for Cooper Levenson for hundreds of thousands of dollars. No AOM is required because no legal expert is necessary to explain that this was a fraudulent scheme no different from any fraudulent scheme structured and perpetrated by anyone, attorney or otherwise. There was no legal work, complex or otherwise, in the structure and perpetrating of this fraudulent scheme that requires an expert to explain to a juror a professional standard of care, because the quality

of that legal work in structuring the transaction is not and was never at issue in the case.

Instead, the legal malpractice claims against M&C simply arise out of their failure to advise Plaintiffs of their fraudulent scheme and participation in the conspiracy, and how Plaintiffs' money would actually be wrongfully taken and distributed among Menas and the co-conspirators Defendants. Plaintiffs respectfully submit that the average juror, "using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts," is capable of knowing that an attorney commits malpractice when he fails to advise his clients that they have structured a transaction for the purpose of conspiring to steal their money. Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590, 945 A.2d 120, 122-23 (App. Div. 2008). Plaintiffs do not claim that M&C negligently drafted transactional documents or negligently performed land use work. Instead, the legal malpractice that Plaintiffs are alleging is that M&C failed to advise them that Menas and the co-conspirator Defendants would defraud Plaintiffs of a certain amount of the money Plaintiffs paid in pursuit of the transaction. Such malpractice is common knowledge and does not require an AOM.

Likewise, Cooper Levenson's negligent supervision of their attorney trust account does not require expert opinion. Any person knows that if one is entrusted

with the funds or anything of value of another, the entrusted party must ensure said funds or things of value are not distributed negligently or fraudulently to unintended recipients, otherwise they have been negligent in the supervision of those funds. Furthermore, as the court held in Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168, 183, 117 A.3d 181, 191 (App. Div. 2015), "an AOM is not necessary to support a claim against a firm whose employee or agent acted negligently if the claim against the firm is solely based on a theory of vicarious liability or agency." Since an AOM is not necessary to support a legal malpractice claim against a firm based on a theory of vicarious liability when that claim arises from the firm's employee's negligence, an AOM is certainly not necessary to support a legal malpractice claim against a firm based on a theory of vicarious liability when that claim arises from the firm's employee's intentional torts. Therefore, in either case, whether Cooper Levenson was negligent in their supervision of the attorney trust account or negligent based on a theory of vicarious liability for the intentional tortious actions of Nicholas Menas, no legal expert is required to explain Cooper Levenson's negligence. Such malpractice is common knowledge and does not require an AOM.

POINT II

THE COURT ERRED IN FINDING THAT THE TORT CLAIMS AGAINST M&C WERE LEGAL MALPRACTICE CLAIMS WHICH REQUIRED THE FILING OF AN AOM. (1T37).

In the present matter, Plaintiffs' Tort Claims against M&C are not legal malpractice claims and therefore do not require proof of a deviation from the professional standard of care. The New Jersey Supreme Court in Couri v. Gardner, 173 N.J. 328, 340, 801 A.2d 1134, 1141 (2002) held:

> [R]ather than focusing on whether the claim is denominated as tort or contract, [courts] should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession.
> Id. at 801.

The factual allegations that M&C committed fraud, conversion, tortious interference, New Jersey RICO, aiding and abetting, and conspiracy to commit same, do not allege that these actions were a deviation from the applicable professional standard of care, but that they were simply blatant tortious acts. Indeed, those identical Tort Claims survived against the non-attorney Defendants since they are not legal malpractice claims. As such, no expert testimony is required to prove these claims.

As previously argued, New Jersey courts do not require expert testimony or an AOM in cases where attorneys have failed to fulfill the most basic obligations. Expert testimony was not required to support the client's cause of action against an

attorney who: 1) inadequately prepared the client's case by failing to submit a legal argument in the trial brief in support of the client's claim for tenure in an employment action; 2) failed to report to the client settlement discussions accurately and recommend disposition of the case based on an accurate rendition of each party's position; and 3) failed to tell the client that the adverse parties had no defense to one of her claims thereby affecting her decision to accept their settlement offer. See Sommers v. McKinney, 287 N.J.Super. 1, 8-12, 670 A.2d 99 (App.Div.1996). Expert testimony was not required to support the client's cause of action against an attorney for the attorney's failure to protect the client's claim against the running of the statute of limitations by not conducting any investigation into when the statute of limitations began to run. See Brizak v. Needle, 239 N.J.Super. 415, 431-32, 571 A.2d 975 (App.Div.), certif. denied, 122 N.J. 164, 584 A.2d 230 (1990). Expert testimony was not required to support the seller's cause of action against their attorney where the attorney sacrificed client's creditor priority by failing to ensure that a bond and mortgage were properly recorded. See Stewart v. Sbarro, 142 N.J.Super. 581, 591-92 (App.Div.) certif. denied 72 N.J. 459, 371 A.2d 63 (1976). No affidavit of merit was required where application for a trial de novo from an adverse arbitration decision was not timely filed. See Popwell v. Law Offices of Broome and Horn, 363 N.J.Super. 404, 410, 833 A.2d 102 (Law Div.2002). Finally, in Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer &

Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 13, 783 A.2d 246, 253 (App. Div. 2001) the Court stated that:

> A common thread runs through these cases, namely none of them required the trier of fact to evaluate an attorney's legal judgment concerning a complex legal issue. Where a trier of fact would be put in such a position, New Jersey courts have required expert testimony to be presented.

It should be apparent by now that Plaintiffs' Tort Counts do not require the trier of fact to evaluate M&C's legal judgment concerning a complex legal issue, just as in Sommers, Brizak, Stewart, and Popwell above. The Court in these cases found that no legal expert testimony or an AOM was required notwithstanding the fact that the claims in those cases dealt with the legal judgment of attorneys concerning legal issues: briefs, statutes of limitations, recording bonds and mortgages, etc. The Court's basis for finding no need for expert testimony or an AOM is that the trier of fact was not being called upon to evaluate an attorney's legal judgment concerning a *complex* legal issue. In the present matter, the trier of fact will not even be called upon to evaluate an attorney's judgment concerning *any* legal issue, let alone a complex legal issue, because a trier of fact's evaluation of a fraudulent scheme to take a client's money does not evaluate an attorney's judgment concerning a legal issue, unless the Court is prepared to uphold the Trial Court's holding that wrongfully taking a client's money is indeed legal work. Rather, a trier of fact would simply be evaluating M&C's participation in the fraudulent scheme, as would be the case against the other co-conspirator

Defendants accused of participating in the alleged fraudulent scheme. The mere happenstance that one member of a conspiracy to commit intentional torts is an attorney does not transform those intentional tort claims against that attorney into legal malpractice claims.

For this reason, it is self-evident based on the case law cited above that no expert testimony is required to prove allegations that monies were transferred from the firm's attorney trust account fraudulently, or even most blatantly, allegations that an attorney in concert with other co-conspirators instructed a client to make payments via wire transfers and checks made payable to the bank accounts of entities and persons whom the attorney and co-conspirators controlled or manipulated to thereafter transfer funds to the bank accounts of co-conspirators. None of these allegations involve an attorney's legal judgment concerning a legal issue, let alone a complex legal issue.

Similarly, in Couri, the Supreme Court of New Jersey found that the facts in that case fell beyond the purview of the AOM statute and no AOM was required. The Supreme Court explained as follows:

> Although defendant's unauthorized dissemination of the report also might implicate a deviation from prevailing professional standards of practice, proof of that deviation is not essential to the establishment of plaintiff's right to recover based on breach of contract.
>
> Couri v. Gardner, 173 N.J. 328, 341-42, 801 A.2d 1134, 1142 (2002)

Essentially, as the Supreme Court analogously explained in Couri, the crux of Plaintiffs' Tort Claims is that M&C, in concert with non-attorney co-conspirator Defendants, acted wrongfully by creating the fraudulent scheme that is the subject matter of this litigation. This fraudulent scheme does not implicate a deviation from a professional standard of care, and proof of a deviation from a professional standard of care is not essential to prove Plaintiffs' Tort Claims. Indeed, Plaintiffs were permitted to pursue the Tort Claims against the non-attorney co-conspirator Defendants. Therefore, just as in Couri, no AOM or expert testimony was required in this matter.

In Bender, an AOM was required since a pharmacist gave a plaintiff a drug dosage other than the one listed on the prescription. Again, giving drug dosage is the kind of work a pharmacist performs. Civil law theft is not the kind of work an attorney performs. In Sommers, the attorney failed to submit a legal argument in a trial brief. The Court in Sommers held that an AOM was not required because the attorney's failure did not involve a complex legal issue and therefore fit under the common knowledge exception. Sommers, amongst other cases, demonstrates a situation in which even an attorney's mishandling of legal work does not necessarily require an AOM, and the analogy is self-evident. If AOMs are sometimes not required when an attorney mishandles legal work (simply because that legal work is not deemed complex enough to require expert testimony), how

much more so is an AOM not required when an attorney in concert with non-attorneys commits civil law theft, which is a wrongful action that has nothing to do with that attorney's legal work?

Respectfully, either the Trial Court misread the facts of the Complaint and Plaintiffs' briefs, or the Court was successfully misled by Defendants' misrepresentation and red herring that the subject transaction was a complex, multi-party, multi-property transaction. 1T 5:12-16. A correct reading of the facts in the Complaint and Plaintiffs' briefs clearly shows that the transaction at issue is no different than any other basic, simple real estate transaction – that is, there is a buyer (Plaintiffs) and there were sellers. The single transaction which is the subject transaction of this matter is a simple real estate transaction in which Plaintiffs were the buyer, there were sellers, and M&C in concert with non-attorney co-conspirator Defendants, by their fraudulent acts, wrongfully took transactional proceeds.

While Plaintiffs strongly oppose the Trial Court's erroneous finding that the subject transaction was in fact a complex, multi-party, multi-property transaction for all the reasons set forth above, the complexity or simplicity of the underlying transaction is actually not even relevant to the Tort Counts. Even assuming arguendo the underlying transaction was complex, the only facts relevant to proving liability for Plaintiffs' Tort Claims was the act of wrongfully taking Plaintiffs' money. This was the separate factual predicate, which the Trial Court

erroneously stated was never presented (1T 38:24–39:6), but was in fact specifically and exhaustively outlined repeatedly in Plaintiffs' Complaint, briefs, and oral arguments. The background transaction in which M&C committed this simple wrongful act could involve the most complex legal transaction imaginable, but that simple wrongful act in concert with non-attorney co-conspirator Defendants remains separate and apart in its clarity and simplicity, and is completely estranged from anything resembling legal work. In fact, non-attorneys participated in and perpetrated the simple, wrongful act, and those same claims against them survived and proceeded to trial where the parties reached a settlement. The Trial Court's error should be reversed.

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO STATE NEWLY DISCOVERED CLAIMS AGAINST M&C

Rule 4:9-1 governs amendments to pleadings. The Comments to said Rule cite case law that establishes the liberal standard for granting motions to amend pleadings. "The motion for leave to amend is required by the rule to be liberally granted and without consideration of the ultimate merits of the amendment." Notte v. Merchants Mut. Ins. Co., 185 N.J 490 (2006).

As a matter of law and physical reality, a party can only state a claim that is known. A party cannot state a claim it does not know exists. When Plaintiffs filed

the Complaint on June 11, 2015, they did not know and could not have known that Menas was the sole member of TNM. Consequently, Plaintiffs could not have known at that time that Menas is liable for the torts committed by TNM as sole member of TNM, and Plaintiffs could not have known that M&C committed legal malpractice when they failed to advise Plaintiffs that Menas was the sole member of TNM. Accordingly, at the time they filed the original Complaint, Plaintiffs could not and did not state any tort claims against Menas arising out of his role as sole member of TNM. Moreover, Plaintiffs could not and did not state any legal malpractice claims against M&C arising out of their failure to advise Plaintiffs that Menas was the sole member of TNM.

Through the long, often-obstructed, often-delayed, and hard-fought pursuit of discovery, Plaintiffs uncovered that Menas was the sole member of TNM at all times relevant to this matter, first by way of a Mortgage dated May 7, 2008 (570a), executed by Menas as sole member of TNM. Upon discovery of the Mortgage, Plaintiffs filed a Motion to Vacate the Orders of November 16, 2016, and December 20, 2016. In response to said Motion, counsel for TNM, Timothy Bloh, Esq., and counsel for M&C, John Slimm, Esq., continued to maintain that TNM was owned solely by Teddy Menas. In their arguments to the Court, Mr. Bloh and Mr. Slimm pointed to the deposition testimonies of Menas, Ford, Walls, and Rocco in another matter and proffered for the first time in this litigation the Collateral

Assignment (96a), to support their representation that TNM was solely owned by Teddy Menas (52a)[2]. Based on the aforesaid misrepresentations, the Collateral Assignment was alleged to be the only reason Menas executed the Mortgage, and the Trial Court erroneously denied Plaintiffs' Motion to Vacate on April 3, 2018. (188a)

Thereafter, Plaintiffs discovered an Affidavit of Title executed by Menas as sole member of TNM. 622a. In addition, and most importantly, Plaintiffs discovered checks showing that Menas, four months prior to May 7, 2008, had already been repaid the alleged $250,000.00 loan for which Teddy Menas allegedly gave him the Collateral Assignment. 625a–627a; 645a–650a. Thus, Plaintiffs discovered that at the time Menas signed the Mortgage, the Collateral Assignment had already been extinguished since the loan had been repaid. Thus, the only reason Menas signed the Mortgage as sole member of TNM was because Menas was in fact sole member of TNM, as he certified and was notarized, notwithstanding self-serving and perjurious testimonies of co-conspirator

[2] Pursuant to Rule 2:6-1(a)(2), Mr. Slimm's brief is permissible content for Appellants' Appendix as it raises an issue which is germane to the appeal. Namely, Mr. Slimm's brief, producing the Collateral Assignment for the first time in the case, formed the basis of M&C's argument that Menas was not the Sole Member of TNM despite the Mortgage. As a result of Mr. Slimm's brief, and the Trial Court's reliance on said brief, Plaintiffs were not able to claim, at that time, that Menas was the Sole Member of TNM.

Defendants and the misrepresentations of Mr. Bloh and Mr. Slimm. Upon discovering this new evidence, Plaintiffs moved to amend the Complaint, to state claims against M&C they did not know at the time of the filing of the original Complaint.

Upon discovery of evidence that refuted M&C's misrepresentations based on the Collateral Assignment, Plaintiffs had every right to file newly discovered claims based on this newly discovered evidence, and were not required to *prove* the truth of their claims. Instead, Plaintiffs were certainly able to *state* this claim upon its discovery, and that is all Plaintiffs needed to demonstrate in the context of a motion to amend. Prior to the discovery of this new evidence, Plaintiffs did not know and could not have known of the existence of their tort claims against Menas arising out of his role as sole member of TNM, nor of the existence of their legal malpractice claims against M&C for their failure to advise Plaintiffs that Menas was the sole member of TNM.

Due to the proffering of the alleged Collateral Assignment following discovery of the Mortgage, the new claims arising out of the new evidence that Menas was the sole member of TNM, developed over time. While it is true that Plaintiffs claimed in their Motion to Vacate that Menas was the sole member of TNM upon discovery of the Mortgage, further discovery of the Affidavit and the

checks refuted the Collateral Assignment and established the new claim that Menas was the sole member of TNM.

Considering that motions for leave to amend must be liberally granted, and taking into account the grave injustice that would be visited upon Plaintiffs if they were not permitted to bring their newly discovered, previously unknown, fraudulently and even perjuriously concealed claims against M&C, Plaintiffs should have been granted leave to amend the Complaint. Denying Plaintiffs this relief resulted in a grave injustice and effectively rewarded years of fraudulent concealment and perjury.

In addition to the newly discovered and previously unknown claims against M&C arising out of the newly discovered evidence that Menas was sole member of TNM, Plaintiffs further sought leave to amend the Complaint to state claims against Menas arising out of his operation of PCHA as a sham entity, and claims for legal malpractice against Defendants M&C arising out of their failure to advise Plaintiffs that PCHA was operated as a sham entity by Menas. Plaintiffs did not know and could not have known the existence of these claims prior to obtaining, analyzing, and understanding as a whole the accumulated discovery and the deposition testimonies of Russo, Walls, Rocco, and Brestle.

There is no rule or case law prohibiting a party from seeking to bring a new claim, previously unknown and unknowable, against parties who were previously

dismissed with prejudice prior to the discovery of said new claim. The erroneous dismissal of the prior claims against M&C was not a "global" dismissal in the way that settlements can be "global" and settle even claims that were unknown at the time of settlement. Instead, a dismissal only applies to known or knowable claims at the time of the dismissal.

Indeed, the Court in DiTrolio v. Antiles, 142 N.J. 253, 273–74, 662 A.2d 494, 505 (1995) established:

> [T]he entire controversy doctrine does not apply to unknown or unaccrued claims. R. 4:30A cmt. 2; Mauro v. Raymark Indus., Inc., 116 N.J. 126, 138, 561 A.2d 257 (1989) (holding that entire controversy doctrine would not bar toxic-tort plaintiff's damage claim because plaintiff discovered existence of disease after first litigation); Zaromb v. Borucka, 166 N.J.Super. 22, 27, 398 A.2d 1308 (App.Div.1979) (holding that slander claim was not precluded by entire controversy doctrine because party was not aware of its existence).

Plaintiffs' new claims against M&C were not known, could not have been known, and therefore were not pled at the time of the dismissal of Plaintiffs' previous claims. Said claims may be filed once discovered despite the previous dismissal with prejudice of prior, distinct claims.

The significance of the "newness" of Plaintiffs' claims is that they were unknown, unknowable, unpled, and therefore not precluded by Judge Gummer's dismissal of Plaintiffs' prior claims. Plaintiffs' claims are "new" in the sense that they were discovered *after* the dismissal of Plaintiffs' previous, different claims

against M&C. The claims are "new" in the sense that they were unknown, unknowable, never pled, and therefore never dismissed at the time of the dismissal of Plaintiffs' previous, different claims against M&C. Defendants evidently confused the Trial Court by alleging that these claims are not new because they were allegedly not discovered relatively recently enough. But the focus of the Trial Court should have been on the real significance of the "newness" of these claims, which is the fact that the claims were unknown, unknowable, not pled, and therefore not dismissed with prejudice at the time of the dismissal with prejudice of the previous claims against M&C. Due to the proffering of the alleged Collateral Assignment following discovery of the Mortgage, the new claims arising out of the new evidence that Menas was the sole member of TNM, developed over time. While it is true that Plaintiffs claimed in their Motion to Vacate that Menas owned TNM upon discovery of the Mortgage, further discovery of the Affidavit and the checks were necessary in order to refute the Collateral Assignment and to establish the viability of the new claims once and for all.

Defendants' argument effectively asserted that even before Plaintiffs ever knew Menas was the sole member of TNM, and even before Plaintiffs ever could have pled that Menas was the sole member of TNM, Plaintiffs somehow *did* plead and Judge Gummer somehow *did* dismiss claims arising out of Menas's ownership

of TNM. Such an assertion is not only legally impossible but it confounds logic and any conceivable sense of reality.

Besides the illogical and legally impossible nature of M&C's argument, their argument additionally contradicted their own prior, successful arguments before Judge Gummer and the clear prior holdings of Judge Gummer with respect to the dismissal of Plaintiffs' prior claims. M&C repeatedly, successfully argued that Plaintiffs' prior claims against M&C, however labeled, were legal malpractice claims arising out of Menas's legal work on behalf of Plaintiffs. Judge Gummer erroneously agreed with M&C, and explicitly found that all of Plaintiffs' claims, however labeled, were legal malpractice claims. Indeed, Judge Gummer dismissed Plaintiffs' claims due to the lack of an AOM. A court cannot dismiss non-legal malpractice claims for lack of an AOM. Therefore, as M&C forcefully and repeatedly argued, and due to Judge Gummer's holding, the procedural posture at the time Plaintiffs filed their Motion to Amend the Complaint was that Plaintiffs had *never* filed a non-legal malpractice claim against M&C.

Accordingly, Plaintiffs' non-legal malpractice claims against M&C arising out of Menas's newly discovered role as sole member of TNM were necessarily new claims, because the Trial Court repeatedly held, however erroneously, that *all* the prior claims against M&C were legal malpractice claims. Instead, the new tort claims against M&C arising out of Menas's previously unknown and unknowable

ownership of TNM are not legal malpractice claims whatsoever. Simply, Menas as sole member of TNM, is liable personally and for the torts of TNM, and must be a Defendant in this matter. These facts and these claims were unknown and unknowable at the time of the dismissal of Plaintiffs' prior claims against M&C.

Likewise, the new legal malpractice claims against M&C were not and could not have been known or claimed prior to the dismissal of the previous claims, because they similarly arise solely out of Menas's ownership of Defendant TNM, a fact that could not have been and was not previously known or alleged. The new legal malpractice claims against Menas have absolutely no connection to the prior, dismissed legal malpractice claims, and the prior dismissal of malpractice claims was not and could not have been a "global" dismissal of all malpractice claims whether known or unknown. Instead, the prior, dismissed claims, as Defendants argued and Judge Gummer erroneously held, were all legal malpractice claims arising out of Menas's legal work on behalf of Plaintiffs with respect to the transaction. The new legal malpractice claims against Menas, on the other hand, were solely supported by the previously unknown and unknowable fact that Menas was the sole member of TNM and therefore committed malpractice by failing to advise Plaintiffs of that fact. Plaintiffs did not and could not have pled such a legal malpractice claim previously, and therefore it is impossible to hold that this legal malpractice claim was already dismissed. At the time they filed the original

Complaint, Plaintiffs could not and did not state any tort claims against Menas arising out of his role as sole member of TNM. Accordingly, Plaintiffs could not and did not state any legal malpractice claims against M&C arising out of their failure to advise Plaintiffs that Menas was the sole member of TNM.

As the Court can read in the "First Count" of Plaintiffs' Complaint (13a–15a) which was dismissed by Judge Gummer, the prior, dismissed legal malpractice claim alleged that M&C committed malpractice by way of their failure to advise Plaintiffs of their fraudulent scheme and participation in the conspiracy, and how Plaintiffs' money would actually be wrongfully taken and distributed among the co-conspirator Defendants.

On the other hand, as the Court can read in the "Twelfth Count" of Plaintiffs' Fourth Amended Complaint (371a–372a), Plaintiffs alleged that M&C committed malpractice by failing to:

a) advise Plaintiffs that Defendant Menas was the sole member of Defendant TNM;

b) advise Plaintiffs that Defendant Menas solely, or with Defendant Ford, operated Defendant PCHA, the sham entity to which Plaintiffs were directed by Defendants Menas and Ford to make payments in pursuit of the PCHA-MTDC Assignment and Releases.

It is self-evident that the previously dismissed claim for legal malpractice had absolutely none of the factual predicates of the legal malpractice claim in the Amended Complaint, and for obvious reason: Plaintiffs did not know and could not

have known at the time of the filing of the Complaint that Menas was the sole member of TNM and operated PCHA as a sham entity. These facts only emerged during the course of discovery, after the dismissal of Plaintiffs' prior claims. Therefore, Plaintiffs' new claims against M&C are certainly new and were never dismissed by Judge Gummer because they were not known and could not have been pled at the time of the original Complaint. For these reasons, the Trial Court's error should be reversed and Plaintiffs should be permitted to amend the Complaint and state their newly discovered claims.

POINT IV

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO R&P

Summary judgment has a specific standard and is to be granted with extreme caution. Henschke v. Borough of Clayton, 251 N.J. Super. 393 (App. Div. 1991). Summary judgment is only appropriate if there is no genuine issue as to any material fact in the record. Rule 4:46-2(c); Leang v. Jersey City Bd. Of Educ., 399 N.J. Super. 329 (App. Div. 2008), aff'd in part, rev'd on different grounds, 198 N.J. 557 (2009).

The movant's burden is essentially twofold. It must show by its proofs that there are no genuine issues of material fact, and that there is no issue of credibility related to the proofs. Rotwein v. Gen. Accident Group, 103 N.J. Super. 406 (Law Div. 1968). If there is a genuine issue of material fact, or even the slightest doubt

as to existence of a material fact, the motion for summary judgment should be denied and the non-movant is entitled to a trial on the merits. DePrimo v. Lehn & Fink Prods. Co., 223 N.J. Super. 265 (Law Div. 1987); See also Murphy v. Implicito, 392 N.J. Super. 245 (App. Div. 2007). Simply put, summary judgment should be denied unless the moving party's right to judgment is so clear that there is no room for controversy. Akhtar v. JDN Props. at Florham Park, L.L.C., 439 N.J. Super. 391, 399 (App. Div. 2015).

In this matter, it is evident that there are significant and numerous issues of material fact that are genuine and in dispute, as it relates to the participation of R&P in the conspiracy to commit the tortious actions pled by Plaintiffs against all Defendants. The deposition testimonies of Theresa Menas, Borini, Ford, Walls, Rocco, Brestle, and Plaintiffs set forth in the Statement of Facts create significant genuine issues of material facts that warranted the denial of summary judgment to R&P.

The Trial Court erroneously held that R&P had not duty to Plaintiffs as there was no attorney-client relationship, and that Plaintiffs failed to provide any evidence of affirmative misrepresentations made to them by R&P. 414a. The Trial Court was blatantly incorrect. First, the fact that R&P were not Plaintiffs' attorneys is wholly irrelevant. The fact that R&P were not Plaintiffs' attorneys did not absolve them of their requirement to disclose

material information or to refrain from concealing material information. As set forth in Berman v. Gurwicz, 189 N.J. Super. 89, 93–94, 458 A.2d 1311, 1313–14 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49, 458 A.2d 1289 (App. Div. 1983), a leading case in fiduciary duties in transactions:

> The significance of the disclosure requirement is underlined by Pomeroy: "If either party to a transaction conceals some fact which is material, which is within his own knowledge, and which it is his duty to disclose, he is guilty of actual fraud." Op. cit., § 901 at 545–546. The rule is set forth in Jewish Center of Sussex County v. Whale, 165 N.J.Super. 84, 397 A.2d 712 (Ch.Div.1978), aff'd 172 N.J.Super. 165, 411 A.2d 475 (App.Div.1980):
>
> > The fact that no affirmative misrepresentation of a material fact has been made does not bar relief. The suppression of truth, the withholding of the truth when it should be disclosed, is equivalent to the expression of falsehood. The question under those circumstances is whether the failure to volunteer disclosure of certain facts amounts to fraudulent concealment, or, more specifically, whether the defendant is bound in conscience and duty to recognize that the facts so concealed are significant and material and are facts in respect to which he cannot innocently be silent. Where the circumstances warrant the conclusion that he is so bound and has such a duty, equity will provide relief. [at 89, 397 A.2d 712; citations omitted]

Irrespective of the fact that R&P were not Plaintiffs, attorneys, they had a duty to disclose the truth and were bound in conscience and duty to recognize that the facts they concealed were significant and material. As such, Plaintiffs absolutely demonstrated a genuine issue of material fact in dispute with respect to R&P's failure to disclose facts and active concealment of facts.

Furthermore, the notion troublingly held by the Trial Court's erroneous decision is that the law provides no remedy to parties who are victims of an attorney's fraudulent schemes that constitute civil law theft if the parties had no principal-agent or attorney-client relationship. This notion is not only explicitly contradicted by the relevant case law but is abhorrent and an offense to the integrity of our noble system of jurisprudence.

In addition, the Trial Court was clearly incorrect that Plaintiffs failed to provide facts to support their claims that R&P made misrepresentations to them. Though it is reduced to a footnote in the Trial Court's Statement of Reasons, the revelations of said footnote are monumental, and the Trial Court's error must be reversed. The Court erroneously stated in footnote 6 in its Statement of Reasons that "Plaintiffs' opposition papers contained no exhibits." 414a. Accordingly, to the extent Plaintiffs cited to evidence in the record in their opposition papers, the Court admitted that no such evidence was reviewed, since the Court erroneously believed that no such evidence was "provided to the court." This statement by the Trial Court is self-evidently erroneous and clearly reversible error. As Plaintiffs demonstrated to the Court in their brief in support of their Motion to Reconsider the Orders of December 9, 2021, Plaintiffs' submitted to the included twenty-eight exhibits, all of which were filed on e-Courts with the Court on September 15, 2020, and September 16, 2020, and with a courtesy copy hand-delivered. 426a–

436a.[3] The Court admittedly overlooked Plaintiffs' twenty-eight exhibits and hundreds of citations to deposition testimony, erroneously believing none was filed with the Court. As such, the Trial Court expressly did not review a single exhibit provided by Plaintiffs or a single word of a single line of a single page of deposition testimony provided by Plaintiffs.

Plaintiffs outlined from page 4 through 14 of their moving brief in their Motion to Reconsider the Order of December 9, 2021, facts supported by one hundred and four deposition citations which demonstrate precisely how Rocco participated in the conspiracy to steal Plaintiffs' money. 426a–436a. There can be no doubt that Rocco participated in the conspiracy to steal Plaintiffs' money, and Pepper Hamilton is vicariously liable for that conduct. The deposition testimony of Brestle, Russo, Walls, and Rocco himself, all set forth in the Statement of Facts herein and which the Trial Court admittedly ignored, are irrefutable evidence that Rocco, *acting* as attorney of PCHA, made misrepresentations and continued to make misrepresentations to Plaintiffs in the Releases, at the meeting of April 2009 at the offices of Pepper Hamilton, and ultimately with his letter to Plaintiffs, dated

[3] Pursuant to Rule 2:6-1(a)(2), Plaintiffs' brief is permissible content for Appellants' Appendix as it raises an issue which is germane to the appeal. Namely, Plaintiffs' brief demonstrates that the Trial Court erroneously found that Plaintiffs failed to provide evidence to support their claims that R&P made misrepresentations to Plaintiffs, concealed facts from Plaintiffs, and failed to disclose facts to Plaintiffs.

December 17, 2009, with the intent that Plaintiffs rely on said misrepresentations, adding another substantial semblance of credibility to the scheme to defraud Plaintiffs of their money through the scam PCHA-MTDC Assignment and Releases transaction. Plaintiffs reasonably relied on R&P's misrepresentations and suffered millions of dollars of damages. All the Trial Court managed to say in response to these facts supported by voluminous evidence is that Plaintiffs failed to provide any evidence to the Court of their claims and that Rocco was not Plaintiffs' attorney. In other words, according to the Trial Court, Defendant Rocco can participate in a fraudulent scheme to steal Plaintiffs' money, without consequence, because he is not Plaintiffs' attorney. Yet again, as occurred earlier in the matter with M&C, an attorney was effectively absolved of his participation in a tortious conspiracy by virtue of his status as an attorney. According to the Trial Court, an attorney can participate in a tortious conspiracy so long as he is not the attorney of the victim. This holding is troubling and must be reversed.

Despite the Trial Court's error, Plaintiffs did not merely claim that they were third parties who reasonably relied upon an attorney's representations, and that said attorney is therefore liable for legal malpractice. Plaintiffs' claim is also that Rocco was an active participant in the fraudulent scheme perpetrated against them, whereby Defendants stole Plaintiffs' money. Rocco's role in this fraudulent scheme was to *act* as the attorney for the sham entity PCHA. The record certainly

demonstrates genuine issues of material fact in dispute as to whether or not Rocco was ever the attorney for PCHA, or if PCHA was simply a sham entity utilized to defraud Plaintiffs and steal their money for the benefit of the co-conspirator Defendants. Rocco's role in the conspiracy was central, and Pepper Hamilton is vicariously liabile for failing to supervise Rocco while he was perpetrating a fraud in their office.

It is clear that notwithstanding that Walls and Brestle were nominally members of PCHA, PCHA was operated by Menas as a sham entity, and Rocco *acted* as PCHA's attorney in furtherance of the conspiracy perpetrated against Plaintiffs. Rocco allege to be the attorney for PCHA even after the death of Teddy Menas, by authoring the Second Amendment and Restatement of the General Release, staging the April 2009 meeting with Plaintiffs at the offices of Pepper Hamilton where Rocco stated to Plaintiff Wozniak that Russo was the person there at the meeting with them to accept the $250,000.00 check on behalf of PCHA, and then authoring and forwarding the default letter dated December 17, 2009 to Plaintiffs. However, since Teddy Menas is already dead, and neither Walls nor Brestle ever met or even knew of Rocco prior to this action, as they testified, then it is obvious that Rocco was *acting* as the attorney for the sham entity PCHA only in furtherance of Defendants' conspiracy to steal Plaintiffs' money.

According to the testimony of Brestle, Walls, Russo, and Rocco himself as set forth in the Statement of Facts, the people Defendants claim owned PCHA testified that they never controlled nor operated PCHA, never met each other, and never knew or communicated with the alleged attorney for PCHA, and vice versa. As such, there are glaring and genuine issues of material fact in dispute as to whether PCHA was simply a sham entity, and Rocco was its sham attorney, in furtherance of Defendants' conspiracy to steal Plaintiffs' money. The Trial Court's holding that Rocco must be granted summary judgment because he was purportedly PCHA's attorney rather than Plaintiffs' attorney completely misses the point of Plaintiffs' claims against Rocco as a central participant in Defendants' conspiracy.

In addition, since the Trial Court erroneously believed no evidence was cited, the Trial Court failed to appreciate the significance of Wozniak's clear testimony regarding the affirmative misrepresentations and omissions that Rocco made to him, and also Rocco's affirmative misrepresentations to all Plaintiffs by way of the Releases and Rocco's default letter to Plaintiffs, all in furtherance of Defendants' conspiracy. The Trial Court unbelievably and erroneously held that all of these misrepresentations by Rocco were insignificant because Rocco was not Plaintiffs' attorney. In reality, it is factually and legally impossible for the Trial Court to consider this evidence and conclude that the R&P have resolved all

genuine issues of material fact in dispute as to whether they participated in Defendants' conspiracy to steal Plaintiffs' money, and as to whether those actions constituted legal malpractice. The Trial Court's error should be reversed.

CONCLUSION

In defense of the integrity of the legal profession and the entire judicial system, wrongfully taking a client's money must not be considered legal work, close to legal work, or the kind of work an attorney ordinarily performs. As such, there is no requirement for an expert with respect to Plaintiffs' claims against M&C in this case for two alternative reasons: 1) the legal malpractice of M&C is so blatant, simple, and part of a fact-finder's common knowledge that no expert is required to explain a departure from a professional standard of care, and 2) the Tort Claims against M&C are so separate from the work of an attorney, that no expert is required to explain a departure from a professional standard of care, as no profession or professional standard of care is implicated. The quality of the legal work performed by M&C is not under scrutiny in Plaintiffs' Complaint. Plaintiffs' legal malpractice claims stem solely from M&C's failure to advise Plaintiffs that their money was actually being transferred to Menas and his co-conspirators.

As for the Tort Claims against M&C, the Trial Court's holding implies that orchestrating and participating in a conspiracy to wrongfully take a client's money is legal work. The Trial Court's error suggests that any wrongful action of an

attorney (including intentional torts) against his client done during the course of an attorney-client relationship ultimately implicates the legal work that the attorney performs for the client. This rationale is erroneous. If an attorney assaults a client in his office, that assault does not transform into legal malpractice solely because the attorney happened to be performing some kind of legal work on behalf of that client at the time of the assault. The legal work that was performed in this case, similarly, was, at most, only peripheral. It is mere happenstance that Menas was an attorney. Menas was sued for the Tort Claims for the same reason all other non-attorney Defendants were sued for the Tort Claims: that is, Menas was involved in a tortious conspiracy perpetrated against Plaintiffs. Plaintiffs never contested the quality of M&C's legal work performed in that office. Plaintiffs only allege that during the course of a transaction, Defendants wrongfully took Plaintiffs' transactional proceeds. This is civil law theft, not legal malpractice.

Finally, the purpose of the AOM statute is to weed out meritless claims. See Bender at 122-23. To allow the Tort Claims against all the non-attorney co-conspirator Defendants to remain, proceed to trial, and ultimately settle, but simultaneously dismiss the identical claims against the co-conspirator Defendants who simply happened to be attorneys because no AOM was filed, does not serve the purpose of the statute to weed out meritless claims. Essentially, the Court below has held that Tort Claims that *do* have merit for the non-attorney co-

conspirator Defendants in this case, did *not* have merit for the attorney co-conspirator Defendants simply by virtue of the fact that those Defendants are attorneys. Such a result, rather than weeding out meritless claims, effectively holds a non-attorney to a higher standard than an attorney, and allows the attorney to escape liability, not because the claims are meritless, but because the Trial Court erroneously permitted the AOM statute to be improperly used as a shield that can only be used by the attorney Defendants. It would be a grave and unreasonable injustice to permit M&C to shield themselves from liability using the AOM statute, when the same claims survived because they have merit against the non-attorney co-conspirator Defendants. Such a result frustrates the clear purpose of the AOM statute as clearly intended by the legislature and interpreted by our Courts. Such a result would set a dangerous precedent and undermine whatever good remains in the general citizenry's perception of the legal profession; it would confirm the colloquialism that attorneys in fact do have a license to lie and steal.

Likewise, Plaintiffs should be permitted to state their newly discovered claims against M&C. The discovery that Menas was the sole member of TNM and operated PCHA as a sham entity to perpetrate the conspiracy against Plaintiffs created new claims against M&C. The dismissal of prior, distinct claims, under distinct predicate facts, should not have any impact on Plaintiffs' ability to state newly discovered claims supported by newly discovered predicate facts.

Finally, there is ample testimony and documentary evidence in the record to create a genuine issue of material fact as to R&P's role in the conspiracy against Plaintiffs. Testimony in the record, including Rocco's own testimony, raised serious doubts as to whether Rocco was in fact the attorney of PCHA or only *acting* as the attorney of PCHA for the purpose of perpetrating Defendants' conspiracy against Plaintiffs. Similar to the dismissal of the claims against M&C, the Trial Court's holding essentially absolved R&P of their role in Defendants' conspiracy by virtue of their status as attorneys who were not the attorneys of Plaintiffs. While Plaintiffs' claims survived against all the non-attorney co-conspirator Defendants, R&P obtained summary judgment because they were not Plaintiffs' attorneys and therefore, in the Trial Court's view, had no duty to refrain from conspiring to steal their money. This notion is as disquieting as it is confounding, and this error must be reversed.

For all the foregoing reasons, Plaintiffs respectfully request that Your Honors reverse the Orders of January 19, 2016, November 10, 2016, April 3, 2018, January 24, 2020, December 16, 2020, December 9, 2021, and January 21, 2022, reinstating the Complaint against M&C and R&P, and granting Plaintiffs leave to amend the Complaint to state the newly discovered claims.

Dated: February 6, 2023

DE PIERRO RADDING, LLC

/s/ Giovanni De Pierro

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JOHN FENDT, ALAN WOZNIAK, MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC Plaintiffs/APPELLANTS, v. NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; MICHAEL BORINI; 322 WEST ASSOCIATES, LLC; JAMES WALLS; JOSEPH ROCCO, ESQ.; PEPPER HAMILTON, LLC; THERESA MENAS; TNM DEVELOPMENT CONSULTING, LLC; AND ABC CORPORATION 1-10, JOHN DOES 1-10, AND JANE DOES 1-10 (NAMES BEING FICTITIOUS AS TRUE IDENTITIES ARE UNKNOWN) Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION A-000354-22 ON APPEAL FROM ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO: MON-L-3782-15 SAT BELOW: HON. KATIE A. GUMMER, J.S.C. HON. LOURDES LUCAS, J.S.C. HON. LINDA GRASSO JONES, J.S.C. **DATE SUBMITTED: 04/27/23**

AMENDED BRIEF OF DEFENDANTS/RESPONDENTS NICHOLAS MENAS, ESQUIRE & COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

On the Brief:
John L. Slimm, Esquire - NJ Attorney ID No. 263721970

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PRELIMINARY STATEMENT

Defendants, Nicholas Menas, Esquire & Cooper Levenson April Niedelman & Wagenheim, P.A. (collectively, the "Cooper Levenson Defendants"), ask this Court to affirm various Orders of the trial court, including the following:

1. Order of January 19, 2016, Dismissing Plaintiffs' Complaint against Defendants Nicholas Menas, Esq., and Cooper Levenson;

2. Order of November 10, 2016, Denying Plaintiffs' Motion to Vacate the Order of January 19, 2016;

3. Order of April 3, 2018, Denying Plaintiffs' Motion to Vacate the Order of January 19, 2016;

4. Order of January 24, 2020, Denying Plaintiffs' Motion to Amend the Complaint; and

5. Order of December 16, 2020, Denying Plaintiffs' Motion to Reconsider the Order of January 24, 2020

Ever since the Cooper Levenson Defendants were dismissed, with prejudice, from this case on January 19, 2016, plaintiffs have continuously attempted to bring Mr. Menas and Cooper Levenson back into this case before the trial court, arguing various alternative theories. Plaintiffs sought on numerous occasions to pour old wine in new bottles, meaning that plaintiffs

repeatedly attempted to make the same arguments before the trial court in an attempt to obtain a different result.

It is respectfully submitted that this Court review the voluminous history of Motion practice by plaintiffs in an attempt to reconsider the proper dismissal of this case, with prejudice, as to the Cooper Levenson Defendants, which occurred nearly seven years ago on January 19, 2016.

This matter is a complex legal malpractice action that arises out of a relatively substantial number of related complex land transactions, involving multiple parties and multiple lawsuits. The issues raised in the plaintiffs' original Complaint implicated the standard of care concerning the legal representations the Cooper Levenson Defendants; communications as counsel; and allegations pertaining to disbursement of funds from the Cooper Levenson Trust Account; and Cooper Levenson's supervision of Mr. Menas when he was an attorney with the firm. Plaintiffs failed to provide an Affidavit of Merit to substantiate their claims against the Cooper Levenson Defendants, which led to the Complaint being properly dismissed, with prejudice, on January 19, 2016. Plaintiffs, throughout the trial court, continually argued that their attorney, Giovanni DePierro, Esquire, could not have allegedly discovered that Nicholas Menas was allegedly the sole member of TNM Development

Consulting, LLC. This exact issue was before the trial court on numerous occasions, including on plaintiffs' Motion to Vacate the November 10, 2016 Order, which was properly denied on April 3, 2018; and on January 24, 2020 before the trial court denied plaintiffs' Motion to Amend.

Therefore, due to plaintiffs' repeated, unsuccessful attempts to bring old parties back into this case before the trial court, after their failure to previously file and serve an Affidavit of Merit in this case, based on the futility of plaintiffs' instant appeal, it is respectfully submitted that this Court deny plaintiffs' Appeal. Plaintiffs' harassment of the Cooper Levenson Defendants have now surpassed seven years, and this continued harassing practice cannot be permitted by this Court.

PROCEDURAL HISTORY

On June 12, 2015, plaintiffs filed their original Complaint (1a).

On July 20, 2015, the Cooper Levenson Defendants filed their Answer to plaintiffs' Complaint, which included Separate Defenses and a Demand for Affidavits of Merit. (26a).

Since plaintiffs failed to file and serve Affidavits of Merit in this case against the Cooper Levenson Defendants, on November 24, 2015, a Motion to Dismiss was filed against plaintiffs. (39a).

Plaintiffs failed to oppose this Motion to Dismiss.

On January 19, 2016, the Honorable Katie A. Gummer, J.S.C. granted the Cooper Levenson Defendants' Motion to Dismiss and plaintiffs' Complaint was dismissed, with prejudice, as to the Cooper Levenson Defendants. (41a).

On September 1, 2016, months after the dismissal order, plaintiffs filed a Motion to Reinstate the Complaint. (47a).

On November 10, 2016, the trial court denied plaintiffs' Motion to Reinstate the Complaint. (50a). This November 10, 2016 decision resulted in a 42 page transcript and was announced during the proceeding that took one hour and eleven minutes to complete. (1T).

Plaintiffs then filed a Motion for Reconsideration of Judge Gummer's November 10, 2016 Order. (Da1) Judge Gummer conducted oral argument of this Motion for Reconsideration on December 16, 2016 and denied plaintiffs' Motion by order of December 20, 2016.[1]

On February 28, 2018, plaintiffs filed a Motion to Vacate the Order of Judge Gummer of November 10, 2016 and again moved to Reinstate the Complaint against Nicholas Menas, Esq. and Cooper Levenson. (187a) On

[1] Plaintiffs filed a First Amended Complaint on December 21, 2016 and a Second Amended Complaint on February 13, 2017.

March 29, 2018, Judge Gummer held oral argument on plaintiffs' Motion to Vacate the November 10, 2016 Order (2T) and on April 3, 2018, Judge Gummer entered an Order denying plaintiffs' Motion to Vacate the Order of November 10, 2016. (188a).

On August 8, 2018, plaintiffs filed a Third Amended Complaint (incorrectly captioned as "Second Amended Complaint"), which (among other things) added Michael Brestle as a Defendant. On December 4, 2019, plaintiffs sought leave to file another (fourth) Amended Complaint to re-join Nicholas Menas, Cooper Levenson, and Pork Chop Hill Associates, LLC ("PCHA") as parties and assert "new" tort and legal malpractice claims against Menas and Cooper Levenson, among others. (776a).

This Court, after hearing oral argument on January 24, 2020, denied plaintiffs' Motion for Leave to File a Fourth Amended Complaint. (Exhibit "V".)

On October 28, 2020, plaintiffs filed a Motion for Reconsideration of the January 24, 2020 Order (378a), which was denied by the trial court on December 16, 2020. (379a).

On March 4, 2020, plaintiffs instituted a new Lawsuit against the Cooper Levenson Defendants. (the "2020 Lawsuit"). (Da5)

On August 28, 2020, Judge Zazzali Hogan issued her Order dismissing plaintiffs' Amended Complaint, with prejudice, as to the Cooper Levenson defendants, and issued a comprehensive Opinion supporting her decision. (Da72).

On September 15, 2020, the Cooper Levenson Defendants, in the 2020 Lawsuit, filed a Motion for Fees and Sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. (Da94).

On January 25, 2022, the trial court granting the Cooper Levenson Defendants' Motion for Fees and Sanctions. (Da96).

After resolving this matter among all remaining defendants, this appeal followed. (465a and 472a).

STATEMENT OF FACTS

This matter is a complex legal malpractice action which arises out of a series of complex land transactions involving multiple parties. The issues raised in the plaintiffs' Complaint implicate the standard of care concerning Defendants' representations of parties; communications as counsel; and allegations pertaining to disbursement of funds from the Cooper, Levenson Trust Account.

On June 11, 2015, plaintiffs filed a Complaint against Defendants Nicholas Menas, Esquire, Cooper Levenson, April, Niedelman & Wagenheim, P.A., Eric Ford, Pulte Homes, KDL Realty Management, LLC, Michael Borini, 322 West Associates, LLC, James Walls, Joseph Rocco, Esquire, Pepper Hamilton LLC, Theresa Menas and TNM Development Consulting, LLC, under docket number MON-L-3782-15 (the "2015 Lawsuit"). (1a).

On July 20, 2015, Nicholas Menas, Esquire and Cooper, Levenson, April, Niedelman & Wagenheim, P.C. filed an Answer to the Complaint with Separate Defenses and a Demand for Affidavits of Merit. (26a). On or about November 24, 2015, Nicholas Menas, Esquire and Cooper, Levenson, April, Niedelman & Wagenheim, P.C. filed a Motion to Dismiss the plaintiffs' Complaint for failure to provide an Affidavit of Merit. (39a).

Plaintiffs did not submit an Opposition to Menas and Cooper Levenson's Motion to Dismiss. Plaintiffs did not dispute that they were served properly and timely with the initial Motion to Dismiss. Plaintiffs did not dispute that they timely received the Court's Order and Statement of Reasons.

The Motion was granted by Judge Gummer, and the Complaint against Menas and the Cooper Levenson firm was dismissed, with prejudice, on January 19, 2016. (41a).

Plaintiffs filed a Motion to Reinstate the Complaint (47a), which was denied by Judge Gummer on November 10, 2016. (50a). The November 10, 2016 decision resulted in a 42-page transcript and was announced during the proceeding that took one hour and 11 minutes to complete. The Court, in denying plaintiffs' Motion to Reinstate the Complaint as to Mr. Menas and Cooper Levenson, entered a well-reasoned and comprehensive decision. (1T).

The Court's opinion quoted several portions of the plaintiffs' Complaint in its decision. (1T:14: 4-13). The Court then provided a review, with quotations, of the pleadings filed by the plaintiffs and Menas and the Cooper Levenson firm. (1T:14:4-19:6.). Specifically:

> Plaintiffs assert that they are bringing this motion under Rule 4:50-1. They argue that the court's order should be vacated, because according to plaintiffs, an affidavit of merit was not required as to their legal malpractice claims, because according to plaintiffs, those legal malpractice claims fall within the common knowledge exception to the requirement for an affidavit of merit.
> Plaintiff assert that no legal expert is necessary to explain any aspect of defendants' purported legal malpractice. Plaintiffs also argues -- plaintiffs also argue that a dismissal of the entire complaint for failure to provide an affidavit of merit was improper, asserting that the dismissal of the non-legal malpractice claims of fraud, tortious interference, conspiracy, based on an affidavit of merit was not proper, because according to plaintiffs, those claims

do not constitute legal malpractice, and thus, do not require an affidavit of merit.

Specifically, on page 22 of their brief in support of this motion, plaintiffs assert that "Defendants Menas and Cooper Levenson's carelessness, negligence, tortious interference, and fraud that gives rise to their legal malpractice, are certainly "readily apparent to anyone of average intelligence, and ordinary experience" and therefore, does not require the filing of an AOM.
Defendants Menas and Cooper Levenson breached their duties to plaintiffs, failed to exercise the knowledge, skill, ability, and devotion ordinarily possessed, and employed by members of the legal profession similarly situated in connection with the discharge of their responsibilities and breached their duty to exercise reasonable care and prudence in connection with those responsibilities.

Specifically, Defendants Menas and Cooper Levenson failed to advise plaintiffs that Defendants Menas, Ford, KDL, TNM, Theresa Menas, Walls, Borini, 322 West, were personally gained from the real estate transaction at issue, and that defendants would conspire, and ultimately deviate, and transfer a substantial amount of the funds paid by plaintiffs in pursuit in the aforesaid intended transactions and developments."

[P]laintiffs also assert that Defendant Cooper Levenson's negligent supervision of its attorney's trust account does not require the explanation of a legal expert." Id., at 23.
…

THE COURT: Plaintiffs assert that the court does not need to decide this case under any particular

subparagraph of Rule 4:50-1. But in particular, highlight Subparagraph D, and Subparagraph F.

THE COURT: In opposition to the motion, defendants argue that plaintiffs motion for relief under Rule 4:50-1 is improper, and really is a motion for reconsideration in the guise of a motion for relief under Rule 4:50-1.
Under either rule, plaintiff – defendants contend that plaintiffs do not meet the criteria for reconsideration. Defendants also argue that defendants (sic) motion fails in that they have failed to show exceptional circumstances, or that the enforcement of the order would be unjust, oppressive, or inequitable.

Defendants argue that none of those predicate circumstances are present here. They contend that both the motion and the order were properly served and that plaintiff has failed to establish that newly discovered evidence exists or that reversal is justified, because of fraud mistaken, inadvertent surprise, or excusable neglect.

Substantively, defendants argue that the court correctly decided the motion asserting that an affidavit of merit was required under these circumstances, and that an affidavit of merit was required for all of the causes of action, regardless of how labeled, because all of them are based on alleged acts of legal malpractice.
…

Plaintiffs in the reply brief stated as follows:

"The grave and blatant exceptional circumstances in this matter are:

> One, an entire complaint including non-legal malpractice claims, has been dismissed for failure to provide an AOM, which only applies to legal malpractice.
>
> Two, legal malpractice claims, which fall under the common knowledge exception, have been dismissed for failure to provide an AOM when no AOM was necessary as a matter of law.
>
> In fact, three, the improper dismissal with prejudice of an entire action and/or certain claims within that action amounts to circumstances which are exceptional and cause a grave injustice on plaintiffs." Id.
> Plaintiffs again argue that an – an affidavit of merit was not necessary here, because "the transactions at issue are only the setting in which Defendants Menas -- Menas and Cooper Levenson committed the blatant readily apparent wrongful actions that amount to legal malpractice, fraud, tortious interference, and conspiracy to commit fraud, and tortious interference.
>
> A jury will not be called upon to understand the complexity of the underlying transactions to recognize that Defendants Menas and Cooper Levenson improperly transferred and stole money." Id., at 3.

(1T:14:4-19:6.).

Having reviewed the moving papers, the Court agreed with the position of Menas and the Cooper Levenson firm that the Motion, presented as one under R. 4:50-1, was actually a Motion for Reconsideration of the Court's dismissal Order. (1T:23:6-11). The Court then held that plaintiffs' Motion to Reinstate and vacate the Order of Dismissal of January 19, 2016 would be

denied, and that considering the issues under either a R. 4:50-1 standard or a R. 4:49-2 standard, an Affidavit of Merit was required under the circumstances. (1T:24:25-25:9).

The Court noted that the plaintiffs did not attribute the failure to provide an Affidavit of Merit to Extraordinary Circumstances. Rather, they asserted that no Affidavit was required. (1T:28:21-29:3).

The Court determined that "in none of the cases cited by plaintiff under the common knowledge exception come anywhere close to the complexity of the issues that would have to be put before a fact finder". (1T:34:9-12). Judge Gummer found that "even how plaintiffs characterize the causes of action, again, make it clear to the Court of the need for an affidavit of merit, and made it clear to the Court that the allegations do not fall within the common knowledge exception." (1T:35:9-14). The Court provided a specific reference to page 22 of the plaintiffs' moving brief in support of this position. (1T:35:15-17). The Court also provided further analysis of the plaintiffs' brief setting forth why the Motion to Vacate the January 19, 2016 Order would not be granted. (1T:36:4-37:2). The Court provided a detailed analysis concerning the counts not labeled as legal malpractice, determining that an Affidavit of Merit was needed, pursuant to the analysis of Couri v. Gardner,

173 N.J. 328 (2002) and that the dismissal of the entire Complaint was appropriate. (1T:37:13- 41:8).

Judge Gummer further stated that:

> It was the same allegation of what these defendants did or failed to do that formed the premise of the remaining counts of the Complaint, and—and not any separate or distinct factual predicate.

(1T:21:13-17).

The trial court found that the common knowledge exception did not apply in this case:

> THE COURT: The—in the first count, plaintiffs identify three ways in which defendants allegedly breached their duty to defendants allegedly breached their duty to… [plaintiffs], and failed to meet the standard of care required by those engaged in the legal profession.
> Reviewing each of those, it's—again, as I said, it's clear to the court that they do not fall within the common knowledge exception.

(1T:32:18-25; 33:1.)

Also, the trial court stated as follows concerning plaintiffs' claims pertaining supervision of the attorney trust account:

> THE COURT: I -- on Page 23, plaintiffs assert that Cooper Levenson's negligent supervision of the attorney trust account would not require the explanation of a legal expert.

> I -- I -- again, they -- they cite no case law that supports that proposition. And of course, there are a number of rules that address an attorney's obligation, or law firm's obligation with respect to its attorney trust account.
> So, again, respectfully, I -- I just cannot see how that would be within the ken of a -- of a juror.
>
> THE COURT: It's not a situation where a deadline was missed. It's not a situation where there was a failure to file a motion timely. It's not a case where there was a failure to relay a settlement offer, for example. It's not simply a failure to produce an expert witness in a trial. It's - it's not that simple.

(1T:36:4-23.)

The Court stated as follows concerning its application of the standard set forth in the Couri matter:

> THE COURT: with respect to the issue as to the remaining counts against Defendants Menas and Cooper Levenson, both sides asserted that the court should be guided by the Couri v. Gardner case, 173 N.J. 328 (2002).
>
> THE COURT: In that case, the court addressed the affidavit of merit statute.
>
> THE COURT: And specifically addressed whether that -- whether the affidavit of merit statute could be applicable to a breach of contract claim.
>
> The court there found that "it is not the label placed on the action that is pivotal, but the nature of the legal inquiry. Accordingly, when presented with a tort or contract claim asserted against a professional specified in the statute, rather than focusing on whether the

claim is denominated as tort or contract, attorneys and courts should determine if the claims underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession. If such proof is required, an affidavit of merit is required for that claim, unless some exception applies." Id. at 340.

THE COURT: "a claimant should determine if the underlying factual allegations of the claim require proof a deviation from the professional standard of care for that specific profession."

Applying that standard to the remaining claims, the court respectfully denies the motion, and maintains its dismissal of the remaining claims.

Again, I'm guided by what is specifically pled. And in reviewing this matter again, it was clear to the court that really the factual predicates for the legal malpractice claims and the non-legal malpractice claims remain the same.

Plaintiff - plaintiffs do not identify either in their pleading or in their briefs in support of this motion a -- a factual predicate that applies only to the purported non-malpractice claims and not to the legal malpractice claims.

So, for example, in the fourth count, how these defendants conducted themselves with respect to the transactions, with respect to the agreements, how these lawyers conducted themselves in connection with their clients, again, would require an expert to set forth the standard of care as to what someone in the profession should or should not do.

> With respect to fraud, again, here, this is the fifth count, plaintiffs allege that defendants engaged in fraud by misrepresenting the true status of the transactions, events, terminations of the agreements, assignments, and on from there.
>
> That allegation in Paragraph 3 of Count --the fifth count, really is saying effectively the same thing that plaintiffs say in the first count in Subparagraphs A through E, as well as the third paragraph of Count 3, in which plaintiffs, again, allege as to a number of allegations as to how these defendants failed to – provide certain information, failed to timely advise them of certain aspects regarding the transactions, and the structures of the transactions, and the interrelationship between the parties.
>
> It -- it really all goes back to that set of allegations which, as I've said, would require an expert to set forth the standard of care.
> The conversion, as I've noted, the use of an attorney trust account would require an expert to talk about law firm and attorneys responsibilities with respect to the trust account.
>
> With respect to the seventh count, in terms of conspiracy, again, that relates, to the defendants conduct in these transactions, what they should have -- what information they should have relayed, what action they should have taken, should not have taken.
>
> And again, as I've set forth that, again, it's effectively the same wrongful acts or inactions that are alleged in connection with the legal malpractice claims for which the court has found an expert would be necessary.

(1T:37:13-40:21).

Plaintiffs then filed a Motion for Reconsideration of Judge Gummer's November 10, 2016 Order. (Da1). Judge Gummer conducted oral argument of this Motion for Reconsideration on December 16, 2016 and denied Plaintiffs' Motion by order of December 20, 2016.

Following the above motion practice, plaintiffs filed a First Amended Complaint on December 21, 2016 and a Second Amended Complaint on February 13, 2017.

On February 28, 2018, plaintiffs filed a Motion to Vacate the Order of Judge Gummer of November 10, 2016 and again moved to Reinstate the Complaint against Nicholas Menas, Esq. and Cooper Levenson. (187a) On March 29, 2018, Judge Gummer held oral argument on plaintiffs' Motion to Vacate the November 10, 2016 Order (2T) and on April 3, 2018, Judge Gummer entered an Order denying plaintiffs' Motion to Vacate the Order of November 10, 2016. (188a). During the March 29, 2018 oral argument, Mr. DePierro, on behalf of the plaintiffs, argued:

> **[Now] we know that Mr. Menas is actually TNM, and we only found out about this also recently, of concealment, and misrepresentation, and quite outright perjuries, now we know that Mr. Menas was the managing member and sole managing member of TNM.** And TNM got over half the money, the million four was almost equally divided between TNM and KDL. KDL was Eric Ford and TNM was

> Nicholas Menas. And the money from TNM then was transferred, back to back transfers, into the personal bank account of Nicholas Menas and Theresa Menas. There was no legal work here. There's no—the issue of, well, was it a complex legal issue, because that's the thread, as the Court says, that runs through is that there was no—where there is no complex legal issue you don't need an affidavit of merit for legal malpractice claims. In this case here there is no legal issue. There was no legal issue…
> THE COURT: Then why did you plead one?
> ….
> MR. DEPIERRO: At the time we—we didn't have this—this is newly discovered evidence. We didn't have Mr. Walls, who provided this information, saying that—I didn't—I didn't even know.

(2T:61:13-62-13.)

The newly discovered evidence cited by plaintiff during the March 29, 2018 oral argument dealt with the alleged ownership of TNM. (2T:67: 7-9.). During the March 29, 2018 oral argument, the Court denied plaintiffs' Motion to Vacate, holding:

> COURT: I don't see any reason to revisit that. I'm going to deny the motion. Whether it's—whether this is deemed as simply another motion for reconsideration under 4:49-2, which is really what it appears to be, in reality, or under 4:50-1, it really is just asking the Court to revisit its decision, but in doing so fails to address the extensive analysis that the Court conducted under Couri v. Gardner, 173 N.J. 328.
>
> As required under Couri v. Gardner, the Court did an extensive analysis of the allegations in that case, or

> the allegations in the case, and came to the conclusion -- the conclusions that the Court came to. And plaintiff has not articulated any basis other than taking what seems to be yet another bite at the apple that would prompt the Court to revisit that extensive analysis.
>
> Plaintiff asserts that there is new evidence, but again, I have to look at the factual allegations pled, and I don't see any basis to vacate the Court's order on that argument. I'm denying the motion.

(2T:68:7-69:2)

On August 8, 2018, Plaintiffs filed a Third Amended Complaint (incorrectly captioned as "Second Amended Complaint"), which (among other things) added Michael Brestle as a Defendant. (776a). On December 4, 2019, Plaintiffs sought leave to file another (fourth) Amended Complaint to re-join Nicholas Menas, Cooper Levenson, and Pork Chop Hill Associates, LLC ("PCHA") as parties and assert "new" tort and legal malpractice claims against Menas and Cooper Levenson, among others. (320a). Plaintiffs' Motion for Leave was based on alleged "newly discovered evidence", alleging that they have discovered that Mr. Menas was allegedly the sole owner of TNM Development Consulting, LLC. Mr. Menas and Cooper Levenson filed a Brief in Opposition to plaintiffs' Motion for Leave to File a Fourth Amended Complaint arguing that plaintiffs raised these same arguments before and the Court previously rejected these arguments numerous times. This Court, after

hearing oral argument on January 24, 2020, denied plaintiffs' Motion for Leave to File a Fourth Amended Complaint. (376a).

On March 4, 2020, Plaintiffs instituted the 2020 Lawsuit. (Da5).

On August 28, 2020, Judge Zazzali Hogan issued her Order dismissing plaintiffs' Amended Complaint, with prejudice, as to the Cooper Levenson defendants, and issued a comprehensive Opinion supporting her decision. (Da72).

On September 15, 2020, the Cooper Levenson Defendants, in the 2020 Lawsuit, filed a Motion for Fees and Sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. (Da94).

On January 25, 2022, the trial court granted the Cooper Levenson Defendants' Motion for Fees and Sanctions. (Da96).

After Plaintiffs were unsuccessful in their 2020 Lawsuit and after Plaintiffs settled the claims with the remaining defendants in this case, this appeal followed. (465a and 472a).

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT SINCE THE LEGAL MALPRACTICE CLAIMS AGAINST THE COOPER LEVENSON DEFENDANTS DID NOT FALL UNDER THE COMMON KNOWLEDGE EXCEPTION TO THE AFFIDAVIT OF MERIT STATUTE (50a-51a)

In Plaintiff's first argument, Plaintiffs asserts that the trial court erred in finding that the legal malpractice claims against the Cooper Levenson Defendants did not fall under the common knowledge exception to the Affidavit of Merit statute, N.J.S.A. 2A:53A-27. (50a-51a).

The substance of plaintiffs' allegations against the Cooper Levenson Defendants makes it clear that the trial court properly found that this is a case arising out of the Cooper Levenson Defendants' role as an attorney providing services in connection with a series of complex real estate transactions. This is not a case, for instance, of a claim for injuries suffered by the plaintiff as a result of a slip and fall accident at the office of the Cooper Levenson Defendants. The claims in the Complaint require proof of a deviation from the standard of care and, therefore, an Affidavit of Merit was required to be provided within the timeframe set forth by statute.

N.J.S.A. 2A:53A-27 requires a plaintiff to serve an Affidavit of Merit in matters alleging malpractice or negligence of a professional. Failure to

provide the Affidavit of Merit in accordance with the statute mandates dismissal of the Complaint for failure to state a cause of action. N.J.S.A. 2A:53A-29.

The "common knowledge" exception to the Affidavit of Merit Statute does not apply to the instant matter, contrary to plaintiffs' assertion. Therefore, the trial court properly held that this case did not fall within the common knowledge exception to the Affidavit of Merit Statute.

The common knowledge doctrine allows a plaintiff to proceed with a malpractice action against a licensed professional without expert testimony. Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). It is only applied in cases where "the issue of negligence is not to technical matters peculiarly within the knowledge of [the licensed practitioner]." Sanzari v. Rosenfeld, 34 N.J. 128, 142 (1961). In other words, "the carelessness of the defendant [must be] readily apparent to anyone of average intelligence and ordinary experience." Rosenberg, 99 N.J. at 325. "In such a case the jury itself is allowed 'to supply the applicable testimony relative thereto: "Ibid. Such a case is essentially transformed into "an ordinary negligence case," which the jury resolves by reaching into "its fund of common knowledge." Sanzari, 34 N.J. at 141-142.

"Nevertheless, it is the unusual professional malpractice case in which the common knowledge doctrine can be invoked." Rosenberg, 99 N.J. at 325.

During the November 10, 2016 oral argument on plaintiffs' Motion to Vacate the Order of January 19, 2016, the trial court opined on plaintiffs' claims pertaining supervision of the attorney trust account:

> THE COURT: I -- on Page 23, plaintiffs assert that Cooper Levenson' s negligent supervision of the attorney trust account would not require the explanation of a legal expert.
>
> I -- I -- again, they -- they cite no case law that supports that proposition. And of course, there are a number of rules that address an attorney's obligation, or law firm's obligation with respect to its attorney trust account.
>
> So, again, respectfully, I -~ I just cannot see how that would be within the ken of a -- of a juror.
>
> THE COURT: It's not a situation where a deadline was missed. It's not a situation where there was a f failure to file a motion timely. It's not a case where there was a f failure to relay a settlement offer, for example. It's not simply a f failure to produce an expert witness in a trial. It's -~ it's not that simple.

(1T:36:4-23)

The trial court stated as follows concerning its application of the standard set forth in the Couri matter:

THE COURT: with respect to the issue as to the remaining counts against Defendants Menas and Cooper Levenson, both sides asserted that the court should be guided by the Couri versus Gardner case, 173 N.J. 328, 2002.

THE COURT: In that case, the court the affidavit of merit statute.

THE COURT: And specifically addressed whether that -- whether the affidavit of merit statute could be applicable to a breach of contract claim.

The court there found that "it is not the label placed on the action that is pivotal, but the nature of the legal inquiry. Accordingly, when presented with a tort or contract claim asserted against a professional specified in the statute, rather than focusing on whether the claim is denominated as tort or contract, attorneys and courts should determine if the claims underlying f actual allegations require proof of a deviation from the professional standard of care applicable to that specific profession. If such proof is required, an affidavit of merit is required for that claim, unless some exception applies." Id., at 340.

THE COURT: See also Id., at 341 (a claimant -- "a claimant should determine if the underlying factual allegations of the claim require proof a deviation from the professional standard of care for that specific profession."

Applying that standard to the remaining claims, the court respectfully denies the motion, and maintains its dismissal of the remaining claims. Again, I'm guided by what is specifically pled. And in reviewing this matter again, it was clear to the court that really the factual predicates for the

> legal malpractice claims and the non-legal malpractice claims remain the same.

(1T:37:13-40:21)

The trial court properly held that this is a legal malpractice matter in which the Plaintiffs' claims needed to be supported by a competent expert report and testimony. The trial court properly held that this is not a case in which the "common knowledge" exception has any application and the trial court was correct in dismissing the matter because the Plaintiffs failed to serve an Affidavit of Merit within the time permitted under the statute.

The Plaintiffs' reliance upon the matter of Bender v. Walgreen E. Co., 399 N.J. Super. 584 (App. Div. 2008) is misplaced and does not support the Plaintiffs' argument. The underlying matter in Bender was a claim that the pharmacy breached its duty of care to the plaintiff by giving him a drug other than the one listed on the prescription he presented. The Appellate Division concluded that the claim of professional negligence based on the pharmacist's filling a prescription with a drug not prescribed fell within the common knowledge exception. However, expert testimony would be necessary to establish plaintiff's claims based on the pharmacist's failure to recognize the impropriety of the dosage in the medication delivered and failure to provide adequate information or warnings. Bender has no bearing upon the analysis of

the instant matter. Bender was not a legal malpractice case. Certainly, the plaintiffs, by citing Bender, are simply grasping at straws to equate the erroneous alleged error of a pharmacist in filling a prescription to the work done by the Cooper Levenson Defendants in the underlying, complex land use/acquisition transactions.

Plaintiffs' reliance upon Sommers v. McKinney, 287 N.J. Super. 1 (App. Div. 1996) is also misplaced. The Sommers matter involved the Appellate Division's reversal of the Trial Court's decision to grant summary judgment for plaintiff's failure to provide a legal malpractice expert report. The allegations in Sommers included the failure to submit a legal argument in a trial Brief in support of the client's claim for tenure in an employment action; failure to report settlement negotiations accurately and a failure to tell the client that the adversary had no defense to certain claims. The Appellate Division held that plaintiff "is not required to produce an expert to announce that an attorney may not charge for work that has not been performed or to advise the jury that a trial brief does not exist." Sommers, at 287 N.J. Super 12. The Sommers matter involved evaluation of the Defendant lawyer's handling of a civil litigation matter. The facts and issues raised in Sommers are not complex

issues like those raised in the instant matter against the Cooper Levenson Defendants.

The Sommers opinion held that expert testimony is necessary for trial of a legal malpractice arising from a complex commercial transaction. Sommers, at 287 N.J. Super. 12, citing, 2175 Lemoine Ave. Corp. v. Finco, Inc., et. al, 272 N.J. Super 478, 490 (App. Div. 1994). The matter at issue is clearly a complex commercial transaction which requires expert testimony. Therefore, an Affidavit of Merit should have been filed and served.

Plaintiffs' reliance on Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168 (App. Div. 2015), is also misplaced. Mazur was a medical malpractice nursing home case wherein the Complaint alleged negligence, malpractice, negligent hiring, negligent supervision, and negligent training. The core allegation was that defendants' untimely diagnosis and treatment of a stroke deviated from the standard of care. The negligent hiring count incorporated the allegations as to Dr. Shah and plaintiff argued that Dr. Shah deviated from the standard of care when caring for the patient.

Plaintiff did file an Affidavit of Merit in Mazur, issued by Dr. Mehlman, stating that the standard of care was not met, and that the nursing teams and Dr. Shah's deviations contributed to the patient's debilitating condition. Dr.

Mehlman was certified in emergency and internal medicine. Dr. Shah filed an Answer, stating that his field of specialty was geriatrics, that he was Board Certified in geriatrics, and that the treatment involved geriatrics. However, the statement that Shah was Board Certified was false. Although he was once Board Certified in geriatrics, he was not certified for several years or more before he began to treat the plaintiff.

Also, a month before the Ferreira conference, Dr. Shah's counsel sent a letter to plaintiff's counsel stating that Dr. Shah was treating the plaintiff as a Board Certified geriatric specialist and, therefore, Dr. Mehlman was not qualified, as an emergency room physician, to offer the Affidavit.

On the Motion to Dismiss, the Certification of defense counsel repeated the false assertion that Dr. Shah was Board Certified in geriatric medicine. They attached an internet printout, stating that Shah's Board Certification in internal medicine expired on December 31, 2006, and his Board Certification in geriatric medicine expired on December 31, 2008. Both the Court and counsel overlooked those dates. The Trial Court granted the Motion to Dismiss on the basis that plaintiff's affiant was not Board Certified in geriatrics. The Trial Court based its decision of defendant Shah's Motion on false statements in his Answer, his attorney Certification, and his Brief, as well as incompetent

evidence. Accordingly, the Appellate Division reversed the Order dismissing the Complaint against the Lutheran defendants, which owned the facility where the malpractice occurred.

In plaintiffs' instant case before this Court, the Motion to Dismiss decision by the trial court was not based upon an inadequate or insufficient Affidavit of Merit. No Affidavit of Merit was ever filed. Therefore, the trial court's decision to grant the Cooper Levenson Defendants' Motion to Dismiss, with prejudice, should be affirmed.

Additionally, the other cases cited by plaintiffs such as Brizak v. Needle, 239 N.J. Super. 415 (App. Div.) certif. denied, 122 N.J. 164 (1990), (failure to protect client's claim against the running of the statute of limitations); Stewart v. Sbarro, 142 N.J. Super. 581, certif. denied, 72 N.J. 459 (1976) (attorney's failure to ensure that a bond and a mortgage were properly recorded); and Popwell v. Law Offices of Broome and Horn, 363 N.J. Super. 404 (Law Div. 2002) (Plaintiff's failure to file an application for trial de novo from an adverse arbitration decision) do not serve to support Plaintiffs' position that no Affidavit of Merit was required in this complex real estate transaction handled by the Cooper Levenson Defendants. In fact, plaintiff's citation to Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo,

345 N.J. Super. 1, 13 (App. Div. 2001), rev'd on other grounds, 211 N.J. 230 (2012), actually supports the Cooper Levenson Defendants' position. The alleged facts presented in this matter certainly implicate the standard of care as to the Cooper Levenson Defendants' "legal judgment concerning a complex issue" which would require expert testimony.

In Hubbard v. Reed, 168 N.J. 387, 390 (2001), the Court held "that the common-knowledge doctrine applies where jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine the defendant's negligence without the benefit of the specialized knowledge of experts." Id. at 394. Plaintiffs' claim and the issues raised in this appeal is not a case against an attorney where the duty is so basic that it may be determined by the Court as a matter of law. In legal malpractice cases, expert evidence is not required to establish the attorney's duty of care only when the duty is so basic that it may be determined by the Court as a matter of law. Brizak v. Needle, 239 N.J. Super. 415 (App. Div.) certif. denied, 122 N.J. 164 (1990). For example, an attorney who fails to protect a client's claim against the running of the statute of limitations would be an example of when an Affidavit is not necessary. However, as noted in Brizak, "where the attorney has undertaken some investigation, a jury will rarely be able to evaluate its

adequacy without the aid of expert legal opinion." Brizak, 239 N.J. Super. at 432.

Also, as the Supreme Court cautioned in Hubbard:

> Although we hold today that there is a common-knowledge exception to the Affidavit of Merit statute, we construe that exception narrowly in order to avoid non-compliance with the statute. Indeed, the wise course of action in all malpractice cases would be for plaintiffs to provide Affidavits even when they do not intend to rely on expert testimony at trial. In most such cases, expert testimony will be required to establish both a standard of care and breach of that standard by the Defendant, and a plaintiff who fails to present testimony could be subject to involuntary dismissal pursuant to R. 4:37-2(b). [Hubbard, super., 168 N.J. at 397.]

Plaintiffs' arguments raised in this Appeal only serve to support the Cooper Levenson Defendants' position that the underlying transaction was a complex legal matter that certainly required an Affidavit of Merit. Plaintiffs' recitation of the facts of this case alone, with the description of a series of structured transaction and the Cooper Levenson Defendants' service as legal counsel, implicate the standard of care and show that an Affidavit of Merit was necessary.

Therefore, the trial court properly dismissed plaintiffs' Complaint against the Cooper Levenson Defendants, with prejudice, for plaintiffs' failure to file and serve Affidavits of Merit in this case. (41a). The trial court also

properly held that the legal malpractice claims against the Cooper Levenson Defendants do not fall under the common knowledge exception to the Affidavit of Merit Statute.

Accordingly, this Court should affirm the dismissal of plaintiffs' Complaint as to the Cooper Levenson Defendants.

II. THE TRIAL COURT PROPERLY HELD THAT ALL OF THE CLAIMS AGAINST THE COOPER LEVENSON DEFENDANTS SOUNDED IN LEGAL MALPRACTICE WHICH REQUIRED THE FILING AND SERVING OF AFFIDAVITS OF MERIT (50a-51a)

In this appeal, the plaintiffs attempt to label certain causes of action to evade the requirements of the Affidavit of Merit Statute, despite the fact that these attempts were rejected by the trial court and fully explained in a well reasoned and comprehensive opinion. Such labeling is prohibited pursuant to the matter of Couri v. Gardner, 173 N.J. 328 (2002).

The plaintiffs continued attempt to label certain causes of action to evade the requirements of the Affidavit of Merit Statute is prohibited pursuant to the matter of Couri v. Gardner, 173 N.J. 328, (2002). The Supreme Court held in Couri that it is not the label placed on the action that is pivotal, but the nature of the legal inquiry. Couri, 173 N.J. at 340. In Couri, Justice Zazzali noted that when a Court is faced with a tort or contract claim against a professional, rather than focusing on whether the claim stems from either tort

or contract, attorneys in the Court should determine if the claim's factual allegations require proof of a deviation from the professional standard of care applied to that profession. Couri, 173 N.J. at 340. The Court noted that if such proof is required, then an Affidavit of Merit is required. Id.

As can be seen in Couri, and acknowledged by the trial court in the November 10, 2016 Opinion denying plaintiffs' Motion to Vacate the Dismissal Order of January 19, 2016, an action need not be exclusively styled as one for malpractice or negligence for the Affidavit of Merit Statute to apply when the proofs require that the attorney deviated from the professional standard of care. In the filed Complaint, the plaintiffs set forth in Counts 1-3 against the Cooper Levenson Defendants claims for legal malpractice. This is how the plaintiffs chose to present these claims and an Affidavit of Merit is clearly required. Further, the plaintiffs set forth at Counts 4 through 7 claims that are grounded in legal malpractice, and are simply labeled in the guise of tortious interference (Fourth Count); fraud (Fifth Count); and conversion (Sixth Count). (1a).

The facts set forth in the Complaint implicate the standard of care as the work of the Cooper Levenson defendants in connection with a series of complex real estate transactions. The standard of care is implicated as to the

handling of the transactions; communications with individuals; and the alleged recommendations made. Further implicated are actions pertaining to the disbursal of funds from the Cooper, Levenson Trust Account. The work at issue is clearly legal work done by the Cooper Levenson Defendants. Any other characterization of this work is merely an attempt to label the causes of action to avoid Plaintiffs' obligation to have provided a timely Affidavit of Merit. The work performed by the Cooper Levenson Defendants is the type of work commonly performed by land use attorneys and clearly requires proof of a deviation from the professional standard of care.

In Nuveen Municipal Trust v. Withum, Smith & Brown, P.C., 752 F.3d 600 (3rd Cir. 2012), the Third Circuit held that if the claimant's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession, an Affidavit of Merit is required for that claim, unless some exception applies. In Nuveen, plaintiff alleged that an accounting firm committed accounting malpractice and fraud and that a law firm committed legal malpractice and negligent misrepresentation. Id. The factual allegations in Nuveen were as follows: Nuveen, which is a Municipal Bond Fund, purchased the Bond Anticipation Note from Bayonne Medical Center. Id. In connection with the transaction, Bayonne provided Nuveen with

an audit report authored by Bayonne's accounting firm, Withum, Smith & Brown, P.C. ("Withum"), and an opinion letter authored by Bayonne's counsel, Lindabury McCormick Estabrook & Cooper, P.C. ("Lindabury"). Id. Soon after the transaction, Bayonne filed a Chapter 11 Bankruptcy Petition. Nuveen alleged that the audit report and opinion concealed aspects of Bayonne's financial condition and, had it known about those financial issues, plaintiff would not have purchased the Bond Anticipation Note: Nuveen filed the action alleging negligent misrepresentation and fraud as to Withum and negligent misrepresentation and malpractice as to Lindabury. Id. The District Court dismissed the action with prejudice based upon Nuveen's failure to file an Affidavit of Merit and the Third Circuit affirmed. In affirming the District Court's decision, the Third Circuit relied on Couri v. Gardner, 173 N.J. 328 (2002). The Third Circuit in Nuveen held that:

> [t]he problem for Nuveen is that in New Jersey an action need not be styled as one for malpractice or negligence for the AOM Statute to apply.

Rather, in Couri, the New Jersey Supreme Court explained that:

> [i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry. Accordingly, when presented with a tort or contract claim asserted against a professional specified in a Statute, rather than focusing on whether the claim is denominated as tort or contract, attorneys in Court should determine if the

> claimant's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession. If such proof is required, an Affidavit of Merit is required for that claim, unless some exception applies. 173 N.J. at 340, 801 A.2d at 1141.

Therefore, plaintiffs cannot simply attempt to label certain causes of action to evade the requirements of the Affidavit of Merit Statute, despite the fact that these attempts were rejected by the trial court and fully explained in a well reasoned and comprehensive opinion.

Accordingly, this Court should affirm the decisions of the trial court, which dismissed plaintiffs' claims against the Cooper Levenson Defendants, with prejudice.

III. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION TO AMEND THE COMPLAINT SINCE PLAINTIFFS' ARGUMENTS CITING "NEWLY DISCOVERED EVIDENCE" WERE PRESENTED AND REJECTED BEFORE (376a-377a)

In plaintiffs' Appellate submission, similar to numerous arguments made before the trial court, plaintiffs argue that the "new" legal malpractice claims against the Cooper Levenson Defendants were not and could not have been known or claimed prior to the dismissal of the previous claims, because these "new" claims allegedly arose solely out of Mr. Menas' ownership of TNM.

However, this point was argued in connection with plaintiffs' unsuccessful Motion to Amend the Complaint, plaintiffs' unsuccessful Motion for Reconsideration of the Court January 24, 2020 Order denying plaintiffs' Motion to Amend the Complaint (376a) and was argued in the 2020 Lawsuit filed by plaintiffs (Da5), which was promptly dismissed and which led to attorneys fees and sanctions being awarded to counsel for the Cooper Levenson Defendants and against plaintiffs and their counsel. (Da98).

Plaintiffs' allegation of "newly discovered evidence" was first considered by the trial court in connection with plaintiffs' February 28, 2018 Motion to Vacate the Order of Judge Gummer of November 10, 2016[2] (which denied plaintiffs' Motion to Vacate the January 19, 2016 dismissal order). (50a).

On March 29, 2018, Judge Gummer held oral argument on plaintiffs' Motion to Vacate the November 10, 2016 Order (2T) and on April 3, 2018, Judge Gummer entered an Order denying plaintiffs' Motion to Vacate the

[2] In the Statement of Facts section, Plaintiffs cite to the testimony of William Russo, which are baseless *ad hominum* attacks on Mr. Menas, and have no relevance to this case. The content of the Russo complaint was renounced by Mr. Russo prior to his death which led to the filing of a complaint by Mr. Russo's estate against Giovanni DePierro for his handling of the Russo matter. (831a).

Order of November 10, 2016. (Exhibit "O".) During the March 29, 2018 oral argument, Mr. DePierro, on behalf of the plaintiffs, argued:

> **[Now] we know that Mr. Menas is actually TNM, and we only found out about this also recently, of concealment, and misrepresentation, and quite outright perjuries, now we know that Mr. Menas was the managing member and sole managing member of TNM.** And TNM got over half the money, the million four was almost equally divided between TNM and KDL. KDL was Eric Ford and TNM was Nicholas Menas. And the money from TNM then was transferred, back to back transfers, into the personal bank account of Nicholas Menas and Theresa Menas. There was no legal work here. There's no—the issue of, well, was it a complex legal issue, because that's the thread, as the Court says, that runs through is that there was no—where there is no complex legal issue you don't need an affidavit of merit for legal malpractice claims. In this case here there is no legal issue. There was no legal issue…
>
> THE COURT: Then why did you plead one?
> ….
> MR. DEPIERRO: At the time we—we didn't have this—this is newly discovered evidence. We didn't have Mr. Walls, who provided this information, saying that—I didn't—I didn't even know.

(2T:61:13-62-13.)

The newly discovered evidence cited by plaintiff during the March 29, 2018 oral argument dealt with the alleged ownership of TNM. (2T:67:7-9.). However, everything that plaintiff cited to alleging "newly discovered evidence" to support their new theory had been known or knowable to

plaintiffs even before the 2015 case was even filed. Specifically, plaintiffs claim that a mortgage that was filed in 2008 and a bank signature card that was signed in 2008, which has been in plaintiffs' possession since 2014 through discovery in the Schwartz v. Menas[3] matter, revealed that Mr. Menas is actually TNM. This argument was rejected by Judge Gummer during the March 29, 2018 oral argument. (2T). Additionally, numerous times in the 2015 case, plaintiffs cited to an Affidavit of Title executed by Nicholas Menas on behalf of TNM Development. (622a). However, the information included in this Affidavit of Title was redundant to the other documents (mortgage and bank signature card) that plaintiffs had in their possession even before the filing of the 2015 case. (1a). Therefore, the Cooper Levenson Defendants properly argued before the trial court that the "newly discovered evidence" allegation held no merit for the Court to permit the Amended Complaint. The trial court agreed on March 29, 2018 and held:

> COURT: I don't see any reason to revisit that. I'm going to deny the motion. Whether it's—whether this is deemed as simply another motion for reconsideration under 4:49-2, which is really what it appears to be, in reality, or under 4:50-1, it really is just asking the Court to revisit its decision, but in doing so fails to address the extensive analysis that the Court conducted under Couri v. Gardner, 173 N.J. 328.

[3] The Schwartz matter was under Docket No. MON-L-3904-11.

> As required under Couri v. Gardner, the Court did an extensive analysis of the allegations in that case, or the allegations in the case, and came to the conclusion -- the conclusions that the Court came to. And plaintiff has not articulated any basis other than taking what seems to be yet another bite at the apple that would prompt the Court to revisit that extensive analysis.
>
> Plaintiff asserts that there is new evidence, but again, I have to look at the factual allegations pled, and I don't see any basis to vacate the Court's order on that argument. I'm denying the motion.

(2T:68:7-69:2)

The trial court properly held that there was no basis to vacate the prior Orders of the court since plaintiffs' claims of "newly discovery evidence" held no merit.

The trial court was correct in dismissing the claims against Mr. Menas and the Cooper Levenson firm and was correct in denying the repeated baseless efforts to reinstate those claims. Plaintiffs' appeal is simply another baseless attempt by plaintiffs to obtain a different result.

Therefore, the trial court properly denied plaintiffs' Motion to Amend the Complaint by properly holding that plaintiffs' arguments citing to "newly discovered evidence" was unpersuasive to permit the amendment late into discovery and with a trial date pending.

Accordingly, the January 24, 2020 Order of the trial court denying plaintiffs' Motion to Amend the Complaint should be affirmed.

CONCLUSION

For the reasons expressed above, the Cooper Levenson Defendants ask this Court to affirm various Orders of the trial court, including the following:

1. Order of January 19, 2016, Dismissing Plaintiffs' Complaint against Defendants Nicholas Menas, Esq., and Cooper Levenson (41a);

2. Order of November 10, 2016, Denying Plaintiffs' Motion to Vacate the Order of January 19, 2016 (50a);

3. Order of April 3, 2018, Denying Plaintiffs' Motion to Vacate the Order of January 19, 2016 (188a);

4. Order of January 24, 2020, Denying Plaintiffs' Motion to Amend the Complaint (376a); and

5. Order of December 16, 2020, Denying Plaintiffs' Motion to Reconsider the Order of January 24, 2020 (379a).

MARSHALL DENNEHEY
Attorneys for Defendants/Respondents, Nicholas Menas, Esquire & Cooper Levenson April Niedelman & Wagenheim, P.A.

/s/ John L. Slimm
BY:_____
JOHN L. SLIMM
JEREMY J. ZACHARIAS

Dated: April 26, 2023

JOHN FENDT, ALAN WOZNIAK, MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC and PCH ASSOCIATES, LLC, **Plaintiffs/Appellants,** **v.** **NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; MICHAEL BORINI; 322 WEST ASSOCIATES, LLC; JAMES WALLS; JOSEPH ROCCO, ESQ.; PEPPER HAMILTON, LLC; THERESA MENAS; TNM DEVELOPMENT CONSULTING, LLC; AND ABC CORPORATION 1-10, JOHN DOES 1-10, AND JANE DOES 1-10 (NAMES BEING FICTITIOUS AS TRUE IDENTITIES ARE UNKNOWN),** **Defendants/Respondents.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000354-22** **ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Docket No. Below: MON-L-3782-15** **Sat Below: Hon. Katie A. Gummer, J.S.C. Hon. Lourdes Lucas, J.S.C. Hon. Linda Grass Jones, J.S.C.**

BRIEF OF DEFENDANTS/RESPONDENTS JOSEPH ROCCO, ESQ. AND PEPPER HAMILTON LLP LEWIS BRISBOIS BISGAARD & SMITH, LLP

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PRELIMINARY STATEMENT

Respondents Joseph D. Rocco, Esq. ("Mr. Rocco") and Pepper Hamilton LLP ("Pepper Hamilton") hereby submit the following Respondents' brief and respectfully request that the trial court's grant of summary judgment in their favor be affirmed.

Appellants failed to present a scintilla of evidence capable of establishing that Mr. Rocco or Pepper Hamilton owed them a duty of care under the standards enunciated in Petrillo v. Bachenberg (governing when an attorney can be held liable to a non-client for professional negligence) or that Mr. Rocco or Pepper Hamilton ever made any misrepresentation to Appellants of any kind. The depositions of Appellants' own witnesses, in fact, conclusively established the opposite.

As explained within, Appellants in this case were the assignees of a contract to buy a parcel of land in Monroe Township, New Jersey. The assignor of the contract was a limited liability company called Pork Chop Hill Associates ("PCHA"). Appellants were represented by their own attorney, Nicholas Menas, Esq., in the assignment transaction. Joseph D. Rocco, Esq., who was an attorney at Pepper Hamilton at the time, served as counsel for the assignor (PCHA) in the assignment transaction.

Appellants obtained the assignment of rights that they bargained for from PCHA, but claim that their plan to profit from the development of the land in Monroe

Township failed because, according to them, defendant Pulte Homes reneged on a separate agreement to purchase the land from them once they obtained the re-zoning and performed the initial site work needed to develop the tract with single-family residences.

There is no dispute that Mr. Rocco did not represent either Appellants or Pulte Homes, and that he was not involved in Appellants' dealings with Pulte Homes in any way. Yet, Appellants sued Mr. Rocco and Pepper Hamilton for alleged legal malpractice. Appellants' claims were and still are frivolous, and the grounds for affirming the trial court's entry of summary judgment in favor of Mr. Rocco and Pepper Hamilton are straightforward.

Based on Appellants' unequivocal deposition testimony that (1) Mr. Rocco never provided any information or advice to them concerning the assignment or the land that was the subject of the assignment and that (2) they never relied upon Mr. Rocco's words or actions in any aspect of their transactions with PCHA or Pulte, the facts on record were incapable of establishing that Mr. Rocco or Pepper Hamilton owed them any legal duty. The trial court's grant of summary judgment in favor of Mr. Rocco and Pepper Hamilton should therefore be affirmed.

PROCEDURAL HISTORY

Appellants filed their original Complaint in the Superior Court of New Jersey, Burlington County, on June 11, 2015. 1a-25a. Venue was transferred to Monmouth

County on September 29, 2015. Appellants filed an Amended Complaint filed on December 21, 2016 and a Second Amended Complaint filed on February 17, 2017.

Appellants filed their Third Amended Complaint (mis-designated as the "Second Amended Complaint") on August 8, 2018. 776a-823a. The Tenth and Eleventh Counts of the Third Amended Complaint allege legal malpractice against Mr. Rocco and Pepper Hamilton. 820a-822a. The Third Amended Complaint lumps Mr. Rocco and Pepper Hamilton in with all of the other defendants in the headers of several other counts (see First Count (fraud), Second Count (Tortious Interference), Third Count (Conversion), Fourth and Fifth Counts (RICO), and Seventh Count (conspiracy to commit fraud, conversion, tortious interference)) but then does not mention them in any of the substantive factual allegations under those headers. 803a-812a, 814a-817a. For example, Appellants name Mr. Rocco and Pepper Hamilton in the header of the Seventh Count (conspiracy), but then do not identify Mr. Rocco or Pepper Hamilton as being among the alleged co-conspirators. 815a at ¶ 160 ("Menas and Defendants Ford, Pulte, KDL, TNM, Theresa Menas, James Walls, Borini and 332 West acted in concert to commit fraud, consumer fraud, conversion and tortious interference") and ¶ 162 (identifying "[a]ll of the co-conspirators" as being "Defendants Ford, Pulte, KDL, TNM, Theresa Menas, James Walls, Michael Brestle, Michael Borini and 332 West" but **not** Mr. Rocco or Pepper

Hamilton). The Third Amended Complaint is replete with slipshod and mostly unintelligible allegations.

Mr. Rocco and Pepper Hamilton moved for summary judgment on August 8, 2020. 766a-767a. By that time, Appellants had enjoyed the benefit of an extremely long discovery period (1839 days) to attempt to support their claims. The trial court heard oral argument on December 3, 2021 and issued an order and written decision on December 9, 2021 granting Mr. Rocco and Pepper Hamilton summary judgment. 381a-382a. Appellants then filed a motion for reconsideration, which was heard by the trial court and denied on January 21, 2022. 463a-465a.

STATEMENT OF FACTS

Appellants' convoluted claims are set forth in their Third Amended Complaint (though filed as a "Second Amended Complaint," Appellants had amended their pleading three (3) times). 776a-823a.

Appellants' Third Amended Complaint contained a "Statement of Facts" consisting of one hundred and six (106) separate paragraphs describing a transaction in which the Appellant Monroe Township Development Corp. ("MTDC") purchased an assignment from PCHA to become the contract purchaser of a parcel of undeveloped land in Monroe Township called the "Pork Chop Hill Assemblage." Appellants (MTDC and its owners, John Fendt and Alan Wozniak) alleged that the real estate development project that they envisioned for the Pork Chop Hill

Assemblage never came to fruition and that, as a result, they lost millions of dollars. 778a-803a.

Mr. Rocco and Pepper Hamilton were mentioned in only **3** of the 106 paragraphs comprising the "Statement of Facts" in the Third Amended Complaint. 789a-790a at ¶¶ 70-72. The contents of those limited allegations are discussed in the following pages. Pages 5-6, infra. This paragraph, however, will summarize the allegations of the Third Amended Complaint in general. As highlighted above, Appellants claimed that PCHA was the contract purchaser of the Pork Chop Hill Assemblage under a contract of sale with the McTague family (the "McTague Contract"); that MTDC entered into a series of assignment agreements with PCHA whereby PCHA assigned to MTDC, in consideration for payment of certain specified amounts, PCHA's right to purchase the subject land under the McTague Contract; and that MTDC (and the individual Appellants, as owners of MTDC) lost all of the money they had invested in this venture because the real estate development they had envisioned for the Pork Chop Hill Assemblage never materialized. 778a-803a.

The Third Amended Complaint alleged that Appellants were duped into entering these transactions by Pulte Homes and its representative Eric Ford, who allegedly misrepresented that Pulte would buy the Pork Chop Assemblage from them after development of the site began, and by their former counsel, Nicholas

Menas, who they claimed misled them into believing that the only way they could acquire rights to the Pork Chop Hill Assemblage would be to deal with a "flipper" -- namely PCHA -- instead of dealing with the McTague family directly. 776a-823a.

Appellants further alleged that, through this purported "scheme," the proceeds that they paid for the assignment from PCHA found their way into the accounts of various individual defendants, but **not** to Mr. Rocco or Pepper Hamilton. 802a-803a at ¶ 105 ("all of the payments made by Plaintiffs pursuant to the representations, directions and assurances of Menas, Ford and [Pulte], and in accordance with the PCHA-MTDC Assignment, were wrongfully taken by the co-conspirator defendants. Instead of going to PCHA, said payments and monies were wrongfully taken and transferred to and among Defendants KDL, TNM, Ford, Theresa Menas, James Walls, Borini, Michael Brestle, and 322 West").

Two observations about paragraph 105 of the Third Amended Complaint are striking and important to this Appeal. First, the Third Amended Complaint did **not** allege that any funds were "wrongfully taken [or] transferred" to Mr. Rocco or Pepper Hamilton. 796a-802a at ¶ 100 (chart of recipients and transferees of payments, with none of them including Mr. Rocco or Pepper Hamilton). Second, the Third Amended Complaint alleged that there were "representations, directions and assurances" by Mr. Menas and Mr. Ford, but did

not allege that there were any "representations, directions [or] assurances" by Mr. Rocco or Pepper Hamilton. 782a, 786a-787a, 794a.

To the contrary, both of MTDC's principals (Appellant John Fendt and Appellant Alan Wozniak) testified during their depositions that they did **not** receive any information or advice from Mr. Rocco, let alone rely on any information or advice by Mr. Rocco, in any aspect of their dealings with PCHA or Pulte. 826a at 46:10-13 ("I've never met Mr. Rocco. I wouldn't know him if I fell over him. And Pepper Hamilton is the company that he works for so that's all I can say").

Mr. Fendt further testified:

> "Q. Did Joe Rocco ever give you or Mr. Wozniak any kind of legal advice?
>
> A. **Not to me.** I don't know if he ever spoke to Alan.
>
> Q. Did Mr. Rocco ever give you or Mr. Wozniak or MTDC a legal opinion of any kind?
>
> A. Again, same answer. **I've never spoken with Mr. Rocco.** I don't know if Alan spoke to him or not.
>
> Q. Did Mr. Rocco ever provide you with any written information about the McTague property?
>
> A. **Not that I can recall.** Maybe you can show me something. I don't know.
>
> Q. Did Mr. Rocco ever provide you with any written information about Pulte?
>
> A. **Not that I can recall.**

> Q. Did Mr. Rocco ever make any representation to you about whether Pulte was going to buy the property or not buy the property?
>
> A. **Again, not that I can recall.**
>
> Q. Did Mr. Rocco ever make any kind of representation or promise about Pulte of any kind on any subject?
>
> A. **I've never spoken to Mr. Rocco. I've never had any conversation with him so, no.**
>
> Q. Did Mr. Rocco ever provide you with any information concerning the suitability of the McTague property for development?
>
> A. No, sir…"

828a-829a at 96:3-97:2 (emphasis added).

The allegations in the Third Amended Complaint, as they pertained to Mr. Rocco and Pepper Hamilton, purportedly relate to one of the payments that MTDC made for the PCHA assignment, namely, a check in the amount of $250,000 that MTDC wrote to William Russo on April 5, 2009. 789a at ¶ 70. The Third Amended Complaint alleged at paragraph 70 that Menas and Ford "set up a meeting that took place at the offices of Defendant Pepper Hamilton, with Defendant Rocco present, where Plaintiffs, upon the representations, direction and assurances of Menas and Ford, delivered a check made payable to William Russo in the amount of $250,000.00 to a person presented by Menas and Rocco to Plaintiffs to be William Russo, purportedly the new representative/member/managing member of PCHA…." Id. (emphasis added).

Paragraph 71 then went on to allege that the individual who actually received the check at this alleged meeting was not the "real" William Russo, but an imposter of William Russo.[1] 790a.

The only Appellant who claimed to have had any interaction with Mr. Rocco was Alan Wozniak. Mr. Wozniak claimed that he met Mr. Rocco at the alleged meeting when the $250,000 check alluded to above was supposedly given to an "imposter" of PCHA's representative, William Russo. Even if the meeting did occur as alleged, Mr. Wozniak testified unequivocally that he did **not** receive any advice or information, let alone rely on any advice or information, from Mr. Rocco at the alleged meeting:

> Q. When you met at Pepper Hamilton on that occasion with the other individuals you described, did Joe Rocco give any kind of legal opinions about the deal?
>
> A. Not that I recall.
>
> Q. Did he -- did he give you any written information about the deal?
>
> A. Then, no.

856a at 358:1-8.

[1] Though not material to this Appeal, Appellants' false allegation about a meeting where an "imposter" of Mr. Russo received the $250,000 payment was a fabrication. Mr. Russo filed a separate lawsuit in Atlantic County, New Jersey on August 31, 2017 verifying that the story of a meeting with someone impersonating him was manufactured by his then counsel, the same attorney who now represents Appellants. 841a at ¶¶ 86-87.

Instead, Mr. Wozniak testified that he relied exclusively on Eric Ford:

> I relied on Eric Ford to do this and I trusted him. In my opinion, he screwed me . . . I am going to say – I'm going to give you the same answers again. I was told to do this by Eric Ford at Pulte Homes. He told me to write all these checks out and I relied on him. I don't know how simpler I can get this.

858a-859a at 117:22-23 and 119:21-25.

Moreover, and critically, Appellants admitted that the $250,000 check that was supposedly given to an "imposter" was in fact deposited into the "real" Mr. Russo's bank account and properly applied against the remaining assignment purchase price, in other words, used for the purpose for which the Appellants intended it:

> Q. [B]ased on the information that I showed you last time we were together and Mr. Russo's testimony, you know now that the check was cashed into Mr. Russo's account; isn't that correct?
>
> A. Yes, I do.

861a at 559:8-12. Nor can Appellants dispute that MTDC, after making all of its payments, received the very assignment for which it made those payments. 863a-881a. To the contrary, Appellants testified in their depositions that they did obtain the assignment they paid for, and that their status as contract purchasers of the McTague property has never been contested by anyone:

> Q. Well, you described before the documents including the assignment – the assumption and assignment that

> MTDC signed to step into the shoes of the purchase under the McTague agreement, correct?
>
> A. Correct.
>
> Q. And you believe all of the payments necessary to obtain those rights and to step into the shoes of the purchaser under the McTague agreement were made, correct?
>
> A. Correct.
>
> Q. So as far as you're concerned, MTDC is the contract purchaser under the McTague Agreement, correct?
>
> A. Correct.

827a at 89:3-17. Thus, and even if there was some meeting at Pepper Hamilton's office where Appellants gave their $250,000 to an "imposter" of William Russo, Appellants admitted that their check for that amount was deposited into the account of the "real" William Russo, that the $250,000 was applied to the assignment purchase price, and that Appellants obtained the assignment for which they paid. Appellants therefore failed to adduce facts that could possibly support a damages award against Mr. Rocco or Pepper Hamilton at trial, further compelling entry of summary judgment in favor of these Respondents.

Having admitted throughout discovery that they did not receive, let alone rely upon, any advice or information from Mr. Rocco or Pepper Hamilton, Appellants attempted to rely on other pedestrian facts about Mr. Rocco's role as counsel for the "contract opponent," PCHA, as follows: (1) Mr. Rocco was aware of the PCHA-

MTDC Assignment and Assumption of Agreement; (2) Mr. Rocco prepared, in conjunction with Appellants' counsel, Mr. Menas, certain General Releases; (3) the Releases listed Mr. Rocco as attorney for PCHA; and (4) Mr. Rocco sent a default letter on behalf of PCHA because Appellants failed to timely make one of the payments required by the parties' contractual agreement. See Appellants' Brief at p. 14-17.

Yet, the foregoing assertions did nothing more than demonstrate that Mr. Rocco did what an attorney would typically do for his or her client during the course of any business transaction, namely: draft agreements in conjunction with counsel for the other party, become familiar with the transactional documents, and draft and send correspondence (such as notices and default letters) concerning the transaction. None of these functions, alone or in combination with the others, would be sufficient to create any duty of care to a non-client. In summary, the undisputed material facts concerning Mr. Rocco's and Pepper Hamilton's role as counsel to PCHA in the assignment transaction compelled entry of summary judgment in their favor.

STANDARD OF REVIEW

This Court's review of the trial court's grant of summary judgment relief is governed by the de novo standard. Chance v. McCann, 405 N.J. Super. 457, 563 (App. Div. 2009). As set forth in Rule 4:46-2(c), summary judgment shall be entered where:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

Once the moving party satisfies its burden of showing that no genuine issues of fact exist, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 528-29 (1995). If the party opposing the summary judgment motion "offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment, taking as true the statement of un-contradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Id. at 529 (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The question of whether a legal duty exists in a matter such as this is particularly appropriate for summary judgment disposition. See, e.g., Meisels v. Fox Rothschild, LLP, 240 N.J. 286 (2020) (affirming summary judgment in favor of firm, holding as a matter of law that the firm owed no duty to plaintiff).

LEGAL ARGUMENT

POINT ONE

SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE, AS A MATTER OF LAW, MR. ROCCO AND PEPPER HAMILTON OWED NO DUTY TO APPELLANTS, WHO WERE NOT THEIR CLIENTS

Appellants were never the clients of Mr. Rocco or Pepper Hamilton. Their attempted legal malpractice claim against Mr. Rocco and Pepper Hamilton flies in the face of New Jersey jurisprudence refusing to recognize any duty to third-party non-clients unless the attorney knows or should know that the non-clients are relying upon information, work, or legal advice provided by the attorney. Appellants' own admissions during their deposition made it impossible for any rational factfinder to conclude that any such fact pattern existed here.

A. As a Matter of Law, Neither Mr. Rocco Nor Pepper Hamilton Owed Any Duty to Appellants

The determination of the existence of a duty is, of course, a question of law to be decided by the Court. It is well-settled that a lawyer does not owe a duty of care to a third-party non-client unless "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of other legal services, the non-client so relies, and the non-client is not, under applicable law, too remote from the lawyer to be entitled to protection." Petrillo v. Bachenberg, 139 N.J. 472, 483 (1994) (citations omitted). The Petrillo case, unlike

anything that is alleged to have occurred in this case, involved an attorney who received two septic system soil test reports for a property being sold by his client, prepared a composite report that omitted any mention of the unsuccessful percolation tests listed in one of the underlying reports, and knowingly allowed the buyer and buyer's attorney to rely on the incomplete test data when negotiating to purchase the property. Id. at 475.

Here, of course, no such circumstances exist. Not even remotely. Quite the opposite, Appellants testified unequivocally that they never received any advice or information from Mr. Rocco, that Mr. Rocco never made any representation to them about the parties' deal, the McTague property, or Pulte Homes, and that they barely knew who Mr. Rocco was. See, supra, pages 4-7. It is therefore impossible to conclude that Mr. Rocco or Pepper Hamilton owed any duty of care to Appellants.

This case is more similar to the circumstances presented by the Supreme Court of New Jersey's decision in Meisels v. Fox Rothschild, LLP, 240 N.J. 286 (2020). In Meisels, the plaintiff, Meisels, alleged that he instructed a business associate to wire $2.4 million into the defendant law firm's trust account in connection with a real estate transaction involving the firm's client, Weinstein. The money was wired without any limiting instructions or directions. Nor did the wire instructions state that Meisels was the owner of the funds. The firm, in other words, was not an escrow agent. Weinstein later instructed the firm to disburse the money to him, which it did.

When the real estate transaction fell through, Meisels alleged that Weinstein defrauded him out of the $2.4 million and sued the law firm for legal malpractice, breach of fiduciary duty, conversion, and other causes of action for how it allegedly handled the funds at issue. The trial court granted the law firm's motion for summary judgment, and the case was ultimately reviewed by the Supreme Court of New Jersey. The Supreme Court affirmed summary judgment in favor of the firm, holding as a matter of law that the firm owed no duty to Meisels. In so holding, the Court stressed the fact that the firm had made no representations to Meisels whatsoever, that Meisels produced no evidence that he had relied upon the firm in its professional capacity, and there was "no indicia that the defendants endeavored to induce Meisels to rely on the firm." Id. at 301-302. Given these facts, as to which the Court found there was no genuine dispute, it was impossible to find the existence of any duty by the firm to Meisels.

The same result must apply here. As detailed above (supra, pages 5-9) Appellants admitted in their depositions that Mr. Rocco never gave any information or advice to them about the assignment, the Pork Chop Hill Assemblage, or Pulte. 828a-829a, 856a. They further testified that they were relying on others, but not Mr. Rocco or Pepper Hamilton, in making their decisions. 858a-859a. "An invitation to rely and reliance are the linchpins of attorney liability to third parties." Banco Popular v. Gandi, 184 N.J. 161 (2005). Appellants' own admissions establish,

beyond any genuine dispute, that those "linchpins" never existed between them and Mr. Rocco.

Appellants have attempted to argue that the trial court overlooked "twenty-eight" defectively e-filed exhibits that included, according to Appellants, deposition testimony by Alan Wozniak to the effect that Mr. Rocco misrepresented the identity of the person who was allegedly an "imposter" of William Russo at the alleged meeting at Pepper Hamilton. Suffice it to say that Mr. Wozniak gave no such testimony. During his deposition, Mr. Wozniak was pressed to recount every word that was allegedly spoken by Mr. Rocco at the alleged meeting and, in response, he testified as follows:

> Q: Did Mr. Rocco say he was the attorney for Pork Chop Hill Associates?
>
> A: Yes.
>
> ***
>
> Q: Did – aside from saying he was the attorney for Pork Chop Hill Associates, did Mr. Rocco say anything else at the meeting?
>
> A: I don't recall....The only thing I do recall, we discussed a little bit about Pork Chop Hill and that was it.
>
> ***
>
> Q: Do you remember who did the talking on that subject?
>
> A: Joe Rocco and Nick Menas.
>
> Q: What did Joe say?
>
> A: **I don't remember.**

264a (emphasis added). The trial court took this testimony into account, properly concluded that Mr. Wozniak never said what Appellants portrayed him as having said, and correctly determined that Appellants failed to show anything in the twenty-eight defectively filed exhibits that would be capable of creating a genuine issue of material fact. 7T78:14-81:13.

B. It Is Undisputed that Appellants Suffered No Damage as the Result of Any Alleged Act or Omission by Mr. Rocco or Pepper Hamilton.

The record in this case also was completely devoid of evidence which, even if proven to be true, could have established a loss that was proximately caused by Mr. Rocco's and Pepper Hamilton's role in the assignment transaction. See Cortes v. Gindhardt, 435 N.J. Super. 589, 603-04 (App. Div. 2014) (damages claim against attorney requires proof of actual loss proximately caused by the attorney's alleged negligence.)

Again, the factual allegations against Mr. Rocco and Pepper were limited to them being involved in an alleged meeting where a $250,000 check was given to a supposed impostor of William Russo. Yet, Appellants did not adduce any facts to actually connect this outlandish allegation to a damages claim. At paragraph 70 of the Third Amended Complaint, Appellants alleged that the $250,000 check was intended to serve as payment to PCHA towards the MTDC-PCHA assignment, and that it was being paid to Mr. Russo as PCHA's designated representative. 789a at ¶

70. Though Appellants claimed that the individual who received the check was an impostor, there was no allegation (let alone competent factual material) suggesting that the check was not, in fact, deposited into the "real" Mr. Russo's bank account. To the contrary, and as detailed above, Appellants admitted that it was. Since Appellants alleged that Mr. Russo was the intended recipient of their check, and since the check was indisputably deposited into the account of its intended recipient, Appellants were unable to come forth with any facts demonstrating that the alleged actions or inactions by Mr. Rocco and Pepper Hamilton caused them to suffer any damages.

In a similar vein, Appellants alleged that the $250,000 check was meant to serve as payment towards the amount MTDC agreed to pay for the assignment of the McTague Contract from PCHA. Moreover, and as set forth above, Appellants also conceded that the $250,000 payment was applied to the assignment purchase price and that they ultimately obtained the assignment of rights to purchase the McTague property for which they had paid. Thus, though Appellants painted the picture of a shady meeting with an impostor, the record was devoid of facts that, if proven to be true, could link Mr. Rocco's or Pepper Hamilton's alleged (and nebulously articulated) misconduct to any actual damages.

This matter is therefore very similar to what occurred in Delray Holding v. Sofia Design, 439 N.J. Super. 502 (App. Div. 2015). In that case, the plaintiff

investors sued the defendant corporation alleging that one of its principals had diverted corporate loan proceeds, all of which had been deposited into a company bank account to pay company debts, for improper purposes. The company's bank account records, however, showed that the amounts paid from the company's account to pay company bills exceeded the amount of the loan proceeds originally placed into the account. The defendant therefore moved for dismissal of the plaintiffs' damages claims. The defendant presented a very simple argument with respect to the absence of damages: Since the company bills that got paid out of the account exceeded the amount of the loan proceeds deposited into the account, there was no possible way that the plaintiffs could have suffered any damages as the result of the defendant's alleged misconduct. The trial court therefore granted summary judgment and dismissed plaintiffs' case with prejudice, and the Appellate Division affirmed.

The same result must apply here. Appellants have failed to adduce any facts that could legitimately support a claim for damages against Mr. Rocco or Pepper Hamilton. Since proof of actual damages was an essential element of each and every one of Appellants' purported causes of action, including their legal malpractice claim, the trial court properly granted Mr. Rocco and Pepper Hamilton summary judgment.

POINT TWO

BASED UPON THE UNDISPUTED MATERIAL FACTS OF THE CASE, THE TRIAL COURT PROPERLY GRANTED MR. ROCCO AND PEPPER HAMILTON SUMMARY JUDGMENT AS TO APPELLANTS' ILL-DEFINED CLAIMS FOR ALLEGED FRAUD, RICO VIOLATION(S), CONSPIRACY AND "AIDING AND ABETTING"

Appellants also brought frivolous claims against Mr. Rocco and Pepper Hamilton for alleged fraud (Count One); tortious interference (Count Two), conversion (Count Three), violation of New Jersey's RICO statute, N.J.S.A. 2C:41-2, et seq. (Counts Four and Five); conspiracy (Count Seven), and aiding and abetting all of the above (Count Eight).

A cause of action for fraud requires proof of (1) the material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Banco Popular N. Am. v. Gandi, 184 N.J. 61, 172-73 (2005). Pursuit of a private RICO action requires not only proof of a pattern of racketeering activity through the commission of certain criminal offenses, see N.J.S.A. 2C:41-1(d) and 2C:41-1a(1) and (2), but also proof of resulting damages. See Interchange State Bank v. Veglia, 286 N.J. Super. 164, 180 (App. Div. 1995). A claim for conspiracy requires proof of "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a

lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damages." Morgan v. Union County Bd. of Chose Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993). A claim for "aiding and abetting" arises where one defendant "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself." Dep't of Treasury v. Quest Communications Intl., Inc., 387 N.J. Super. 469, 481 (App. Div. 2006).

As set forth above, Appellants were adamant in their depositions that neither Mr. Rocco nor Pepper Hamilton never made any representations to them of any kind. Appellants' admissions in this regard conclusively negated any claim against Mr. Rocco and Pepper Hamilton based on fraud. Moreover, the courts have consistently held that none of the other co-conspirator type claims (e.g., RICO, aiding and abetting, etc.) brought against the attorney for an alleged wrongdoer can survive summary judgment unless there is some proof that the attorney directed or participated in the alleged wrongdoer's business operations or management. For example, in Manley v. Stark & Stark, Civil No. 97-524 (AET), 1999 U.S. Dist. LEXIS 22082 (D.N.J. August 10, 1999), the plaintiffs were investors who lost large sums of money they had invested in a company called Sigma, which later proved to be a Ponzi scheme. The plaintiffs sued Stark & Stark and two of its attorneys for

fraud and alleged conspiracy to commit RICO violations, alleging that the firm and its lawyers should have known that Sigma was a "scam." The court, however, dismissed these claims on summary judgment finding that, though the attorneys had counseled Sigma on securities law compliance issues, they had never crossed the line into directing or participating in Sigma's business operations. The court also dismissed all RICO claims because the plaintiffs failed to produce any evidence that the attorneys had "agreed" with Sigma to pursue Sigma's allegedly criminal objectives.

Here, Appellants produced no evidence during discovery that Mr. Rocco participated in the management, business operations, or earnings of PCHA, Pulte, or any of the other alleged wrongdoers. Moreover, and as in Manley, Appellants were unable to come forth with any competent evidential material to demonstrate otherwise. See also Worldwide Marine Trading Corp. v. Marine Transport Service, Inc., 527 F. Supp. 581, 583 (E.D.P.A 1981) (dismissing all claims against attorney for alleged wrongdoer who did nothing more than draft agreements, deliver copies of checks, and deposit money into escrow for his client, reasoning that "an attorney who is not a stakeholder in the alleged conspiracy must do more than be present at the scene and, indeed, must do more than merely advise.")

For this and all other reasons set forth above, Appellants' purported fraud, RICO, conspiracy and "aiding and abetting" claims against Mr. Rocco and Pepper

Hamilton failed as a matter of law, and the trial court properly granted Mr. Rocco and Pepper Hamilton summary judgment with respect to each of these other counts of the Third Amended Complaint.

CONCLUSION

For the reasons set forth above, Mr. Rocco and Pepper Hamilton respectfully submit that the trial court's Order granting summary judgment and dismissing all claims against them with prejudice should be affirmed.

LEWIS BRISBOIS BISGAARD & SMITH LLP
Attorneys for Respondents Joseph Rocco, Esq. and Pepper Hamilton LLP

By: */s/ Jonathan M. Preziosi*
Jonathan M. Preziosi, Esq.

Dated: April 26, 2023

JOHN FENDT, ALAN WOZNIAK MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC, Plaintiffs/Appellants, v. NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; MICHAEL BORINI; 322 WEST ASSOCIATES, LLC; JAMES WALLS; THERESA MENAS; TNM DEVELOPMENT CONSULTING, LLC; JOSEPH ROCCO, ESQ.; PEPPER HAMILTON, LLC; and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000354-22 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Docket No. Below: MON-L-3782-15 Sat Below: Hon. Katie A. Gummer, J.S.C. Hon. Lourdes Lucas, J.S.C. Hon. Linda Grasso Jones, J.S.C.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE LEGAL MALPRACTICE CLAIMS AGAINST NICHOLAS MENAS AND COOPER LEVENSON DID NOT FALL UNDER THE COMMON KNOWLEDGE EXCEPTION TO THE AFFIDAVIT OF MERIT STATUTE (50a-51a).

The Complaint against Nicholas Menas, Esq., and Cooper Levenson (hereinafter collectively "M&C") was dismissed for lack of an Affidavit of Merit ("AOM") when no AOM was required, since M&C's legal malpractice fits plainly under the "common knowledge exception." Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590, 945 A.2d 120, 122-23 (App. Div. 2008).

The Court below held that Plaintiffs' claims do not fit under the common knowledge exception because of "the importance of legal expert testimony in cases involving complex commercial transactions, the structure of those transactions" 1T 37:9-11. However, contrary to the Court's erroneous belief, Plaintiffs' legal malpractice claims against M&C do not allege that any of the legal work of the transaction was structured inappropriately or negligently. The Trial Court's fixation on the so-called "complexity" of the legal work performed is misplaced, because Plaintiffs never call into question M&C's legal work. Instead, Plaintiffs simply allege that within the context of a transaction, M&C received Plaintiffs' money for the transaction, sent said money to certain Defendants, and said Defendants divided said money among all Defendants, unbeknownst to Plaintiffs.

No expert testimony is required to demonstrate that the scheme devised and implemented by M&C with the other co-conspirator Defendants intended and resulted in Defendants wrongfully taking approximately $1,400,000.00, and generated legal fees for Cooper Levenson for hundreds of thousands of dollars. No AOM is required because no legal expert is necessary to explain that this was a fraudulent scheme no different from any fraudulent scheme structured and perpetrated by anyone, attorney or otherwise. There was no legal work, complex or otherwise, in the structure and perpetrating of this fraudulent scheme that requires an expert to explain to a juror a deviation from a professional standard of care, because the quality of that legal work in structuring the transaction is not at issue.

Instead, the legal malpractice claims against M&C simply arise out of their failure to tell Plaintiffs of their fraudulent scheme and participation in the conspiracy, and how Plaintiffs' money would actually be wrongfully taken and distributed among Menas and his co-conspirators Defendants. Plaintiffs do not claim that M&C negligently drafted transactional documents or negligently performed land use work. Instead, the legal malpractice that Plaintiffs are alleging is that M&C failed to tell them that Menas and his co-conspirator Defendants would defraud Plaintiffs of a certain amount of the money Plaintiffs paid in pursuit of the transaction. Such malpractice is common knowledge.

Likewise, Cooper Levenson's negligent supervision of their attorney trust

account does not require expert opinion. Any person knows that if one is entrusted with the funds or anything of value of another, the entrusted party must ensure said funds or things of value are not distributed negligently or fraudulently to unintended recipients, otherwise they have been negligent in the supervision of those funds. Furthermore, as the court held in Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168, 183, 117 A.3d 181, 191 (App. Div. 2015), "an AOM is not necessary to support a claim against a firm whose employee or agent acted negligently if the claim against the firm is solely based on a theory of vicarious liability or agency." Since an AOM is not necessary to support a legal malpractice claim against a firm based on a theory of vicarious liability when that claim arises from the firm's employee's negligence, an AOM is certainly not necessary to support a legal malpractice claim against a firm based on a theory of vicarious liability when that claim arises from the firm's employee's intentional torts. Therefore, in either case, whether Cooper Levenson was negligent in their supervision of the attorney trust account or negligent based on a theory of vicarious liability for the intentional tortious actions of Nicholas Menas, no legal expert is required to explain Cooper Levenson's negligence.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE TORT CLAIMS AGAINST M&C WERE LEGAL MALPRACTICE CLAIMS WHICH REQUIRED THE FILING OF AN AOM (50a-51a)

Plaintiffs' claims against M&C for fraud, conversion, tortious interference, New Jersey RICO, aiding and abetting, and conspiracy to commit same ("Tort Claims"), are not legal malpractice claims and therefore do not require proof of a deviation from the professional standard of care. The New Jersey Supreme Court in Couri v. Gardner, 173 N.J. 328, 340, 801 A.2d 1134, 1141 (2002) held:

> [R]ather than focusing on whether the claim is denominated as tort or contract, [courts] should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession.
> Id. at 801.

Plaintiffs' Tort Claims do not allege that M&C's actions were a deviation from the applicable professional standard of care, but that they were simply blatant intentional tortious acts committed by them and their co-conspirator Defendants alike. Indeed, those identical Tort Claims survived against the non-attorney Defendants since they are not legal malpractice claims.

Plaintiffs' Tort Counts do not require the trier of fact to evaluate M&C's legal judgment concerning a complex legal issue. In this matter, the trier of fact will not even be called upon to evaluate an attorney's judgment concerning *any* legal issue, let alone a complex legal issue, because a trier of fact's evaluation of a fraudulent scheme to take a client's money does not evaluate an attorney's judgment concerning a legal issue. Rather, a trier of fact would simply be evaluating M&C's participation in the fraudulent scheme, as would be the case

against the other co-conspirator Defendants accused of participating in the alleged fraudulent scheme. The mere happenstance that one member of a conspiracy to commit intentional torts is an attorney does not transform those intentional tort claims against that attorney into legal malpractice claims.

For this reason, it is self-evident that no expert testimony is required to prove allegations that monies were transferred from the firm's attorney trust account fraudulently, or even most blatantly, allegations that an attorney in concert with other co-conspirators instructed a client to make payments via wire transfers and checks made payable to the bank accounts of entities and persons whom the attorney and co-conspirators controlled or manipulated to thereafter transfer funds to the bank accounts of co-conspirators. None of these allegations involve an attorney's legal judgment concerning a legal issue, let alone a complex legal issue.

Similarly, in Couri, the Supreme Court of New Jersey found that the facts in that case fell beyond the purview of the AOM statute and no AOM was required. The Supreme Court in Couri explained as follows at 341-42:

> Although defendant's unauthorized dissemination of the report also might implicate a deviation from prevailing professional standards of practice, proof of that deviation is not essential to the establishment of plaintiff's right to recover based on breach of contract.

Essentially, as the Supreme Court analogously explained in Couri, the crux of Plaintiffs' Tort Claims is that M&C, in concert with non-attorney co-conspirator Defendants, acted wrongfully by creating the fraudulent scheme that is the subject

matter of this litigation. This fraudulent scheme does not implicate a deviation from a professional standard of care, and proof of a deviation from a professional standard of care is not essential to prove Plaintiffs' Tort Claims. Indeed, Plaintiffs were permitted to pursue the identical Tort Claims against the non-attorney co-conspirator Defendants without the need of any expert testimony. Therefore, just as in Couri, no AOM or expert testimony was required in this matter.

Respectfully, either the Trial Court misread the facts of the Complaint and Plaintiffs' briefs, or the Court was successfully misled by Defendants' misrepresentation and red herring that the subject transaction was a complex, multi-party, multi-property transaction. 1T 5:12-16. A correct reading of the facts in the Complaint and Plaintiffs' briefs clearly shows that the transaction at issue is no different than any other simple transaction – that is, there is a buyer (Plaintiffs) and there were sellers. The PCHA-MTDC transaction is a simple transaction in which Plaintiffs were the buyer, there was a seller, and M&C in concert with non-attorney co-conspirator Defendants, by their fraudulent acts, wrongfully took transactional proceeds.

While Plaintiffs strongly oppose the Trial Court's erroneous finding that the subject transaction was in fact a complex, multi-party transaction, the complexity or simplicity of the underlying transaction is actually not even relevant to the Tort Claims. Even assuming arguendo the underlying transaction was complex, the only

facts relevant to proving liability for Plaintiffs' Tort Claims was the act of wrongfully taking Plaintiffs' money. This was the separate factual predicate for Plaintiffs' Tort Claims which does not implicate a deviation from the professional standard of care. M&C's tortious acts in concert with non-attorney co-conspirator Defendants are simply and completely estranged from anything resembling legal work. In fact, non-attorneys participated in and perpetrated the same simple, wrongful acts, and those same Tort Claims against them survived and proceeded to trial where the parties reached a settlement.

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO STATE NEWLY DISCOVERED CLAIMS AGAINST M&C (376a–377a)

When Plaintiffs filed the Complaint on June 11, 2015, they did not know and could not have known that Menas was the sole member of TNM. Consequently, Plaintiffs could not have known at that time that Menas is liable for the torts committed by TNM as sole member of TNM, nor that M&C committed legal malpractice when they omitted to Plaintiffs that Menas was the sole member of TNM. Accordingly, at the time they filed the original Complaint, Plaintiffs could not and did not state any tort claims against Menas arising out of his role as sole member of TNM. Moreover, Plaintiffs could not and did not state any legal

malpractice claims against M&C arising out of their failure to tell Plaintiffs that Menas was the sole member of TNM.

Plaintiffs first believed that Menas was the sole member of TNM at all times relevant to this matter, following discovery (just prior to the filing of Plaintiffs' Motion to Vacate) of a Mortgage dated May 7, 2008 (570a), executed by Menas as sole member of TNM. Upon discovery of the Mortgage, Plaintiffs filed a Motion to Vacate the Orders of November 16, 2016, and December 20, 2016. In response to said Motion, counsel for TNM, Timothy Bloh, Esq., and counsel for M&C, John Slimm, Esq., continued to maintain that TNM was owned solely by Teddy Menas. In their arguments to the Court, Mr. Bloh and Mr. Slimm pointed to the deposition testimonies of Menas, Ford, Walls, and Rocco in another matter and proffered for the first time in this litigation a purported Collateral Assignment (96a), to support their representation that TNM was solely owned by Teddy Menas (52a). Based on the aforesaid misrepresentations, the Collateral Assignment was alleged to be the only reason Menas executed the Mortgage, and the Trial Court erroneously denied Plaintiffs' Motion to Vacate on April 3, 2018. (188a)

Thereafter, on August 9, 2019, after years of obstruction and motion battles, Plaintiffs discovered checks showing that Menas, four months prior to May 7, 2008, had already been repaid the alleged $250,000.00 loan for which Teddy Menas allegedly gave him the Collateral Assignment. 625a–627a; 645a–650a.

Thus, Plaintiffs discovered that at the time Menas signed the Mortgage, the Collateral Assignment had already been extinguished since the loan had been repaid. Thus, the only reason Menas signed the Mortgage as sole member of TNM was because Menas was in fact the sole member of TNM, as he certified and was notarized, notwithstanding the perjurious testimonies of Menas and his co-conspirator Defendants, and the misrepresentations of Mr. Bloh and Mr. Slimm. Upon discovering this new evidence, Plaintiffs moved to amend the Complaint, to state claims against M&C they did not know at the time of the original Complaint.

Due to the fraudulent proffering of the alleged Collateral Assignment following discovery of the Mortgage, the new claims arising out of the new evidence that Menas was the sole member of TNM, developed over time. Although Plaintiffs claimed in their Motion to Vacate that Menas was the sole member of TNM, the Court denied that motion because of the Collateral Assignment. It was only upon obtaining the checks that refuted the Collateral Assignment, overcoming years of misrepresentations, perjury, and fraud on the Court, that the new claim that Menas was the sole member of TNM was established.

In addition to the newly discovered and previously unknown claims against M&C arising out of the newly discovered evidence that Menas was sole member of TNM, Plaintiffs further sought leave to amend the Complaint to state claims against Menas arising out of his operation of PCHA as a sham entity, and claims

for legal malpractice against Defendants M&C arising out of their failure to advise Plaintiffs that PCHA was operated as a sham entity by Menas. Plaintiffs did not know and could not have known the existence of these claims prior to obtaining, analyzing, and understanding the accumulated discovery and deposition testimonies of Russo, Walls, Rocco, and Brestle cited in Plaintiffs' initial brief.

It is self-evident that the previously dismissed claim for legal malpractice had absolutely none of the factual predicates of the legal malpractice claim in the Amended Complaint, and for obvious reason: Plaintiffs did not know and could not have known at the time of the filing of the Complaint that Menas was the sole member of TNM and operated PCHA as a sham entity with Defendant Eric Ford. These facts only emerged during the course of discovery, after the dismissal of Plaintiffs' prior claims. Therefore, Plaintiffs' new claims against M&C are certainly new and were never dismissed by Judge Gummer because they were not known and could not have been pled at the time of the original Complaint. For these reasons, the Trial Court's error should be reversed and Plaintiffs should be permitted to amend the Complaint and state their newly discovered claims.

POINT IV

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS JOSEPH ROCCO, ESQ. AND PEPPER HAMILTON (381a–382a)

There are significant and numerous genuine issues of material fact in dispute with respect to Defendants Joseph Rocco, Esq., and Pepper Hamilton's (hereinafter collectively "R&P") participation in the conspiracy to commit the tortious actions pled by Plaintiffs against all Defendants. Deposition testimonies of Theresa Menas, Borini, Ford, Walls, Rocco, Brestle, and Plaintiffs set forth in the Statement of Facts in Plaintiffs' initial brief create significant genuine issues of material facts in dispute, and R&P should have been denied summary judgment.

The Trial Court erroneously held that R&P had no duty to Plaintiffs as there was no attorney-client relationship, and that Plaintiffs failed to provide any evidence of affirmative misrepresentations made to them by R&P. 414a. The Trial Court was blatantly incorrect. First, the fact that R&P were not Plaintiffs' attorneys is wholly irrelevant. Irrespective of the fact that R&P were not Plaintiffs' attorneys, they had a duty to disclose the truth and were bound in conscience and duty to recognize that the facts they concealed were significant and material, as set forth in Berman v. Gurwicz, 189 N.J. Super. 89, 93–94, 458 A.2d 1311, 1313–14 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49, 458 A.2d 1289 (App. Div. 1983). As such, Plaintiffs absolutely demonstrated a genuine issue of material fact in dispute with respect to R&P's failure to disclose facts and active concealment of facts.

Furthermore, the notion troublingly held by the Trial Court's erroneous decision is that the law provides no remedy to parties who are victims of an attorney's fraudulent schemes that constitute civil law theft if the parties had no principal-agent or attorney-client relationship. This notion is not only explicitly contradicted by the relevant case law but is abhorrent and an offense to the integrity of our noble system of jurisprudence.

In addition, the Trial Court was clearly incorrect that Plaintiffs failed to provide facts to support their claims that R&P made misrepresentations to them. Plaintiffs outlined from page 4 through 14 of their moving brief in their Motion to Reconsider the Order of December 9, 2021, facts supported by one hundred and four deposition citations which demonstrate precisely how Rocco participated in the conspiracy to steal Plaintiffs' money and which misrepresentations Rocco made to Plaintiffs. 426a–436a. There can be no doubt that Rocco participated in the conspiracy to steal Plaintiffs' money, and Pepper Hamilton is vicariously liable for that conduct. The deposition testimony of Brestle, Walls, and Rocco himself, all set forth in the Statement of Facts in Plaintiffs' initial brief and which the Trial Court admittedly ignored, are irrefutable evidence that Rocco, *acting* as attorney of PCHA though he was *not* the attorney of PCHA, made misrepresentations and continued to make misrepresentations to Plaintiffs in the Releases, at the meeting of April 2009 at the offices of Pepper Hamilton, and ultimately with his letter to

Plaintiffs, dated December 17, 2009, with the intent that Plaintiffs rely on said misrepresentations, adding another substantial semblance of credibility to the scheme to defraud Plaintiffs of their money through the scam PCHA-MTDC Assignment and Releases transaction. Plaintiffs reasonably relied on R&P's misrepresentations and suffered millions of dollars of damages.

Despite the Trial Court's error, Plaintiffs did not merely claim that they were third parties who reasonably relied upon an attorney's representations, and that said attorney is therefore liable for legal malpractice. Plaintiffs' claim is also that Rocco was an active participant in the fraudulent scheme perpetrated against them, whereby Defendants stole Plaintiffs' money. Rocco's role in this fraudulent scheme was to *act* as the attorney for the sham entity PCHA. The record certainly demonstrates genuine issues of material fact in dispute as to whether or not Rocco was ever the attorney for PCHA, or if PCHA was simply a sham entity utilized to defraud Plaintiffs and steal their money for the benefit of the co-conspirator Defendants. Rocco's role in the conspiracy was central, and Pepper Hamilton is vicariously liabile for failing to supervise Rocco while he was perpetrating a fraud.

It is clear that notwithstanding that Walls and Brestle were the members of PCHA, PCHA was operated by Menas as a sham entity, and Rocco *acted* as PCHA's attorney in furtherance of the conspiracy perpetrated against Plaintiffs. Rocco misrepresented to Plaintiffs that he was the attorney for PCHA by being

listed as same in the Releases, authoring the Second Amendment and Restatement of the General Release, staging the April 2009 meeting with Plaintiffs at the offices of Pepper Hamilton where Rocco misrepresented to Plaintiff Wozniak that Russo was the person there at the meeting with them to accept the $250,000.00 check on behalf of PCHA, and then authoring and forwarding the default letter dated December 17, 2009 to Plaintiffs. However, since neither Walls nor Brestle ever met or even knew of Rocco prior to this action, as they and Rocco testified, then it is obvious that Rocco was only masquerading as the attorney for the sham entity PCHA in furtherance of Defendants' conspiracy to steal Plaintiffs' money. As such, every breath Rocco took in the presence of Plaintiffs, every word he spoke to Plaintiffs, and every word he wrote to Plaintiffs *pretending* to be PCHA's attorney was an affirmative misrepresentation.

According to the testimony of Brestle, Walls, and Rocco himself, the people who owned PCHA testified that they were never aware of the PCHA-MTDC transaction, never met each other, and never knew or communicated with the alleged attorney for PCHA, and vice versa. As such, there are glaring and genuine issues of material fact in dispute as to whether PCHA was simply a sham entity, and Rocco was its sham attorney, in furtherance of Defendants' conspiracy to steal Plaintiffs' money. The Trial Court's holding that Rocco must be granted summary judgment because he was purportedly PCHA's attorney rather than Plaintiffs'

attorney completely misses the point of Plaintiffs' claims against Rocco as a central participant in Defendants' conspiracy.

In addition, the Trial Court failed to appreciate the significance of Wozniak's clear testimony regarding the affirmative misrepresentations and omissions that Rocco made to him, and also Rocco's affirmative misrepresentations to all Plaintiffs by way of the Releases and Rocco's default letter to Plaintiffs, all in furtherance of Defendants' conspiracy. The Trial Court unbelievably and erroneously held that all of these misrepresentations by Rocco were insignificant because Rocco was not Plaintiffs' attorney. In reality, it is factually and legally impossible for the Trial Court to consider this evidence and conclude that R&P have resolved all genuine issues of material fact in dispute as to whether they participated in Defendants' conspiracy to steal Plaintiffs' money, and as to whether those actions constituted legal malpractice. The Trial Court's error should be reversed.

CONCLUSION

For the reasons set forth above and in Plaintiffs' initial Brief, Plaintiffs respectfully request that the erroneous Orders Dismissing the Complaint against M&C, denying Plaintiffs' Motion to Amend the Complaint, and Granting Summary Judgment to R&P be reversed.

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