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| Plaintiffs-Appellants,<br>STONEFIELD INVESTMENT FUND III, L.L.C.; SF2 RE1, L.L.C.; and MAPLE ROCK, L.L.C.;<br><br>vs.<br><br>Defendants-Respondents,<br>L AND J ENTERPRISES 1, L.L.C. and LANCE SCHONER | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br><br>Docket A-509-23<br><br>CIVIL ACTION<br><br>On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket- OCN-L-1807-19<br><br>Sat below:<br>Hon. Valter Must, J.S.C. |

# APPELLANTS' BRIEF

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[1] Highlighting on documents appeared below.

## PRELIMINARY STATEMENT

Tasked on remand with making findings of facts and conclusions of law, the trial court did not do so. Appellant thus returns.

The trial court previously *sua sponte* dismissed claims under the Consumer Fraud Act (CFA) because Plaintiff was sophisticated. This court disagreed and remanded for findings of fact and an analysis of the factors in All the Way Towing, L.L.C. v. Bucks County Int'l, Inc., 236 N.J. 431 (2019), including whether home improvements constituted "merchandise" under the CFA. Pa159.

On remand, the trial court, again without urging by Defendants, now found that Plaintiffs' witness was not a party in interest, that he was akin to a general contractor for the plaintiffs, and that he somehow lacked standing. This finding is not supported by the record – which showed that the witness was a Manager for Stonefield and SF2 and an owner of Maple Rock. The factual finding is plain error.

Because of this finding, His Honor found that the CFA did not apply and did not make the conclusions of law that this Court mandated.

## STANDARD OF REVIEW

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011), citation omitted. The factual finding that Mr. Finkelstein was a general contractor cannot be found in the record and cannot stand on appeal.

Questions of law are reviewed *de novo* and no deference is required. Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 373 (1999). The trial court here did not address the legal issue of the CFA because of the mistaken finding of fact.

## STATEMENT OF FACTS

Three plaintiffs owned six residential properties for which home improvement contracts were entered into with Defendants. 1T13:5-12[1], 1T20:17-22, 1T22:10-17, 1T26:23 to 27:4, 1T28:22 to 29:1, 1T30:2-7. Michael Finkelstein was a manager for Stonefield III, 1T7:4-8, a property manager for SF2, 1T11:8-16, and a one-third owner and manager for Maple Rock. 1T11:19-23. In 2017, Mr. Finkelstein was referred to Lance Schoner and L&J by a referral from a local realtor, Carissa Turner. 1T12:1-8.

### 284-286 Ellison Street

Mr. Finkelstein testified that there was an agreement for 284-286 Ellison St. for $170,000.00, 1T13:16-24, P-1, and he paid $53,000.00, P2, 1T14:10-17, as a result of which defendants performed minimal demolition work. 1T15:17–24. After promises to complete the job, a second payment of $53,000.00 was made, P3, 1T18:6–20, but Defendants did not return. 1T19:9-13. As a result, Defendants were paid $106,500.00 for approximately $10,000.00 worth of work. 1T15:15 to 17:5.

Mr. Schoner testified that he did the majority of the work, 1T54:10, but that there were issues with the project. 1T54:11–17. He conceded he did not complete the project but did not specify what was done nor what was left. He admitted there were structural issues, squatters, and theft of materials, though he also testified that

[1] 1T is the trial transcript and 2T is the trial court decision on remand.

he never had a bad job, never had any complaints, but still did not complete the contract. 1T54:12-17. He produced no documents at trial nor in discovery to show work performed or materials purchased. 1T66:17, 1T69:20.

110 Schooner Drive

110 Schooner was a residential property owned by SF2. 1T20:17-22. Mr. Finkelstein paid $6,800.00 towards a contract of $13,500.00, 1T21:1–13, P4, P5, yet Defendants did no work, not even showing up. 1T22:1–9. In response, Mr. Schoner stated that he did all the work and that he was, in fact, owed $7,800.00, 1T52:3–9. Defendant had no documents to support his claim, produced no documents to support his claims as part of discovery, and his recollection was simply "as far as I remember." 1T53:7. There were no specific denials of the work that was uncompleted for this project and he could not explain why he was owed money but never asked for payment. 1T62:16-18. Oddly, if he had completed a $13,500.00 project and been paid $6,800.00, he'd have been owed $6,700.00, not $7,800.00 as he testified.

106 Lawrence

106 Lawrence was owned by Maple Rock. 1T22:10-17. The contract, P6, was for $50,000.00, 1T23:6. The first payment, $16,666.66, was paid, 1T24:5-8, but maybe $5,000.00 worth of light demolition work was performed. 1T24:20 to 25:12.

Mr. Schoner asked for more money and another $16,666.67 was paid on his promise to complete. 1T25:13–25. He never showed up. 1T26:8–22.

In response, Mr. Schoner stated only that "that did not make sense," 1T57:12, but was unable to provide any specifics. Once again, he provided not even one specific fact nor document concerning this project, nor did he claim that he did the $50,000.00 worth of work or was owed the $16,666.67 balance if he had.

25 Deer Run

On 25 Deer Run, also owned by Maple Rock, 1T26:23 to 27:4, there was an estimate for $65,000.00. 1T27:8-14, P-10. A payment of $21,666.66 was made, 1T28:7-14, P-11, but no work done. 1T28:18. Mr. Schoner did not even mention 25 Deer Run at all, thus not disputing plaintiff's testimony.

1410 Kay

On 1410 Kay, another Maple Rock property, 1T28:22 to 29:1, defendant was paid in full, $4,000.00, for window replacements, P12, 1T29:5-22, but never showed up. 1T29:25–30 to 30:1. Once again, Mr. Schoner did not address this property in his testimony. This too stood undisputed.

10 Forest Edge

10 Forest Edge Court was another residence owned by Maple Rock. 1T30:2-7. Mr. Schoner agreed to refund $5,000.00 for uncompleted work but never did. 1T30:8 to 31:4, P16. Mr. Finkelstein was able to successfully reverse the credit card

charge. 1T31:1-23, Pa96. Mr. Schoner again chose not to address this property in his testimony, conceding, or at least nor disputing, Plaintiff's claims.

While Defendant agreed to provide a $5,000.00 refund for unsatisfactory work, P-16, Pa96, he somehow also testified that "I've never had a bad job." 1T56:5. He even said that he never had any written complaints, T56:24 to 57-1, despite the text messages that he had sent conceding problems. 1T31:5-18, P-16, Pa96. No explanation was provided how he never received any complaints of any kind yet still agreed to refund $5,000.00 and admitted to incomplete projects. Businesses don't refund money for jobs well done.

It would be one thing if defendant testified to facts that contradicted plaintiff's testimony, but he didn't. Had there been competing testimony, the trial court judge would have been obligated to make findings of fact and set forth the basis for credibility determinations. Here, the judge found Plaintiff credible, though he also found defendant to be somewhat credible – despite the fact that defendant was a convicted felon with a money laundering conviction who was combative, belligerent, and evasive. Even so, much of Plaintiff's testimony about work not done remained undisputed[2].

[2] The panel commented on the absence of an expert, however, the trial court found that Mr. Finkelstein was an expert. 2T8:6-10, 2T13:5, 2T13:16

Defendant's contradictory testimony abounded. He stated that he never received any complaints about his work, never was written to, and received no text messages or phone calls. 1T61:2-17. This contradicted his earlier testimony that Ellison Street "had a lot of other issues" where he claimed to have done "most [but not all] of the work," 1T:54:12, and "I'm sure he had complaints, but everything always got resolved," 1T60:6-7, and even agreed to refund $5,000.00 on one project.

Mr. Schoner first testified that he didn't receive text messages from Mr. Finkelstein, but was quickly forced to admit that this wasn't true either:

> Q. Did you ever receive any objections from Mr. Finkelstein?
> A. No.
> Q. Ever?
> A. No.
> Q. Did he ever write to you or text you saying there were problems with the jobs.
> A. I don't have any text messages from him.
>
> [1T61:2-9].
>
> Q. Mr. Schooner, you were just asked if he text messaged you, and your response was I don't have any text messages. That wasn't the question. Did he text message you at all?
> A. Yes.
> Q. You just don't have them?
> A. Correct.
>
> [1T61:22 to 63:3].

Plaintiff sought to challenge Mr. Schoner with interrogatory answers, to which the court expressed disdain. 1T63:15-18. In those answers, none of Mr. Schoner's trial testimony appeared. Instead, every single answer was "premature," as if the

contracts, payments, and disputes had never happened. P-14, Pa55, 1T65:21-25, 1T66:2 to 67:21, 1T68:14-25. The trial judge, however, dismissed interrogatories in general as "totally worthless." 1T-77:7-12.

Mr. Schoner conceded that he didn't answer the interrogatory questions because it would have taken time to do so, 1T66:21-23, as if that was an excuse for evading discovery. Mr. Schoner admitted having no invoices to show money owed, 1T66:15-17, no proof of structural issues on Ellison, 1T67:4-9, no proof of squatters, 1T67:10-13, and no proof of thefts. 1T67:14-18. All of these issues remained unmentioned for more than three years – until trial, that is. When specifically prodded as to interrogatory 27 and his claim that work was completed, he conceded that he "has nothing to show that [he] did all this work." 1T69:18-20

Mr. Schoner was then asked whether he had ever lied to a court, 1T69:25 to 70-1. As counsel pressed, the court interjected, 1T70:13-15, asking whether there was a conviction involved – which was promptly shown. 1T70:20-23. The court, however, quickly halted that line of questioning, even as Plaintiff's counsel proffered two perjured affidavits of the Defendant. 1T73:4-23, 1T74:4-8. P-17, P-18, P-19, Pa97-107[3]. Despite prior false statements under oath, the court rejected this as "bootstrapping". 1T73:24. Not only had Mr. Schoner pleaded guilty to an

[3] The panel affirmed the trial court on these issues, Pa161. Appellant recites this for completeness but, of course, cannot revisit this issue. The documents are also included in our appendix only for the sake of completeness.

$18,000,000.00 money laundering scheme involving international drug distribution, but he had filed a verified complaint and two sworn affidavits with the federal court that were false. Ibid.

After a brief colloquy in the witness' absence, the court allowed Plaintiff to ask if Defendant had ever lied under oath. 1T74:9-11. Nevertheless, the court quickly told counsel "come on." 1T75:2. Defendant grew belligerent. When asked if the $180,000.00 seized by the DEA were illegal proceeds, he responded with questions instead of answers - "How do you know that?" and "How do you know that it wasn't lawful proceeds from my jewelry business." 1T75:17-20. As indicated, Plaintiff had Mr. Schoner's allocution and was prepared to utilize it during cross-examination. Pa118.

As Plaintiffs' counsel sought to answer the witness' own questions to prove the false statements and perjured affidavits, the court stated "you've made your point, move on." 1T76:2-7. This was also while Mr. Schoner's tenor grew evasive and belligerent, challenging counsel with his own questions, 1T75:17, 19-20. Defendant actually testified that he didn't remember getting stopped by the police - as if losing $180,000.00 and $300,000.00 in cash seizures to the federal DEA was something anyone might forget. 1T70:6-8.

After the testimony concluded, the trial court dismissed the case, making no specific findings of fact or credibility. 1T79:6 to 82:14. Even the undisputed projects

were dismissed. Consequently, Plaintiffs appealed and the decision was remanded with specific instructions to make findings pursuant to the CFA. Pa159.

On remand, the trial court did not make the CFA findings because it decided that Plaintiffs' witness was not a proper witness, but that he was a general contractor and that defendants were sub-contractors. As with His Honor's initial dismissal of CFA claims on May 23, 2022, this finding was not raised by the Defendants but was, again, without warning or notice. It was also mistaken given that the record does not bear it out.

This mistaken finding of fact resulted in His Honor's mistaken determination that the CFA did not apply.

## PROCEDURAL HISTORY

Plaintiff filed the complaint April 17, 2019. Pa1. Following service, venue was transferred to Ocean County July 12, 2019. Pa16. An answer was filed September 13, 2019 and discovery commenced. Pa17. On March 24, 2020, Defendants moved to strike Plaintiffs' pleadings for discovery which was denied when discovery was provided. Pa22. Defendants' counsel moved to be relieved on May 18, 2020, granted July 10, 2020. Pa24. On August 31, 2020, Plaintiffs moved for default against the unrepresented L.L.C., which was withdrawn when counsel re-entered the case on Defendants' behalf.

The parties appeared virtually for trial in October, 2021, but were adjourned when Defendant could not appear due to a family medical issue. Trial was held in person May 23, 2022.

Plaintiffs' representative testified. At the close of Plaintiffs' case, Defendants moved for dismissal, alleging that no proof was provided of the cost to complete the work. 1T45:11-17. However, Plaintiffs were not seeking the cost to complete; they sought, instead, the monies paid for work that simply wasn't done at all. The trial judge denied the motion to dismiss on the proffered basis, but without notice or warning, then dismissed the CFA claims despite the fact that the Defendants hadn't even sought such relief in their motion nor their answer.

Mr. Schoner then took the stand for the defense. Mr. Schoner's testimony was less than convincing and his testimony was contradictory and unconvincing, and he did not dispute plaintiff's testimony on several of the projects.

On cross-examination, Mr. Schoner was belligerent and disrespectful. Although admitting that he had no proof and had provided no documents concerning money owed, 1T66:17, structural issues, 1T67:9, squatters, 1T67:12, theft, 1T67:18, or even work performed, 1T69:20, when asked about his evasive interrogatory answers he responded with "If that's what it says in front of you." 1T69:15.

When asked if he always told the truth, the trial judge questioned counsel whether there was a criminal conviction at play and was answered in the affirmative. 1T70:13-16. The witness, when asked about it, responded with "If that's what is says in your paper." 1T71:1. Challenged about the laundered funds, he responded, not with answers but with challenges - "how do you know that" and "how do you know that it wasn't lawful proceeds from my jewelry business?" 1T75:16-20. As counsel tried to elicit more information about Mr. Schoner's criminal past and prove the prior false statements, the court halted that line of questioning. 1T76:2-7.

The trial judge expressed disdain for questions involving Defendants' interrogatory answers, stating that "interrogatories are totally worthless" and that depositions are the way to go if you want answers. 1T77:7-12. In doing so, Defendants' nonsensical interrogatory answers were discounted by the court.

The court then discussed how it disliked construction cases and how they typically go and what they involve. 1T79:6 to 82:14. Relying on personal experience in construction cases, the judge made no findings as to this case, only construction cases in general. The court then dismissed the entire case without factual or legal findings, even as to the projects that the Defendants had not disputed.

Plaintiff filed a timely appeal and this Court reversed June 27, 2023, instructing the trial court to make findings of fact and conclusions of law and noting that All the Way Towing applied. An in-person hearing was held on remand on October 2, 2023, and the trial court placed findings of fact on the record, again dismissing the case. Pa163.

Although Defendants did not raise the issue, the trial court on its own and without notice, now questioned the authority of Mr. Finkelstein testifying on their behalf and found that he was akin to a general contractor, not a proper witness. 2T13:15-22. This factual finding is entirely unsupported in the trial transcript. To the contrary, Mr. Finkelstein was a manager for all three plaintiffs and a partial owner of one. This finding finds no support whatsoever in the record.

The trial court also found that the Plaintiffs – who owned the various properties - somehow "were not renovating them, or improving them for their own use." 2T15:18-19. Consequently, His Honor did not perform the analysis of the All the Way Towing factors as directed.

Plaintiff appealed October 19, 2023, asserting that the factual findings were not supported by the trial transcript and that the court did not make the mandated conclusions of law. Pa164.

## LEGAL ARGUMENT

### I. THE TRIAL COURT FAILED TO FOLLOW THE APPELLATE MANDATE TO MAKE FACTUAL FINDINGS AND CONCLUSIONS OF LAW. THE FACTUAL FINDINGS MADE WERE CONTRADICTED BY THE TESTIMONY. (Not Raised below as this is an appellate argument).

When an appellate court remands, "the trial court is under a peremptory duty to obey the mandate of the appellate tribunal precisely as it is written." Flanigan v. McFeely, 20 N.J. 414, 420 (1956); see also Lowenstein v. Newark Bd. of Educ., 35 N.J. 94, 116-17 (1961); State v. Kosch, 454 N.J. Super. 444 (App. Div. 2018); Henebema v. Raddi, 452 N.J. Super. 438 (App. Div. 2017), certif. denied, 233 N.J. 215 (2018). The "terms and scope of the remand or specific instructions it has issued regarding the litigation bind[s] the court below whether it agrees or not." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R.2:9-1 (2019). "[T]he very essence of the appellate function is to direct conforming judicial action. As such, the trial court has no discretion when a mandate issues from an appellate court. It simply must comply." Tomaino v. Burman, 364 N.J.Super. 224, 233 (App. Div. 2003) (citations omitted).

The panel "agreed with plaintiffs that the Supreme Court made clear in All the Way Towing "that the CFA is applicable to commercial transactions." Pa158, (quoting 236 N.J. at 443). Noting that Defendants never disputed the CFA's application, the panel found that "the court never engaged in this analysis, and did not make findings of fact or conclusions of law, as to whether the nature of the transaction between the parties, satisfies, the CFA definition of "merchandise" under All the Way Towing. On remand, we direct the court to also engage in this analysis, and make findings of fact and conclusions of law anew." Pa159.

Yet the trial court on remand did not address whether home improvements constituted "merchandise" under the CFA[4], nor did it discuss the All the Way Towing factors. Instead, it now found that Mr. Finkelstein was more akin to a general contractor and that this alone justified the dismissal of the CFA claims. 2T8:23-24, 2T13:16-22. The court somehow found that Plaintiffs were not "the customer" aggrieved by the defendants' actions, that the contracts were "between Mr Finkelstein, and the defendant, and not the plaintiffs." 2T17:8-10. This finding is clearly mistaken. The court then dispensed with a consideration of the All the Way

[4] "Merchandise" is defined in N.J.S. 56:8-1(c) as including any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.

factors, touching the second factor only slightly and failing to discuss the remaining three, despite the remand mandate.

A court's decision to decide an issue *sua sponte* must meet the requirements of due process. See Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84-85 (App. Div. 2001). "The minimum requirements of due process . . . are notice and the opportunity to be heard." Doe v. Poritz, 142 N.J. 1, 106 (1995). Following trial, the court made an unprompted legal decision that the CFA did not apply, despite the fact that the Defendants never raised the issue. This Court remanded but the trial court next determined, again on its own, to disqualify Mr. Finkelstein's testimony, contrary to the transcript and again without Defendants raising the issue. Consequently, it failed to make the required conclusions concerning All the Way Towing.

It would not matter if Mr. Finkelstein was not "the plaintiff" because he was a competent witness who testified about his personal knowledge. N.J.Evid.R. 601. "In order to be competent to testify, a witness "should have sufficient capacity to observe, recollect and communicate with respect to the matters about which he is called to testify, and to understand the nature and obligations of an oath." State v. G.C., 188 N.J. 118, 131 (2006), citations omitted. "[T]he testimony of a competent witness cannot be capriciously rejected. There must appear some good reason for such action, as, for example, that his story was inherently improbable, or that it was contradicted by some other testimony, or by some proven fact or circumstance, or

by testimony impeaching his truth and veracity." Baldauf v. Nathan Russell, Inc., 88 N.J.L. 303, 306 (1915).

The trial judge did not reject Mr. Finkelstein's testimony. To the contrary, the court found him credible. 2T13:1-3. Mr. Finkelstein's testimony was more than sufficient to prove a *prima facie* case; indeed, Defendant's testimony mostly bore that out. Further, the trial court's comment about possible mis-joinder of plaintiffs was mistaken, because the various transactions constituted a series of transactions involving Mr. Finkelstein, his companies, and the defendants.

Turning to the various plaintiffs, Mr. Finkelstein testified that he was a member and manager of Stonefield. 1T33:17–18. He testified that he managed the Stonefield portfolio, 1T9:2–16, that Stonefield III was owned by Stonefield, 1T11:5–7, and that he was property manager for SF2. 1T11:8–16. As to Maple Rock, he was one of three owners of the company. 1T11:22–23. Any finding that he was not an appropriate witness or that the Plaintiffs were not the ultimate customer is unsupported by the record.

Somehow the trial court found that Mr. Finkelstein "was not buying the services for his own use," that the plaintiffs themselves "were not renovating or improving those for their own use," and that plaintiffs were not "the ultimate users" of the improvements. 2T13:16-22, 2T15:17-19, 2T16:5-11. These findings make no sense. After all, if plaintiffs own the properties and entered into home improvement

contracts to repair or renovate their own properties, who else would they be contracting for? It does not matter if a homeowner intends to fix and rent its property or fix and sell it; the law protects the owner from violations of the CFA because home improvements are expressly and explicitly governed by statute. To hold otherwise would immunize contractors who violated the CFA simply because the property owner chose to sell the property. This cannot be the intended result of the CFA.

Nor would it matter if Mr. Finkelstein was a general contractor or not, though he wasn't, because Plaintiffs were still damaged by Defendants' conduct. There is no question that "a homeowner who contracts directly with a building contractor to perform a home improvement, without engaging the services of a general contractor, may assert a claim against that contractor under the Consumer Fraud Act (CFA), N.J.S. 56:8-1 to -20, and the Contractor's Registration Act, N.J.S. 56:8-136 to -152." Murnane v. Finch Landscaping, LLC, 420 N.J. Super. 331, 334 (App.Div. 2011). Plaintiffs, as owners of the properties, were, without question, damaged by the Defendants' actions.

In Murnane, the owner characterized himself as the general contractor, leading to the trial court's dismissal of the claim. Id. at 335. This court discussed the CFA at length, finding

> There is no basis in these definitions for excluding a homeowner who contracts with multiple contractors from the protections of the CFA and

> the Contractor's Registration Act. **Even if such a homeowner could be characterized as a general contractor, he is still "an owner . . . of a residential . . . property" who has entered into a "home improvement contract**" with a "contractor." N.J.S.A. 56:8-137.
>
> ***
>
> In contrast, **plaintiff had a direct contractual relationship with defendant. Therefore, even if plaintiff could be viewed as a general contractor with respect to the improvements to his home, he was entitled to the protections of the CFA in his dealings with the contractors who performed those improvements**.
>
> [Id. at 338 and 339, emphasis added.]

Even if Mr. Finkelstein had not been an owner, member, or manager of the various plaintiffs, this would not negate his competency as a fact witness *on behalf of each plaintiff*. Mr. Finkelstein dealt with the defendants on behalf of each plaintiff, entered into the agreements, arranged for payment, and inspected the work; who else would plaintiffs call as a witness other than the person directly involved in the transactions? Given the "direct contractual relationship with defendant," Plaintiffs are entitled to relief under the CFA.

Appellate courts "may not overturn the trial court's fact[-]findings unless … those findings are 'manifestly unsupported' by the 'reasonably credible evidence' in the record." Balducci v. Cige, 240 N.J. 574, 595 (2020). The facts found by the trial court on remand are not only unsupported, they are nowhere to be found in the record. Nowhere in the record is it shown that Mr. Finkelstein was a general contractor or not an "end user." The words "general contractor" do not appear even

once in the trial transcript and Defendants never raised this argument at trial, on appeal, or on remand. The concept was raised for the first time on remand by the trial court, entirely on its own, despite the fact that Mr. Finkelstein was a manager of two companies and a member-manager of the third.

Because of the faulty factual findings, the trial court did not make the findings of fact or conclusions of law about All the Way Towing as commanded. Those factors are:

> (1) the complexity of the transaction, taking into account any negotiation, bidding, or request for proposals process;
>
> (2) the identity and sophistication of the parties, which includes whether the parties received legal or expert assistance in the development or execution of the transaction;
>
> (3) the nature of the relationship between the parties and whether there was any relevant underlying understanding or prior transactions between the parties; and, as previously noted;
>
> (4) the public availability of the subject merchandise.
>
> [236 N.J. at 447-448].

There was no complexity to the contracting process. As with many home-improvement contracts, Plaintiffs were introduced to Defendants through a local realtor and the Defendants provided estimates and contracts. Such is the everyday life of contractors and customers. To be sure, the All the Way Towing Court rejected an appellate panel's view that a "heavily negotiated contract between two sophisticated corporate entities" does not fall into the CFA's reach. 236 N.J. at 446.

Nothing was ever shown here about "heavily negotiated" contracts, let alone the sophistication of the parties.

The identity and sophistication of the parties was of no moment as the agreements were normal, everyday agreements for home improvements. While Plaintiffs were real estate investors, nothing was presented to show that they were familiar with the law, let alone the specific application of New Jersey's CFA. A simple review of the many CFA cases out there show that the Act's requirements are oft overlooked by experienced, sophisticated parties on both sides. Cox v. Sears, Roebuck & Co., 138 N.J. 2 (1994), CDK Global, L.L.C. v. Tulley Auto Group, Inc., 489 F.Supp. 3d 282, 308 (D.N.J. 2020) (applying the All the Way factors), Sun Chemical Corp. v. Fike Corp., 981 F.3d 231, 240 (3d. Cir. 2020) (same).

It would not matter if Mr. Finkelstein was the smartest property manager in the world because it would not change the fact that the Defendants took the money and failed to perform. "There is no statutory exception for sophisticated consumers. Even the most sophisticated consumers are entitled to the protections of the CFA." In re O'Brien, 423 B.R. 477, 488 (Bankr. D.N.J. 2010). Mr. Schoner, meanwhile, was a sophisticated person, having been involved in laundering more than $18,000,000.00 in a global drug trafficking conspiracy. The second factor falls decidedly in Plaintiffs' favor.

The contracts were normal, everyday, interactions between contractor and customer, nothing like the "months-long negotiated contract between sophisticated corporate entities" in All the Way Towing that was still determined to be covered by the CFA. 236 N.J. at 439. "Rather, the CFA applies as long as "a member of the public could, if inclined, purchase" that good "regardless of the popularity of the product." Sun Chemical, supra, 981 F.3d at 240, quoting All the Way Towing, 236 N.J. at 408.

Finally, the "merchandise," home improvements, was publicly available (as distinguished from a custom-built tow truck). By definition, every real estate investor will need home improvements at some point. Home improvement contracts are so readily available to the public that they have their own series of protections under the CFA, the Contractor Registration Act, various regulations, and judicial precedent. N.J.S. 56:8-1 et seq., N.J.S. 56:8-136 et. seq., N.J.A.C. 13:45A-16.1. See Post at 24. While the trial court did not make findings of fact or conclusions of law, with regard to the All the Way factors, there is no question that these factors do exempt defendants from the CFA's reach. Once again, even if any plaintiff might later sell or rent a property does not change the buyer, the seller, or the "merchandise" of home improvements.

To strike down plaintiffs' case impermissibly allows a contractor to take advantage of a consumer merely because they had done business before the default.

"[O]ne who perpetrates a fraud may not urge that his victim should have been more circumspect or astute. Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 27 (1957), Peter W. Kero, Inc. v. Terminal Constr. Corp., 6 N.J. 361, 269-270 (1951) ("It is the policy of the law to protect the unwary and foolish as well as the vigilant from the wiles and artifices of evil-doers and negligence in trusting a representation will not, according to the greater weight of authority, excuse a positive willful fraud, and parole evidence is admissible to show such fraud."). Defendants here didn't even argue that Plaintiffs should have been more astute; the trial court instead, on its own and without prodding, twice raised and twice decided the issue against Plaintiffs. This was error.

## II. THE TRIAL COURT'S LEGAL DECISION THAT THE CFA DID NOT APPLY WAS, AGAIN, MISTAKEN. (RAISED BELOW 1T46:5-50:23; 2T4:20-5:18; 2T16:23-17:5).

Twice the trial court has dismissed CFA claims *sua sponte*, albeit on different bases. Each ruling was mistaken as a matter of law.

The CFA was enacted in 1960 and amended in 1971 to "give New Jersey one of the strongest consumer protection laws in the nation." Cox v. Sears, Roebuck, supra, 138 N.J. at 14-15. It "was intended 'to greatly expand protections for New Jersey consumers.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 120 (2014) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009)). To establish a CFA cause of action, a consumer must demonstrate the alleged violator engaged in

a practice of unlawful conduct; the consumer suffered an ascertainable loss; and there is "a causal relationship between the unlawful conduct and the ascertainable loss." Id. at 121 (quoting Bosland, 197 N.J. at 557).

In addition to the statute, "[t]he Division of Consumer Affairs has enacted extensive regulations ... to deal with practices susceptible to consumer-fraud violations, such as may be found under home-improvement contracts [and] ... provide "objective assurances" of the "terms and criteria according to which home-improvement work [should] be done." Cox, 138 N.J. at 16, citations omitted. Violation of the regulations imposes strict liability, regardless of intent, and "[t]he parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the Act." Id. at 18-19.

Home improvement contracts are expressly and extensively protected by the CFA and its regulations, N.J.S. 56:8-1(c), N.J.S. 56:5-136, N.J.A.C. 13:45A-16.2(a), even where corporate ownership exists. "First, it is well established that the CFA is applicable to commercial transactions." All the Way Towing, 236 N.J. at 443. Consequently, "we need not labor as to whether the corporate plaintiff may qualify as a consumer." D'Ercole Sales v. Fruehauf Corp., 206 N.J.Super. 11, 23 (App.Div. 1985), See also Hundred E. Credit Corp. v. Eric Shuster Corp., 212 N.J.Super. 350, 355 (App.Div. 1986), certif. denied, 107 N.J. 60 (1986) ("Surely a business entity

can be, and frequently is, a consumer in the ordinary meaning of that term."). Coastal Group, Inc. v. Dryvit Systems, Inc., 274 N.J.Super. 171, 179-180 (App.Div. 1994). The CFA "protects corporate as well as private consumers." Marascio v. Campanella, 298 N.J. Super. 491, 499 (App. Div. 1997).

All the Way Towing made clear that even commercial transactions are subject to the CFA. Id. at 443, citing Coastal Grp., Inc. v. Dryvit Sys., Inc., 274 N.J. Super. 171, 175, 179-80 (App. Div. 1994) (trial court erred when it dismissed CFA claim on the ground that "one commercial entity may not recover in tort for economic losses allegedly caused by a product purchased from another commercial entity"); Hundred E. Credit, supra, 212 N.J. Super. at 355 (same); D'Ercole Sales, 206 N.J. Super. at 23 (same), noting that the definition of "person" includes business entities such as a "partnership, corporation, company ..., business entity or association," N.J.S. 56:8-1(d). The comprehensive reach of the CFA cannot be questioned, Murnane, supra, 420 N.J.Super. at 336-338, and unquestionably applies here.

> Surely a business entity can be, and frequently is, a consumer in the ordinary meaning of that term. Since a business entity is also a "person" entitled to recover under the Act, there is no sound reason to deny it the protection of the Act. There is similarly no justification to limit the Act ... to sales and advertising of merchandise for "personal, family or household use." Such a reading would fly in the face of the statutory definitions of "merchandise" and "person" entitled to sue.
>
> [Hundred East Credit, 212 N.J.Super. at 355-356, multiple citations omitted.]

As home improvements are "merchandise" under the CFA, and as Plaintiffs are consumers of home improvements *for their own properties*, the CFA unquestionably applies.

At trial, Defendants moved for a directed verdict on a reason wholly separate from the CFA. In doing so, the CFA was never even mentioned by counsel, conceding that it applies to such situations. This court also found the issue undisputed. Pa156. Nevertheless, the trial court found that the sophistication of the parties – an issue not raised by the parties or in the testimony – rendered the CFA inapplicable. By doing so, the court deprived Plaintiffs of their rights without any notice or cause and the case was remanded for findings of fact and a determination of the All the Way Towing factors.

On remand, the court raised another issue never raised by defense counsel, Mr. Finkelstein's status on behalf of each plaintiff. This too finds no support in the record and is mistaken. Consequently, the trial court failed to reach the legal issue of the CFA as mandated.

## III. THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION TO ENTER JUDGMENT FOR PLAINTIFF. ALTERNATIVELY, THE MATTER SHOULD BE REMANDED TO A DIFFERENT TRIAL JUDGE. (Not raised below, appellate argument).

Plaintiff asks this court to exercise original jurisdiction and determine, as a matter of law, that Defendants' conduct constituted a violation of the CFA. After all,

Defendants never disputed at trial, on appeal, or on remand, that the CFA applied[5]. Given the fact that home improvements are legislatively-mandated as "merchandise" under the Act, there is no reason for further argument below. See Point I, Ante at 15. N.5.

This Court stated:

> The court never engaged in this analysis and did not make findings of fact or conclusions of law as to whether the nature of the transaction between the parties satisfies the CFA definition of "merchandise" under All the Way Towing. On remand, we direct the court to also engage in this analysis and make findings of fact and conclusions of law anew.

[Pa159].

After its erroneous findings about Mr. Finkelstein, "the court [again] never engaged in this analysis and did not make findings of fact or conclusions of law as to whether the nature of the transaction between the parties satisfies the CFA definition of "merchandise" under All the Way Towing."

After five years, justice should not be delayed further. The case should be remanded with instructions to enter judgment in Plaintiffs' favor.

Out of an abundance of caution, Plaintiffs ask that a different trial judge be assigned given the judge's commitment to his findings. Graziano v. Grant, 326 N.J. Super. 328, 349-350 (App.Div. 1999) (allowing remand "out of an abundance of

[5] Defendants also did not raise the standing issue or the general contractor issue that the trial court next relied on to dismiss the case anew.

caution" where "there is a concern that the trial judge has a potential commitment to his or her prior findings"). Although we do not believe a new trial is warranted, the whole trial took approximately 75 minutes, less than many small claim matters. There would be no significant burden to any jurist.

## CONCLUSION

Three companies for whom Michael Finkelstein was a manager entered into contracts with the Defendants for home improvements. Despite undisputed violations of the CFA, the trial court first dismissed the case because Mr. Finkelstein was sophisticated, something not raised by the Defendants. That decision was reversed and remanded with a direction to make findings of fact and conclusions of law about whether home improvements were merchandise under the CFA and whether certain factors applied or not.

The trial court, again without prodding by the defense and without support in the record, instead decided that Mr. Finkelstein was really a general contractor and not a party in interest on Plaintiffs' behalf and that the companies which owned the properties weren't really the end-user of customers of the home improvements. His Honor thus dismissed the case again, still not making the mandated findings of fact or conclusions of law.

There is no question that home improvements are merchandise as they are governed by express statute. Plaintiffs, as property owners, were expressly protected

by the CFA. Defendants violated the Act, failed to complete work, oftentimes not even showing up despite initial payments as well as additional payments cajoled by empty promises.

Based on the undisputed facts below, coupled with the mandatory provisions of the CFA, the most recent decision must be reversed and the case remanded for imposition of treble damages and counsel fees.

Most respectfully submitted,
HONIG & GREENBERG, L.L.C.

By: Adam D. Greenberg
Attorney for Plaintiffs-Appellants

Dated: December 22, 2023
Cherry Hill, New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-509-23
On Remand from A-2882-21-T4

STONEFIELD INVESTMENT FUND III, LLC; SF2 RE1, LLC And MAPLE ROCK, LLC

Plaintiffs/Appellants,

v.

L AND J ENTERPRISES 1, LLC and LANCE SCHONER

Defendants/Respondents

CIVIL ACTION
ON APPEAL FROM
OCN-L-1807-19

SAT BELOW
HON. WALTER MUST, J.S.C.

# BRIEF OF DEFENDANTS/RESPONDENTS L AND J ENTERPRISES 1, LLC and LANCE SCHONER

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## PROCEDURAL HISTORY

Appellants' filed the initial Complaint against the Defendants on or about April 19, 2019 and an Answer was timely filed on March 24, 2020. Although the parties exchanged written discovery, Appellant's made no effort to depose the Defendants, and did not seek to compel any discovery. At no time did the Appellants provide any expert report or identify any witnesses other than the Plaintiff himself. Further, Plaintiff was unable to submit any proofs to the Court which corroborated his testimony. In essence, Plaintiff simply alleges that the Defendant did not do the work he was required to do. However, Plaintiff was unable to provide a single piece of evidence which indicated that due to the alleged fraud and breach of contract of the Defendant/Respondent, that the Plaintiff/Appellant was damaged in some way. It is most important for this Court to note that the entirety of the Trial, including Defendant's affirmative case lasted **one hour and 11 minutes**. This is simply not a case with a voluminous record for the Court to review. Quite simply, there was no error made at the Trial level – as there was so little testimony and evidence in Plaintiff's case.

The Appellate Division did remand the matter to Judge Must on or about June 27, 2023. The remand was for the limited purposed to have the Trial Court "reconsider its dismissal of plaintiff's CFA count and claims anew," and "for the court to

make appropriate findings of fact and conclusions of law under Rule 1:7-4(a). Accordingly, Judge Must had a hearing again on October 2, 2023 to indicate said findings. The reasonings, facts and conclusions of law are in keeping with the direction of the Appellate Division and should alleviate any concern that the Court had in reference to the original decision prior to the first appeal.

## RESPONSE TO STATEMENT OF FACTS

Appellant has prepared approximately eight pages of what they deem to be facts material to the matter. It should be noted that none of the alleges "statements" are of any facts in the matter. They are simply Plaintiff/Appellants self-serving statements and commentary on the testimony offered at the Trial. As such, all of the information in the alleged "Statement of Facts" are denied in their entirety. More importantly, these alleged statements of facts are the same statement of facts filed along with the prior appeal.

## LEGAL ARGUMENT
## POINT I

### THE TRIAL COURT PROPERLY FOLLOWED THE APPELLATE DIVISION'S ORDER FOR REMAND

Appellant cites the relevant case law with respect to a Court's duty to follow the Appellate Division's ruling. The flaw in the argument is simply that the Appellant disagrees with the findings of the Court. Judge Must had a hearing as required by the Appellate Division and put his findings on the record. Once again, the Appellant simply doesn't agree with the ruling. Again, this is after the Appellant limited his Trial to one witness and less than an hour of testimony.

Appellant further indicates that it is his belief that the Court did not reject Appellant Mr. Finkelstein's testimony. This could not be further from the truth. The entirety of his testimony was rejected as is evidenced by both the initial verdict and the decision on remand. To indicate otherwise, is quite simply, fantasy. The Court found that Mr. Finkelstein was not telling the truth, and more importantly, the Court noted that even if his testimony was credible, he could prove no damages to the Court.

Strangely, if the Appellant had been so convinced of his argument during the litigation, one would think he would have at least attempted to make a Summary Judgment motion following

the completion of discovery. That did not occur here – probably due to the lack of actual discovery conducted by the Appellant.

Most notably, the Appellant argues that there were "undisputed violations of the CFA," which could not be further from accurate. The Plaintiff never even put a case on Trial in reference to the Consumer Fraud Act, and relied only in his written Complaint.

According to Plaintiff's Brief, they certainly believe that this matter falls into either of two categories: (1) the trial court has expressed its decision based upon a palpably incorrect or irrational basis; or (2) it is obvious that the Court either did not consider, or failed to appreciate the significant of probative, competent evidence. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

The general rule is that "Plain" or "harmful" error is error that is "clearly capable of producing an unjust result." R. 2:10-2. The plain error rule and the harmful error rule are identical. The different terms are just used in different situations, depending on whether the error was brought to the attention of the trial judge. If error has occurred in the trial court, but the appellant did not bring it to the attention of the trial judge, then the term used is "plain error." If it was raised at trial, "harmful error" is used. In either case, unless an error is "clearly capable of producing an unjust

result," thereby meeting the definition of "plain" or "harmful" error, the Appellate Court will not reverse on the basis of that error. New Jersey Standards for Appellate Review, Ellen T. Wry, 2019.

In the instant matter, it is difficult to determine what Plaintiff/Appellant is arguing. Court Rule 2:10-2: If the error has not been brought to the trial court's attention, the appellate court will not reverse on the ground of such error unless the appellant shows plain error: i.e., error "clearly capable of producing an unjust result." Id. See also, State v. Macon, 57 N.J. 325, 336 (1971).

As for the Harmful Error Rule: This rule is used when a specified error was brought to the trial judge's attention. The "harmful error" rule is essentially identical to the "plain error" rule even though it applies to error which was properly raised below. Under both rules an error will not lead to reversal unless it is "clearly capable of producing an unjust result." R. 2:10-2. Thus, even though an alleged error was brought to the trial judge's attention, it will not be ground for reversal if it was "harmless error." Harmless error will be disregarded by the appellate court, even where the judge is found to have abused his discretion in admitting evidence and failed to properly instruct the jury. See State v. Prall, 231 N.J. 567, 581, 587-88(2018). Here, as with "plain error," an error will

be found "harmless" unless there is a reasonable doubt that the error contributed to the verdict. This is true even if the error is of constitutional dimension. State v. Macon, 57 N.J. 325, 338 (1971); State v. Slobodian, 57 N.J. 18, 23 (1970). New Jersey Standards for Appellate Review, Ellen T. Wry, 2019.

Once again, Plaintiff/Appellant is simply attempting to expand the record below by introducing new evidence and making legal arguments not made prior to or at the time of the Trial. Again, should Appellant/Plaintiff believed that their case was one that was so obviously in their favor, a Motion for Summary Judgment would have been the proper avenue. The Plaintiff/Appellant put the Judge in the position of not having any of the information or case law they rely on when filing the brief.

In this matter, the Appellant/Plaintiff never even sought permission to expand the record on appeal, but rather included a number of exhibits in their appendix which were not a part of the record. The instant court should not consider these materials. New Jersey DYFS v. M.M., 189 N.J. 261, 278 (2007); State v. Sidoti, 120 N.J. Super. 208, 211 (App. Div. 1972).

Although an Appellate Court may consider allegations of error not brought to the trial judge's attention, it frequently declines to consider issues that were not presented at trial. Generally, unless such an issue goes to the jurisdiction of the

trial court or concerns matters of substantial public interest, the appellate court will not consider it. State v. Robinson, 200 N.J. 1, 20-22 (2009). State v. Arthur, 184 N.J. 307, 327 (2005); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). In the instant matter, none of the issues raised in the Appellant's Brief were addressed at Trial.

Plaintiff/Appellant even argues that the Court should remand the matter to a different Judge as they believe this Judge failed to follow the Appellate Division's ruling. Quite clearly, Judge Must had a hearing on the issues as directed by the Appellate Division.

**CONCLUSION**

For the forgoing reasons, the decision of the trial court should be affirmed.

Respectfully submitted,
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Attorneys for the
Defendants/Respondents

By:_____/s/_____
MICHAEL B. YORK, ESQ.

Dated: January 31, 2024

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February 6, 2024

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
PO Box 006
Trenton, NJ 08625-0006

**APPELLANT'S LETTER SUR-REPLY BRIEF**

Re: Stonefield Investment Fund III, L.L.C.; SF2 RE1, L.L.C.; and Maple Rock, L.L.C.;

Plaintiffs-Appellants,

vs.

L AND J ENTERPRISES 1, L.L.C. and LANCE SCHONER

Defendants-Respondents,

Appellate Docket No. A-509-23
Case type: Civil
County: Ocean, Chancery
Trial Court OCN-L-1807-19
Sat below: Hon. Valter Must, J.S.C.

My Dear Judges,

Kindly accept this letter in lieu of a more formal sur-reply brief, pursuant to R.2:6-2(b).

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## TABLE OF RULES



## LEGAL ARGUMENT

### I. RESPONDENTS MERELY DENY THE CONTENTS OF APPELLANTS' BRIEF, PRESENTING NO FACTS, NO PROCEDURAL HISTORY, NOR ANY DISCUSSION OF THE CONSUMER FRAUD ACT OR CASES APPLYING IT.

Respondents' brief simply dismisses Appellant's facts and arguments without any analysis. They seek to distract the Court by pretending things just didn't happen instead of addressing the issues on appeal. Respondents do not set forth "a concise procedural history," any reference to the appendices, nor any statement of facts,

merely "den[ying Appellant's facts] in their entirety.[1]" Rb3. Pretending the record does not exist is insufficient without even the slightest effort to suggest what the facts are.

Respondents even argue that "Plaintiff never even put a case on Trial in reference to the Consumer Fraud Act (CFA), and relied solely in his written Complaint." Rb5. This argument arises from the ether as Plaintiff testified about numerous CFA violations and argued below about its application. The prior panel even stated "Plaintiffs also moved thirteen documents into evidence related to defendants' home improvement work and claimed none of them complied with the requirements of the CFA." Pa151. It then remanded expressly to determine "whether the nature of the transaction between the parties satisfies the CFA definition of "merchandise" under [the CFA…]" Pa159. The panel would not have directed the trial court to consider something not been properly raised at the trial.

Despite this, Respondents not only do not discuss whether the CFA applies or not, they do not even cite to the CFA statutes or even a single case applying them. Pretending something doesn't exist is not sufficient, especially when it does. Courts

[1] A responding brief must conform to the same requirements of appellant's brief. R.2:6-4, referencing R.2:6-2(a)(4), (requiring a "concise procedural history including a statement of the nature of the proceedings...") and (a)(5) "concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript.")

are not the place where parties should pretend that there isn't an elephant in the room[2].

Respondents' argument is confusing, claiming that the plain error or harmful error rules apply, arguing that the argument was not made below, Rb7. This overlooks the appellate standards of review asserted in Appellants' brief and ignores the fact that this Court ordered the trial judge to make findings of facts and conclusions of law concerning the CFA. This is not a case of plain error or harmful error; it is a case where the factual findings have no support anywhere in the record below and where the legal conclusion was misplaced and not consistent with the appellate mandate.

Respondents argue for the second time that a summary judgment motion should have been filed, Rb7, despite obvious material facts in dispute that required trial. A court's time need not be wasted for motions that have no chance of success. A summary judgment motion would not have changed the facts or the law applicable to a CFA case. The argument fails.

Appellants stand by their brief concerning the proper standards of review – which, again, are not even mentioned by Respondents.

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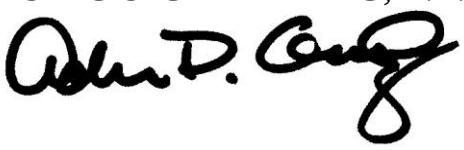
[2] "[A] decision that ignores the elephant in the room is a decision with diminished authority." Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 377, 129 S.Ct. 1093, 1109 (2009) (Souter, J. dissenting). A brief that does so shares that same fate.

## CONCLUSION

Appellants specifically demonstrated that Defendants failed to even mention, let alone dispute or contradict, Plaintiff's testimony about projects where money was paid and work never even started, let alone completed. The regulatory violations of the CFA abounded without dispute.

While this Court remanded with instructions to determine whether the home improvements constituted "merchandise" under the CFA, the trial court chose a different path entirely and did not abide by that mandate, again dismissing the case for reasons not raised by Defendants. This was error and requires correction.

Most respectfully submitted,
HONIG & GREENBERG, L.L.C.



By: Adam D. Greenberg

ADG:st