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EJK REALTY LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, AND EDWARD KLOSS, JR., ***Plaintiffs-Appellants,*** *-vs-* AKR CONTRACTING, INC. AND ANDREW RUSIN, ***Defendants-Respondents,*** *-vs-* RIGG ASSOCIATES, P.A., BRUCE RIGG, AND DYNAMIC ENGINEERING CONSULTANTS, ***Third-Party Defendants.***	) SUPERIOR COURT OF NEW JERSEY) APPELLATE DIVISION)) DOCKET NO. A-1723-22)) Civil Action)) APPEAL SOUGHT FROM:) SUPERIOR COURT OF NEW JERSEY) LAW DIVISION: MORRIS COUNTY) DOCKET NO. MRS-L-518-17)) SAT BELOW:) FRANK J. DEANGELIS, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF APPELLANTS, EJK REALTY LLC & EDWARD KLOSS JR. (VOLUME I – 1a to 99a)

On the Brief:
Allan Maitlin, Esq.
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PRELIMINARY STATEMENT

This matter involves a simple act of negligence by a construction site/grading contractor, AKR, which neglect caused significant damages to Plaintiff Appellant, EJK, an experienced strip mall developer.

EJK acquired a large tract of land which included an existing building (The Longo Building), which was to be converted to retail stores. A six unit retail strip mall was to be built on the tract as well, perpendicular to The Longo Building.

AKR contracted with EJK to do the grading of the tract in accordance with municipality approved plans. AKR agreed to retain a surveyor at its expense to stake the property as needed. Ultimately, AKR retained Rigg Associates for the staking.

After site plan approval by the town, a four-page approved site plan prepared by Dynamic Engineering was delivered to AKR. AKR gave the plan to Rigg for staking. Before any work was done, Edward Kloss, the principal of EJK, found an elevation error on the plan. Kloss advised Dynamic who promptly revised the plan. He also brought the error to the attention of Mr. Rusin, owner of AKR. The new grading plan was approved by the municipality. The new revised plan was delivered directly to AKR by the engineer.

Rigg was told by AKR to begin staking the project. AKR never gave the revised plan, which now consisted of five pages, to the surveyor. Before staking, the surveyor supplied a cut sheet to AKR showing the staking. That document clearly gave the date of the plan as the original plan, not the revised one. It also said Rigg had worked with a 4-page plan, not 5-page plan. The communication from Rigg to AKR expressly required that AKR notify Rigg prior to any construction "if the above referenced plans have been revised." But AKR remained silent. As a result, the property was staked 30" lower than required based upon an erroneous elevation and significant construction progressed. The actual grade was now 30" below the interior floor of the existing Longo Building. When discovered, the town was advised of the error and the municipality immediately stopped the project until the grade problem was resolved and approved by a new appeal to the town Board. The simple act of negligence on the part of AKR in not supplying its surveyor with the proper plan, caused a one year shut down of the project while attempts were made to have a new site plan approved.

Suit was started against AKR. Plaintiff filed its disclosure statement mandated by R. 4:103, 104. Mr. Kloss was listed as a witness as to liability and damages in detail.

Ultimately, AKR moved for summary judgment. It argued that EJK needed an expert to prove AKR's liability. Kloss argued he has full knowledge about AKR's error. He could prove the liability by showing the jury the old and new site plan and explain what occurred. The Court rejected plaintiff's right to testify as to the facts known by him. The Court dismissed the plaintiff's Complaint for failure to have "an expert."

Kloss contends that no expert testimony is required on liability. Mr. Kloss was capable of giving all the testimony needed to show clear liability on the part of AKR. The egregious error was easily understandable through his testimony. The municipality's refusal to issue Certificates of Occupancy until the approved plans were amended and approved shows AKR's liability. Kloss' testimony would came in as lay testimony or as his expertise in construction. As a subset, Kloss relies on the doctrine of "common knowledge negligence." Kloss further has the knowledge and background to testify about all the damages he suffered as outlined by him in the disclosure statement and deposition. His experience in commercial real estate development and construction uniquely qualifies him to give such testimony. The court erred in barring Kloss from proving his case. On the Motion to Reconsider, the Court further failed to grant the equitable relief of allowing the additional time to obtain an expert report.

PROCEDURAL STATEMENT

On March 3, 2017, Plaintiffs-Appellants, EJK Realty LLC and Edward Kloss, Jr. (sometimes collectively referred to as "Kloss") filed a Complaint against Defendants-Respondents, AKR Contracting, Inc. ("AKR") and Andrew Rusin ("Rusin") (Pa30). AKR and Rusin filed an Answer on June 23, 2017 (Pa41) and later filed a Third Party Complaint against Third Party Defendants, Rigg Associates, P.A., Bruce Rigg and Dynamic Engineering Consultants, P.C. (Pa52).[1]

A Case Management Order was entered on October 5, 2017, which required the parties to make certain disclosures and set various discovery deadlines (Pa70). Another Case Management Order was entered on June 29, 2018 (Pa74) setting deadlines for fact depositions and expert discovery, and a subsequent Order was entered on December 9, 2019 concerning discovery and experts (Pa76).

On May 22, 2020, AKR and Rusin filed a Motion for Summary Judgment (Pa77), which was supported by a Statement of Material Facts (Pa79),

[1] The Third Party Complaint was ultimately dismissed with prejudice by Orders entered July 20, 2018 (Pa59) and August 8, 2018 (Pa68). The Third Party Defendants are not parties to this appeal, and the Motions for Summary Judgment are not included in the Appendix as same are not germane to the issues on appeal.

Certification by Rusin (Pa91), Certification by counsel (Pa100) and a Brief. In opposition, Kloss filed a Response to the Statement of Material Facts (Pa364), a Certification by Kloss (Pa382) and a Brief. The Motion was argued on September 29, 2020[2] and an Order entered on September 29, 2020 (Pa1).[3]

On July 6, 2022, AKR and Rusin filed another Motion for Summary Judgment (Pa441), which was supported by a Statement of Material Facts (Pa443), a Certification by counsel (Pa446) and a Brief. In opposition, Kloss filed a Reply to the Statement of Facts and Counter Statement of Facts (Pa449), a Certification by Kloss (Pa462), a Certification by counsel (Pa460) and a Brief. AKR and Russin filed Reply papers (Pa466) and a Reply Brief.

The Motion was argued on November 28, 2022[4]; and, on December 7, 2022, an Order for Summary Judgment was entered dismissing the Complaint with prejudice (Pa3).

Kloss filed a Motion for Reconsideration (Pa499) with a Certification by counsel (Pa501) and a Brief. AKR and Rusin opposed the application with a Certification by counsel (Pa513) and a Brief.

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[2] The Transcript of the hearing conducted on September 29, 2020 is hereinafter referred to as "1T".

[3] The Order incorrected indicates it was entered on June 29, 2020.

[4] The Transcript of the hearing conducted on November 28, 2022 is hereinafter referred to as "2T."

On January 20, 2023, an Order was entered denying the Motion for Reconsideration (Pa16); and, on February 14, 2023, a Notice of Appeal was filed (Pa518). The deadline to file this Brief was extended to December 7, 2023.

STATEMENT OF FACTS

In April 2005, Appellant, Edward J. Kloss, Jr., (hereafter EJK, or Kloss), purchased the property in question, which contained one large vacant structure (the "Longo Building") but was otherwise undeveloped. (Pa221-Pa226.)

Before purchasing the property, EJK engaged Dynamic Engineering Consultants ("Dynamic") to prepare a preliminary site plan, grading plan and other plans for development of the property for retail sales. (Pa383 at Par. 3). Basically the Longo Building would be renovated to be used for retail stores or a single user. It was on the right side of the property; the balance of the property would be developed by the construction of a multi-tenanted new strip mall perpendicular and to the left of the Longo Building. (See, Preliminary Grading Plan, at Pa182)

On or about April 11, 2005, Dynamic submitted a preliminary site plan, including a grading plan, to EJK. (Pa105-120).

In 2005, EJK gave a copy of Dynamic's preliminary plans to Andrew Rusin, owner of defendant/Respondent AKR Contracting Inc., (hereafter

"Rusin" or "AKR") to obtain a rough idea of the cost of site preparation. (Pa384 at ¶8) From the first, it was understood that Rusin would be responsible for obtaining a surveyor and performing grading in accordance with Dynamic's plans (Id.).

During 2006 and 2007, Dynamic revised the site plan several times, and in April 2007, the Morris Plains Board of Adjustment approved the plans (Pa383 at ¶6 & ¶7).

In January 2008, however, before any construction or grading began, Kloss discovered an elevation error in Dynamic's site and grading plans, whereby the first floor elevation of the Longo Building was listed as 443.15 ft instead of 445.77. (Pa384 at ¶10) Kloss advised Dynamic of the error. (Pa384 at ¶10; Pa397).

After finding the error, EJK met with both Rusin and Dynamic to discuss how to proceed. (Pa385 at ¶11).

On March 14, 2008, as per agreement between Kloss, Rusin and Dynamic, Dynamic revised its grading plan to correct the elevation error found by EJK affecting the old Longo building, the new building to be constructed, and other aspects of the site.) (Pa385 at ¶13; Pa127).

Sometime before July 25, 2008, AKR sent a copy of Dynamic's preliminary (unrevised) 4/11/05 grading plan to its surveyor Bruce Rigg (Rigg

Associates, PA.) to solicit a cost estimate for surveying work on the project. (Pa92 at ¶15) Rusin says the 4/11/05 Dynamic plan was the only plan he had at that time. (Id.)

Rigg sent AKR a proposal for surveying work on the project dated "July 25, 2008, Revised 12/02/2008)" (Pa96).

On October 7, 2008, Dynamic sent EJK and AKR its revised site plan which included the grading plan with corrected elevations (Pa386 at ¶18; Pa403).

On November 3, 2008, Dynamic sent Morris Plains Engineer Leon Hall, EJK and AKR a letter with copies of its original 4/11/05 grading plan and its revised, corrected grading plan for the project. (Pa404) Dynamic engineer John Palus explained: "As you are aware based on our discussions, it appears that the main finished floor of the existing building is approximately 3' higher than that which was originally identified in the Boundary and Topographical Survey. (Pa404) At this time, we have regraded the site maintaining the same site layout ... Please note that we have attempted to highlight the major changes to facilitate your review of the enclosed plans." (Pa404)

On December 2, 2008, Rigg submitted to AKR a revised proposal for surveying work on the job, including staking of all elevations for grading. (Pa96).

On January 26, 2009, the Morris Plains Board of Adjustment approved the new grading plan with revised elevations. (Pa406-Pa412).

On March 16, 2009, Rusin, for AKR, signed Rigg's Revised Proposal of 12/02/08, thereby authorizing Rigg to begin surveying work on the site, including staking out elevations, (Pa96).

On the morning of March 19, 2009, Rusin spoke with surveyor Bruce Rigg. (Pa93 at ¶18) Rigg told Rusin he needed Dynamic's current computer files (digital files) for the grading plan and did not want to perform the staking based on paper plans. (Pa93 at ¶18) Rusin told Riggs he did not have any computer files. He told Rigg to contact Dynamic or Kloss to obtain Dynamic's current computer files. (Pa93 at ¶18). A "Call Log" from Rigg's office for that morning confirms that Rusin told Rigg to call Dynamic for the digital file and that Rigg left a phone request for engineer John Palus at Dynamic for the digital file. (Pa228) There is no record that Kloss was contacted by anyone about this issue. (Pa229), or that Rigg received any digital files from Dynamic. (It is impossible to specifically cite the absence of an action or event in the file.)

On March 23, 2009, at 7:08a.m, Surveyor Gary Veenstra of Rigg's office emailed Engineer John Palus of Dynamic: "I will be on the job site today but am looking for the DWG data for Rt 10, Morris Plains job. Thanks for your help." (Pa230). There is no evidence that Rigg received any digital files from

Dynamic. (It is impossible to specifically cite the absence of an action or event in the file.)

On March 23, 2009, at 4:15p.m. a Fax with attached two-page document was sent from Rigg Associates to Rusin, entitled "Cut Sheet for Building Stakeout" dated March 23, 2009, for 1775 Route 10, Morris Plains. (Pa235-Pa237) The cut sheet listed four elevations staked at the four comers of the proposed new building on the site. (Pa236-Pa237) The cut sheet stated explicitly: "Building elevation based on plan entitled "Grading Plan, EJK Realty, Proposed Retail Development, Block 115, Lots 1-5, NJSH Rt 10 & Candlewood Drive, Borough of Morris Plains, Morris County, NJ" dated 4/11/05 and prepared by Dynamic Engineering Consultants, PC Sheet 4 of 11." This undeniably referred to Dynamic's preliminary grading plan, because all subsequent revised grading plans were numbered "5 of 11" with dates beyond April 11, 2005. (Pa236) The cut sheet went on to caution: "Contractor must notify this office prior to any construction if the above referenced plans have been revised." (Pa236).

Nowhere in the evidence does AKR claim that it ever gave surveyor Rigg a revised, corrected set of grading plans while Rigg was performing its stake out, despite strong evidence that AKR was aware of elevation errors on

the original plans and had received revisions of those plans from Dynamic before Rigg staked out the elevations at the site. (Pa91-94; Pa403-404).

Not until March 24, 2010, long after the grading damage was done, did AKR seem to realize its error. (Pa437-Pa438) On that date, according to a Memo to File prepared by Rigg's office, an employee named "Steve" from AKR called Rigg's office to inquire why Rigg's cut sheets did not match AKR's current plans. (Pa437) Rigg's employee wrote in the Memo: "I explained to him that the plans that we were given [by AKR] to provide the layout was (sic) the original set dated 4/11/05. We only recently received a newer set because we have been asked to do additional work onsite. He now understood." (Pa437, emphasis added).

Meanwhile, by December 2009, as grading work progressed from east to west across the site, approaching the Longo Building on the west side of the site, AKR workers realized that if they continued to follow the set elevation markers they would expose the foundation the eastern wall of the Longo Building. (Pa388 at ¶27) The exterior grade would be 30" below the Longo floor interior. (Id.)

In August 2010, Morris Plains Engineer Hall advised his Board of Adjustment that he had become aware of "an elevation issue relating to the construction of the new 15,000 SF building in relation to the existing 20,000

SF building." (Pa251-Pa252) Mr. Hall told the Board that he asked the applicant for an as-built survey, which revealed that the new building was "approximately 2.5 feet lower in relation to the existing 20,000 SF building than what the approved site plan had shown in the past." (Pa252) Hall found this discrepancy significant enough to require an amended application to the Board by Mr. Kloss. (Pa252) The 2.5 ft discrepancy was consistent with the discrepancy between the elevation shown on Dynamic's 2005 grading plan originally provided by AKR to Rigg, and the revised grading plan provided to AKR by Dynamic in late 2008 but not forwarded by AKR to Rigg until long after Rigg performed it's stake out of the new building's elevation in March 2009. (Pa251-252).

Theory of Common Knowledge Negligence of AKR

Based on the events set forth in the Statement of Facts, Appellant will argue that:

AKR, as the site and grading contractor for the job, was responsible for hiring a land surveyor to stake out elevations called for by engineer Dynamic's grading plan.

AKR initially contacted Surveyor Rigg in 2008 and provided him with Dynamic's initial grading plan, labeled "Sheet 4", dated 4/11/05. Rigg submitted

a proposal for the work to AKR in December 2008. AKR authorized the work on March 16, 2009. Rigg began staking out the property on March 23, 2009, following the direction of Dynamic's 4/11/05 grading plan, the only plan given to him by its employer, AKR.

Meanwhile, in January 2008, Edward Kloss discovered that the elevations shown by Dynamic in its 4/11/05 grading plan for the floor of the existing building on site were significantly too low by approximately 30" throwing off the elevations of other key aspects of the entire site, and requiring that the grading plan be redone by Dynamic.

Between January 2008, when the grading plan error was detected by Kloss, and March 2009, when the surveyors staked out the site using the initial, unrevised 2005 grading plan supplied to them by AKR, AKR received repeated notices that the original site plan was defective, had to be revised, and in fact was revised by Dynamic with revisions accepted by the Township of Morris Plains.

Notices to AKR of the errors on Dynamic's initia1 2005 grading plan were multiple and uncontroverted, including:

- Personal meetings in 2008 between Kloss, Rusin and Dynamic to discuss how to correct the error and handle the situation with the township. (Pa385 at ¶11)

- Transmittal by Dynamic's Engineer Palus to EJK and AKR via DHL Ground on October 7, 2008 of its revised Site Plan "in accordance with our discussions to date." (Pa386 at ¶18; Pa403)
- Transmittal by Dynamic's Engineer Palus to town engineer Hall, EJK and AKR, via DHL Ground on November 3, 2008, of a copy of Dynamic's "original approved Grading Plan for the project" (April 11, 2005), and a "copy of the revised Grading Plan" wherein Palus explained in simple layman's terms that the floor of the existing building on the site was discovered to be approximately three feet higher than originally identified in the Boundary and Topographical Survey, and that Dynamic had now "regraded the site maintaining the same site layout." (Pa404)
- Dynamic recorded a running list of revisions on the corner plate of its Grading Plan, including: 3/14/08 "REV. PER EXISTING F.F.E. CHANGE." (Pa127) This stood for "revision per existing finished floor elevation change." Edward Kloss has certified that he forwarded revisions to the site plans to AKR on a regular basis. (Pa384 at ¶8) Even if, as Rusin maintains, "I do not have the professional qualifications to read a site plan," (Pa93 at ¶23), the fact that any revised grading plan sent by EJK had a large bold **"5"**

rather than a "4" on the plate, should have given even a layperson notice that the plan had been revised.

Despite all this, on March 19, 2009 when Surveyor Rigg called Rusin to seek a computerized version of the grading plan, Rusin shuffled him off to Dynamic. It appears that Rigg and Dynamic may have played "telephone tag" and Rigg went ahead with the stakeout using out-of-date inaccurate elevations on March 23, 2009. (Pa229-Pa230)

After Rigg performed its stake out on March 23, 2009, AKR's "common, knowledge negligence" continued.

On the afternoon of March 23, 2009, Rigg faxed Rusin its "cut sheet for Building stakeout" done that day. (Pa235-Pa237) The typed report clearly states that the elevations were based on Dynamic's Grading Plan of 4/11/05, sheet **4**. This was the original plan provided by AKR to Rigg in 2008, before any corrective revisions were made. This demonstrates that AKR had failed to provide Rigg with the revisions of elevation which AKR had unquestionably received from Dynamic in October and November 2008 via DHL delivery service.

On the same March 23, 2009 cut sheet, Rigg cautions the project contractor, AKR, in plain English: "Contractor must notify this office prior to any construction if above referenced plans have been revised." (Pa236)

As shown by this timeline, AKR certainly had notice that Dynamic's April 11, 2005 grading plan had been significantly revised. Yet AKR took no action to notify Rigg that he was working from an outdated, subsequently revised grading plan.

It requires no esoteric expert testimony to argue to a jury that Defendant AKR was negligent in allowing Surveyor Rigg to stake out the elevations of this building site on March 23, 2009 based on a grading plan which AKR knew or should have known to be outdated, inaccurate and already revised by Dynamic. It was equally negligent for AKR to fail to pick up the error and notify the surveyor in a timely manner on or after March 23 that the error could be corrected before significant causally-related damages, including delay of the project for a year, could be avoided.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT AGAINST PLAINTIFF MUST BE REVERSED, BECAUSE THE REPEATED FAILURE OF DEFENDANT AKR CONTRACTING TO SUPPLY ITS SURVEYOR WITH AN ACCURATE REVISED GRADING PLAN UPON WHICH TO STAKE OUT THE CONSTRUCTION SITE CONSTITUTED "COMMON KNOWLEDGE NEGLIGENCE" PROVABLE EVEN WITHOUT A DESIGNATED EXPERT WITNESS ON LIABILITY. (Pa7-Pa10)

A layperson's common knowledge is sufficient to permit a jury to find the duty of care has been breached without the aid of expert testimony when the subject can be understood by jurors using common judgment and experience. Davis v. Brickman Landscaping, 219 N.J. 395, 407 (2014); Campbell v. Hastings, 348 N.J. Super. 264, 270 (App. Div. 2002) Stated otherwise, when the matter is not so esoteric or specialized that jurors of common experience can form a valid conclusion, no expert is required. Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)

In Estate of Chin by Chin v. St Barnabas Med Ctr. 160 N.J. 454, 469-470 (1999) our Supreme Court explained the '"common knowledge doctrine" as follows:

> "Thus, the doctrine of common knowledge applies to a case in which the experience possessed by lay persons, without the explanations of experts would enable a jury to determine that a defendant acted without reasonable care. 'The basic postulate for

> application of the doctrine therefore is that the issue of negligence is not related to technical matters particularly within the knowledge of medical or dental practitioners'." Citing Sanzari v. Rosenfeld, 34 N.J. 128, 142 (1961).

While most common knowledge cases do involve medically related malpractice, the doctrine can be applied in cases involving other fields as well. See, Supreme Court Model Jury Charge 5.52: "Professional Liability of an Architect/Engineer," part C: "Common Knowledge May Furnish Standard of Care."[5]

Applicability of the "common knowledge doctrine" is determined not by the understandability of the subject matter involved, but by the understandability of the alleged act of negligence. E.g. pulling the wrong tooth, or the improper hook· up of a gas line on a piece of medical apparatus.

One recurring application of the common knowledge doctrine involves misreading of a technical document or failure to furnish an updated current technical document, which is exactly the nature of Defendant's alleged negligence herein.

In Palanque v. Lambert-Woolley, 168 N.J. 398 (2001), a defendant physician twice misread reports of her patient's pregnancy tests, mistaking

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[5] Footnote 1 of the Model Charge states: "This charge is equally appropriate for other professionals, such as: engineers, land surveyors, professional planners, etc."

specimen identification numbers for the actual test results, wrongly declaring the patient pregnant, and performing inappropriate procedures as a result of her mistake. The Supreme Court reversed dismissal on summary judgment below and reinstated plaintiff's case for trial, despite her lack of an expert report, under the common knowledge doctrine.

In a case closely on point to ours, Bryan v. Shah, 351 F. Supp. 2d 295 (D.N.J., 2005), Senior Federal District Court Judge Joseph Irenas denied a motion by defendant Prison Health Services (PHS) to dismiss plaintiff's complaint for lack of an expert report. Plaintiff, who was prescribed lithium for a bipolar condition, alleged that despite orders from her attending physician, PHS twice failed to provide updated lithium blood level reports to the physician. As a result, plaintiff was allowed to develop lithium toxicity. The judge explained, at 301-302:

> "We find, however, that it is well within the purview of the ordinary juror whether or not Defendants' failure to follow or complete the order for lab tests constituted negligence. We do not suggest that the average juror would know that an individual taking lithium needs such tests; we do find, however, that an average juror would know...whether or not an alleged failure to fulfill or complete prescriptions, orders and the like of the treating doctor deviates from the standard of care."

In the same way, we argue that an average juror might not know the purpose of a grading plan for a construction project, or how to read such a plan,

but would know, without the benefit of expert testimony, that a contractor who hires a surveyor to set stakes based on the engineer's grading plan, must provide the surveyor with the most current revision of the grading plan available. And if the contractor receives a revised grading plan from the project engineer, the contractor must provide the surveyor with that updated plan as soon as possible.

At time of trial, if our Complaint is reinstated, we will demonstrate through contemporaneous business records and testimony in accord with certifications provided by the parties, that Defendant contractor AKR knew that the original grading plan which they had given to the surveyor was outdated, inaccurate and had already been revised by the time the surveyor relied on it to set his grading stakes on site. AKR had been alerted several times by the project engineer that the old plan was seriously inaccurate. AKR had actually received from the engineer a copy of a revised grading plan and a plain-language explanation of the error. Yet AKR inexplicably failed to provide its surveyor with the new plan.

As the result of defendant AKR's failure to provide its surveyor with the engineer's revised grading plan, the surveyor staked out the construction site 30" lower than it should have been. By the time this was discovered, the majority of the grading had been performed, and the new

building on site had been constructed 30" (2.5 ft.) out of vertical alignment with the pre-existing building on site. Most importantly, the exterior grade of the Longo Building was now 30" below the interior floor level prohibiting use of the Longo Building from being used as a retail building with "ongrade" access to the building from its eastern wall. This directly resulted in all manner of financial loss to plaintiffs, as discussed below.

Just as Defendant Prison Health Services was ordered by the patient's physician in Bryan, supra, to provide updated blood- lithium levels for his patient every month, Defendant contractor AKR was ordered by its surveyor to "notify this office prior to any construction if the above referenced plans have been revised." (Pa235a-237a).

On that same cut sheet, surveyor made clear to AKR that he was staking elevations in accordance with Sheet 4 of 11 on Dynamic's Grading Plan dated 4/11/05, the only plan he had ever received from AKR, which was outdated and inaccurate as to elevations. (98a).

In a "Certification in Support of Motion for Summary Judgment'" dated 4/16/22, AKR's president (Rusin) admits that he gave the surveyor this 4/11/05 Grading Plan in 2008 to obtain a cost estimate from the surveyor, because, "at the time, that was the only grading plan AKR had." (Pa92 at ¶14 & ¶15ss). He never sent the surveyor an updated plan.

AKR recruited, hired, supervised and paid Rigg Associates as the surveyor on this project. Rusin signed the authorization for Rigg to begin work on March 16, 2009. (Pa96)

However, between 2008 and March 2009 when the surveyor performed his stakeout, much had changed with the grading plan. AKR was aware of the revisions (see below). Yet AKR never supplied the surveyor with the engineer's revised grading plan.

In January 2008, plaintiff Edward Kloss came to realize that Dynamic Engineering's April 11, 2005 grading plan was inaccurate, with the first floor elevation of the pre-existing Longo building listed as 30" lower than it actually was. (Pa384 at ¶10).

After finding the error, Kloss met with his engineer Dynamic and with Rusin, president of AKR, to discuss how to proceed. It was decided to revise the plans. (Pa385 at ¶11).

On March 14, 2008, as per agreement with Kloss and Rusin, Dynamic revised its grading plan, correcting the finished floor elevation (FFE) of the existing building from 443.15 to 445.77 ft. (Pa385 at ¶13; Pa127).

On October 7, 2008, Dynamic Engineering sent Kloss and Rusin a revised site plan with corrected elevations. (Pa403; Pa386 at ¶18).

On November 3, 2008, Dynamic sent to Morris Plains Engineer Leon Hall, cc to Kloss and to AKR, a letter with copies of the original4/11/05 grading plan and the revised grading plan. Dynamic's engineer John Palus explained in the letter: "As you are aware based on our discussions, it appears that the main finished floor of the existing building is approximately 3' higher than that which was originally identified in the Boundary and Topographical Survey. At this time, we have regraded the site maintaining the same site layout.... Please note that we have attempted to highlight the major changes to facilitate your review of the enclosed plans." (Pa404).

On January 26, 2009, the Morris Plains Board of Adjustment approves the new grading plan with revised elevations. (Pa406-412). This approval occurred almost two years after the Board of Adjustment had approved the original plan. (Pa407).

On the morning of March 19, 2009, surveyor Bruce Rigg called AKR's Andrew Rusin to request computer files of the grading plan before he started work at the site. Rusin told Rigg he did not have computerized files, and to contact Dynamic or Kloss (Pa93 at ¶18). A call memo from Rigg's office on that morning confirms that Rusin told Rigg to call Dynamic, and that Rigg did call Dynamic to ask for digital files and left a message for Engineer John Palus. (Pa229).

No evidence suggests that anyone called Kloss about obtaining the digital records. No evidence shows that Rigg and Palus made contact with each other, or that the current grading plan was forwarded to Rigg.

On March 23, 2009, at 7:08 a.m., surveyor Gary Veenstra of Rigg's office emailed Dynamic Engineer Palus: "I will be on the job site today but am looking for the DWG data for Rt 10, Morris Plains job. Thanks for your help." (Pa230) There is no evidence that Rigg received any digital files from Dynamic.

On March 23, 2009, at 4:16 p.m., Rigg Associates faxed to Rusin at AKR a two-page document entitled "Cut Sheet for Building Stakeout" dated March 23, 2009, for 1775 Route I 0, Morris Plains. The cut sheet listed four elevations staked at the four comers of the proposed new building. The cut sheet recited: "Building elevation based on plan entitled 'Grading Plan, EJK Realty, Proposed Retail Development, Block 115, Lots 1-5, NJSH Rt I 0 & Candlewood Drive, Borough of Morris Plains, Morris County, NJ' dated 4/11/05 and prepared by Dynamic Engineering Consultants, PC Sheet 4 of 11." This undeniably referred to Dynamic's preliminary grading plan, because all subsequent revised grading plans were numbered "5 of 11" and bore later dates.

The cut sheet explicitly required that AKR "must notify this office prior to any construction if the above referenced plans have been revised." (emphasis added.) AKR made no such notification to the surveyor.

There is no evidence that AKR ever advised Rigg of any change in the grading plan before construction and soil removal commenced. The new building on site, designed to house six commercial stores, was constructed at the wrong elevation. The error came to light as workers approached the Longo Building in a continuing east-to-west process to shave off 2.5 feet of topsoil from the site, and only then realized that if they continued they would expose the foundation wall of the Longo Building. This was in December 2009. (Pa388 at ¶27) Work was immediately suspended.

According to a "Memo to File" from Surveyor Rigg's office, dated March 24, 2010, an employee named "Steve" from AKR called and asked why Rigg's cut sheets did not match AKR's current plans. Rigg's employee wrote: "I explained to him that the plans that we were given to provide the layout was (sic) the original set dated 4/11/05. We only recently received a newer set because we have been asked to do additional work onsite. He now understood." (Pa437). This constituted an admission of error by AKR.

In August 2010, Morris Plains Engineer Leon Hall advised the Board of Adjustment that he had become aware of "an elevation issue relating to the construction of the new 15,000 SF building in relation to the existing 20,000 SF building." Mr. Hall told the Board that he asked the applicant for an as-built survey, which revealed that the new building was "approximately 2.5 feet lower

in relation to the existing 20,000 SF building than what the approved site plan had shown in the past." Hall found this discrepancy significant enough to stop all work and require an amended application to the Board by Mr. Kloss. No Certificate of Occupancy would be issued for the newly constructed strip mall. The 2.5 ft. discrepancy was consistent with the discrepancy between the elevation shown on Dynamic's 2005 grading plan originally provided by AKR to Rigg, and the revised grading plan provided to AKR by Dynamic in late 2008 but never forwarded by AKR to Rigg before Rigg performed it's stakeout of the new building's elevation in March 2009.

Clearly this incorrect grading of the building site flowed directly from the surveyors' use of the outdated grading plan provided by AKR despite AKR's knowledge that the old plan had recently been corrected and superseded.

This constituted classic Common Knowledge Negligence by Defendant AKR, understandable by an average juror with the testimony of Kloss and related witnesses with no need for expert testimony on liability.

As argued in Point II below, we can also present sufficient evidence to reach a jury on the issues of proximate cause and damages based on contemporaneous documents and records and the testimony of witnesses previously identified in discovery, without the need for additional expert witnesses.

POINT II

PLAINTIFFS CAN PRESENT SUFFICIENT CREDIBLE EVIDENCE ON PROXIMATE CAUSE AND DAMAGES TO REACH A JURY THROUGH DOCUMENTARY EVIDENCE AND THE TESTIMONY OF EDWARD KLOSS AND OTHER REAL ESTATE DEVELOPMENT PROFESSIONALS, AND THEREFORE SUMMARY JUDGMENT AGAINST PLAINTIFF MUST BE REVERSED. (Pa10-Pa12)

If a jury were to find Defendant AKR negligent in failing to provide its surveyor with a current revised grading plan for plaintiff's property, then the jury should be permitted to also consider issues of proximate cause and damages.

Just as the court below incorrectly required plaintiff to designate an expert to prove liability, the court likewise incorrectly required plaintiff to designate a specifically labeled "expert" on proximate cause and damages.

The Court below confirmed that the proper measure of damages would be the amount of money required to put the injured party in the same position as if the damages had not occurred, specifically "to financially put the plaintiff in a position as if the grading discrepancy had not occurred." (Pa26)

Plaintiff Edward Kloss, in a certification submitted in opposition to defendants' motion for summary judgment, succinctly sets forth the elements

of alleged damages and his extensive experience as a general contractor enabling him to assess the reasonableness and necessity of these expenses. (Pa462- 465)

Mr. Kloss has been involved with 20 different projects, including building five (5) strip malls from the ground up. He is well-versed in all aspects of property development, including obtaining government approvals, the usual and customary charges of professionals, the timeframe for obtaining approvals, the hiring of necessary professionals, the customary charges for soil removal, and other typical development activities. (Id.)

Mr. Kloss certifies the reasonableness and necessity of the invoices for several categories of alleged losses. We also identify the professionals who performed the services in question, who would be available for cross-examination. See, "Plaintiffs Initial Disclosures Pursuant to Case Management Order entered October 5, 2017" (Pa503-505)

The proximate connection between defendant's negligence and most elements of Plaintiffs' financial loss is self-evident. E.g., the extra engineering fees, extra surveying fees, and extra legal fees required to submit revised plans to the town for ultimate project approval were a natural consequence of defendant AKR's negligent failure to submit revised grading plans to the surveyor. (Pa464)

The unnecessary removal of thousands of square feet of topsoil was the direct consequence of wrongly lowering the elevation of the site by 30 inches. 464a. The contractors who performed this function can testify that their bills, already submitted to defendants, were reasonable and necessary. We refer the Court to the factually similar case Golomore Associates v. New Jersey State Highway Authority, 173 N.J. Super. 55 (App. Div. 1980), where two excavation contractors sued the State for providing them with inaccurate soil elevation diagrams, causing them to lose money on a highway excavation contract. The Court ruled that the inaccurate elevation diagrams were positive statements of actual physical conditions, upon which the State could be sued without plaintiff producing its own estimate of the amount of soil to be excavated. The only damage evidence required in the case was the cost of the additional excavation incurred by plaintiffs.

As to lost rents, Plaintiffs can produce leases already signed by tenants for stores in the new building on site, whose occupancy was delayed for many months due to the town's refusal to issue certificates of occupancy until all issues on the site were resolved. The economic impact on plaintiff from these lost rents is self- evident. (Pa464)

Likewise, Plaintiffs can produce at trial engineering plans, records of the Board of Adjustment, and invoices concerning another element of damages –

the need to increase the height of a retaining wall on the site by three feet, directly due to the grading mistake. (Pa465)

One element of damages, stemming from the Longo Building, is not as direct as others, but can still be proven to a jury through the factual testimony of Mr. Kloss, and through documentary evidence.

As Mr. Kloss certifies, "Absent the [grading] error, the Longo Building could have been leased to one (1) user or three (3) separate users based upon the number of approved parking spaces." 464a. In its Decision Denying Reconsideration, the court below confirmed: "Neither party disputes that the Board had approved the Longo Building for use as one- and three-tenant occupancy." (Pa19). Admittedly, division of space into six stores may have required approval for additional parking spaces and would therefore be somewhat speculative. A single user was already approved for retail. Division of the space into two or three stores would not have required additional municipal approval. Potential rents for stores in the Longo Building could be accurately estimated based on the rents contemporaneously agreed to by six tenants already leasing the stores in the new building next door.

The causal connection between the grading error and the loss of revenue from the Longo Building is as follows: Due to the grading error, stores in the Longo Building could no longer have their entrances on the eastern side of the

building. Under the original site plan, the elevation of the parking lot on the east side was supposed to be flush with the internal floor of the building so that customers could simply walk in. But with the parking lot now graded 2.5 feet below the building floor, customers would need stairs or a ramp to enter the stores from the eastern parking lot. This would create difficult ADA issues and make the stores less desirable. A ramp would be totally impractical due to space limitations. In short, plaintiff determined that his only viable alternative was to rent the entire building to a single business with its entrance on the north (Route 10) side of the building, where no stairs would be required.

After a long delay, while the Longo Building remained empty, Plaintiff was able to attract a highly- specialized retailer, Harley Davidson Motorcycles, which took the entire space for a used motorcycle center, where the majority of customers arrived on motorcycles, which, unlike cars, could be parked on the north side of the building where space was too cramped for automobile parking. Harley, however, demanded to buy rather than rent the building, so Mr. Kloss of necessity sold it to them. Defendants argue that Kloss was able to sell to Harley for more than he originally paid for the building so as to actually sustain a profit rather than a loss. However, this argument is fallacious, since it was Mr. Kloss's original intention, but for the grading error, to continue to own the building and reap rental profits for years. Additionally, he was able to sell for a

profit only after extensive site development had been performed at his expense. The profit was less than it would be if it could be used for the original concept of retail users at a rental identical to the rents of the new building. A greater sales price would have netted a greater profit. Thus, net profit, if any, from the early sale of the Longo Building to Harley Davidson would have only partially mitigated the loss of plaintiff's long-term rental profits or selling value.

In sum, the proximal causal connection between the common knowledge negligence of defendant AKR and plaintiff's economic losses is clear and direct. Plaintiff's proofs are adequate and sufficient to reach a jury. The decision of the court below to grant summary judgment against plaintiffs on liability, proximate cause and damages was against the interests of justice and must be reversed.

POINT III

THE COURTS' OPINIONS BELOW, GRANTING SUMMARY JUDGMENT AND DENYING RECONSIDERATION, REST ON SEVERAL INCORRECT STATEMENTS OF LAW OR FACT. (Pa5-Pa15; Pa18-Pa29)

A. THE COURT BELOW MISSTATED THE RULING OF AN EARLIER COURT REGARDING THE NEED FOR EXPERT TESTIMONY. (Pa12)

In his January 23, 2023 "Statement of Reasons" supporting denial of Plaintiff's Motion for Reconsideration of Summary Judgment (Pa18), and in his "Statement of Reasons" supporting his initial grant of summary judgment (Pa5), Judge DeAngelis relied on an earlier, September 29, 2020, ruling by Judge Bogaard in this case (Pa1-2), which Judge DeAngelis asserted required Plaintiff to obtain an expert report finding AKR to be "at fault for the alleged grading error." However, review of Judge Bogaard's written Order on that motion, as well as sections of the motion argument transcript presented to the Court by defendants, demonstrates that Judge Bogaard made no such finding either orally or in his written Order. Furthermore, even if Judge Bogaard orally made such a requirement for expert testimony (which he did not), Judge DeAngelis wrote in his Statement of Reasons: "The Court concurs with Plaintiff's assertion that a transcript is not binding on the Parties." (Pa25).

In his Statement of Reasons denying reconsideration, as well as his Statement of Reasons supporting his initial grant of summary judgment, Judge DeAngelis relied heavily on the transcript of that earlier motion argument for

proof of a crucial (but actually nonexistent) ruling by Judge Bogaard that an expert would be required on the issue of "whether AKR was at fault for the alleged grading error." (Paragraph 2, Pa6; and Paragraphs 2 and 3, Pa19).

Judge DeAngelis cited a specific page (page 58) of the transcript of the motion argument of September 29, 2020, where he asserted that Judge Bogaard orally required plaintiff to obtain expert testimony on the responsibility of AKR for causing the grading error. (Pa6). However, our review of that transcript excerpt, which defendant attached as Exhibit P to its original Motion of July 6, 2022 for Summary Judgment, reveals no mention by Judge Bogaard of requiring such expert testimony. [Since the transcript has been separately submitted, it is not included as part of the Appendix.]

Likewise, Judge Bogaard's written Order on the 2020 motion (Pa1-Pa2) required no such expert testimony to prove the negligence of AKR in causing the grading error. The only expert testimony required by Judge Bogaard's Order was as follows: "Without expert testimony, plaintiffs may not pursue a claim that but for the grading/elevation error they could have successfully obtained preliminary and final site plan approval (which involves obtaining the necessary variances and satisfying all conditions of approval set forth by the Board professionals) to allow for multiple tenants to occupy the Longo Building space." (emphasis added.) (Pa2). This point of Judge Bogaard's Order, by its

plain meaning, applied to only one aspect of Kloss' damage claim—the loss of ability to rent to multiple tenants in the Longo Building.

But again, Judge DeAngelis misconstrued Judge Bogaard's ruling on Kloss' need for expert testimony. Instead of quoting the entire Paragraph 6 of Judge Bogaard's Order (at Pa2), Judge DeAngelis quoted only half of Judge Bogaard's Paragraph 6, as follows: "without expert testimony, plaintiffs may not pursue a claim that but for the grading/elevation error they could have successfully obtained preliminary and final site plan approval." (Pa25). Judge DeAngelis omitted the last half of Judge Bogaard's Paragraph 6, which clarified the term "approval" to mean only "approval to allow for multiple tenants to occupy the Longo Building space." (Pa2). This was only one limited aspect of Kloss' claim.

In fact, in Paragraph 4 of his Order, Judge Bogaard explicitly denied defendant's motion to dismiss all of Kloss' other negligence claims.

Thus, an important piece of evidence used by Judge DeAngelis to justify his dismissal of plaintiff's case on summary judgment, i.e. the supposed requirement by Judge Bogaard that plaintiff needed an expert to prove all aspects of its claim for damages against AKR, appears to be nonexistant.

B. THE GRADING ERROR AT THE CORE OF THIS CASE AFFECTED THE ENTIRE PROPERTY, NOT JUST THE LONGO BUILDING, AND MULTIPLE ELEMENTS OF DAMAGE FLOW DIRECTLY FROM THAT GRADING ERROR. (Pa23)

Judge DeAngelis, in his Statement of Reasons denying reconsideration, incorrectly stated: "The grading discrepancy did not affect the entire Property, the majority of which was wooded. The grading discrepancy concerned only the Longo Building. The Court's reasoning, which focused on the Longo Building, rather than wooded land that was unaffected by the alleged error, was not so palpably incorrect to warrant reconsideration." (Pa23).

In fact, the grading error affected the entire property, which property was no longer "wooded land," as the judge wrongly surmised. The trees had been cleared and an entirely new second structure, designed to house six additional retail stores, had been constructed on the site. Due to the grading error, the two buildings on site were 2.5 feet out of vertical alignment with each other, throwing the entire site plan seriously out of whack, and prompting the town engineer to require plaintiff to revise and resubmit the entire site plan to the town for reapproval.

From that core grading mistake directly flowed multiple elements of damages. Most obviously, the town of Morris Plains required plaintiff to file a revised zoning application based on revised engineering, surveying and legal documents, all of which required professional fees to prepare and present. The

east side of the Longo Building became unusable for store entrances, because that would require customers to climb stairs or a ramp from parking spaces which were originally designed to be flush with the floor of the Longo Building but were now 2.5 feet lower than the building floor. Besides which, a ramp, as required by the ADA would be so long as to be impracticable. Because the town would not issue certificates of occupancy until the redesign and reapproval of the entire project had been fully completed, plaintiff lost a year of rents from store owners who already had signed leases at fixed rental amounts but could not take possession and open their stores.

A significant additional element of damage obviously flowing from the grading error was the unnecessary removal and disposal of thousands of square feet of top soil, which had already been performed by a excavator and paid for before the error was caught. No one is suggesting that the soil could have been replaced, but the cost of its removal should be reimbursed to plaintiff by defendant to make plaintiff whole, which the Court below found to be the proper measure of damages.

Even the much-discussed losses stemming from use of the Longo Building were incorrectly minimized by the Court below. Much of the Court's Statements of Reasons for granting summary judgment and denying reconsideration focused on plaintiff's alleged need for expert testimony to support his claim that the

building could likely have been approved for six units, as opposed to the one unit then being marketed by plaintiff. However, Judge DeAngelis explicitly stated in his statement denying reconsideration: "Neither party disputes that the Board had [already] approved the Longo Building for use as one- and three-tenant occupancy." (Pa 19). Thus, loss of rent from up to three prospective tenants in the Longo Building was not at all speculative, as three rental units had already been approved by the town. As previously mentioned in Point II above, the best measure of future lost rents would be the rate per square foot in the leases already signed by the tenants for the new building next door, who were waiting for certificates of occupancy to be issued by the town pending resolution of the delays caused by the grading error.

Virtually all plaintiff's damages are liquidated in the form of invoices previously paid to vendors for work already performed or contained in executed property rental leases. These are fact issues, not opinion issues. If questions arise as to the reasonableness or necessity of any costs, plaintiff has identified and can produce at trial the actual vendors who performed the work.

As to the causal connection between expense and the alleged negligence of defendant, we submit that the causal links are self-evident, without the need for expert testimony. The only damage issues presenting any complexity relate to the sale of the Longo Building, previously discussed in Point II. We submit

that Plaintiff Edward Kloss is qualified to testify as to the facts of that transaction, which should be sufficient to reach a jury.

POINT IV

THE COURT BELOW WRONGFULLY REJECTED SEVERAL OTHER ARGUMENTS WHICH WOULD HAVE ALLOWED PLAINTIFF TO TESTIFY AS AN EXPERT OR LAY EXPERT. (Pa11-Pa12)

Very early in this case, Plaintiff served on Defendants a detailed list of witnesses expected to be called, with a detailed description of what the witnesses would testify to and their qualifications to testify. Mr. Kloss was the first witness listed. (Pa503-Pa505). Defendants were put on notice of Mr. Kloss's extensive knowledge and experience specifically in the planning and construction of retail strip malls in New Jersey. (Pa503).

Though the "magic word" "expert" was not formally attached to Mr. Kloss's name, there is no doubt that Mr. Kloss would be qualified to testify as an expert herein.

Evid. R. 701, "Opinion Testimony of Lay Witnesses," permits opinions even by those not listed as experts, if the opinions are rationally based on the perceptions of the witness, and will assist in determining facts in issue. Both these requirements would be satisfied if Mr. Kloss were allowed to express opinion testimony herein.

Additionally, as argued below, as a matter of justice and equity, discovery should be reopened for the limited purpose of allowing Mr. Kloss to be re-deposed as an expert witness in addition to being a fact witness. This is only fair, since the impact on Appellant of dismissing its case on procedural grounds far exceeds the impact on Defendant of having to defend its case at trial.

POINT V

THE COURT BELOW ERRED IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION IN FAILING TO PERMIT PLAINTIFF TO SUBMIT A WRITTEN REPORT BY AN EXPERT WHILE DEFENDANT DID NOT OBJECT TO THE DISCLOSURE STATEMENTS. (Pa28-Pa29)

Subsequent to the entry of the Order dismissing the Complaint for failure to have a "expert report," Plaintiff moved for reconsideration and sought relief from the court to supply an expert report as to breach of contract and damages.

As argued in our Brief in support of the application (Pa515), with the above arguments concerning the Court's reconsideration of the drastic action of dismissal of the entire case, at the very least it is urged that if in fact an actual written report by an expert is necessary to establish negligence or any aspect of damages, it is only fair that plaintiff be given that opportunity where the defense never objected to the disclosures as the basis for liability and damages. Similarly, that opportunity should be afforded plaintiff to demonstrate a breach of contract on the part of defendants. This remedy would be justified based upon

the defense position that nothing further was necessary by way of discovery beyond a newly named expert and the defense failure to recognize the disclosure document as an alternate and substantial compliance with the Rules.

Simultaneously, co-counsel filed a supplemental in support of having the court allow additional time to obtain such a report. (Pa517) In that letter Mr. Bray said:

> "We submit this letter as co-counsel for Plaintiffs to supplement Mr. Maitlin's submissions.
>
> It warrants emphasis that the Court has the discretion, and the right, to consider the prejudice to the parties and the Judiciary attending the procedural dismissal of Plaintiffs' claims. The preclusion of supplemental reports, or experts (if deemed to be required notwithstanding Mr. Kloss' qualifications), causes the Plaintiffs to suffer the loss of patently meritorious claims through no fault of their own. Thus, as things stand, the Plaintiffs are suffering extreme prejudice. The Defendant, on the other hand, does not contend that it will be unduly prejudiced by having to defend the claims on the merits. (A party cannot legitimately contend it has a right to rely upon a procedural deficiency that can be remedied.) Similarly, the Judicial System has been woefully backed-up and according a finite delay to a long-delayed matter will not cause any harm. Thus, we ask that Your Honor consider these factors when considering this application for reconsideration."

Based on the arguments raised, by demonstrating significant deficiencies in the defense position of the equities involved, the trial judge should have

exercised his discretion in allowing the additional time for such a report. Plaintiffs' Brief on Reconsideration (Pa516) has the full explanation for such relief. The trial court's errors as outlined herein warrants a reversal of the dismissal order. Time should be allowed by this court to obtain an expert report if the court concludes one is necessary, but the decision was so flawed it must be reversed. Justice and equity dictates that result.

CONCLUSION

For all the reasons set forth herein, it is respectfully urged that summary judgment granted in favor of defendants be reversed and that this case be returned to the trial list in Superior Court.

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By: */s/ Allan Maitlin*
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Dated: December 7, 2023

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EJK REALTY, LLC, A NEW JERSEY LIMITED LIBILITY COMPANY, AND EDWARD KLOSS, JR., *Plaintiffs-Appellants,* v. AKR CONTRACTING, INC. AND ANDREW RUSIN, *Defendants-Respondents.* v. RIGG ASSOCIATES, P.A., BRUCE RIGG, AND DYNAMIC ENGINEERING CONSULTANTS, *Third-Party Defendants.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-1723-22 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MORRIS COUNTY DOCKET NO. MRS-L518-17 SAT BELOW: HON. FRANK J. DEANGELIS, J.S.C. **BRIEF AND APPENDIX FOR DEFENDANTS-RESPONDENTS**

Peter V. Koenig, Esq.,
Steven A Weiner, Esq.
Of Counsel

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PRELIMINARY STATEMENT

This was a complex action arising from the redevelopment of an existing commercial structure and adjacent land beginning in 2005. The property, owned by plaintiff EJK Realty, LLC, underwent multiple proposed development plans devised by EJK Realty, before being subdivided and sold.

EJK Realty engaged defendant AKR Contracting, Inc. to grade the property in accordance with plans procured by EJK Realty. Plaintiffs allege that AKR Contracting's grading, though in accord with plans provided to AKR Contracting, left a portion of the property with a lower grade level than EJK Realty intended.

The crux of the matter is whether the grade differential caused any damage to EJK Realty and, if so, how that damage arose and what it might be.

These are clearly topics for expert testimony. Plaintiffs could not sustain their claims without expert analysis.

EJK Realty did not name an expert to establish that any damage actually occurred. There was likewise no expert analysis to support the claim for the quantum of damages or how damages were allegedly sustained.

In 2020, after the close of discovery, defendants-respondents obtained partial summary judgment dismissing the bulk of the claims against them, because of the absence of required expert testimony. In 2022, again well after the close of

discovery, defendants obtained judgment dismissing the remainder of the claims on a like basis.

Both Motions were briefed thoroughly, presented via oral argument, and decided by the trial court via comprehensive written opinions. These opinions and Orders well merit affirmance.

CONCISE PROCEDURAL HISTORY

The action below was a re-filing of an essentially identical action by plaintiffs, filed on March 16, 2015 under Docket No. MRS-L-489-15. Da1.[1] That action was withdrawn and dismissed without prejudice in December 2016, while on the trial list, at plaintiffs' request.

On March 3, 2017, plaintiffs filed their second Complaint regarding the matters in question. Pa30. On June 23, 2017, defendants-appellants filed their Answer. Pa41.

On October 6, 2017, a Case Management Order was entered requiring that any party proposing to call an expert witness must serve the name, address, qualifications and report of the proposed expert no later than May 15, 2008. Pa70; *see* Paragraph 6 at Pa71.

[1] The prior action of 2015 and its dismissal were referenced in the court's decision of September 29, 2020, 1T 55-22 to 56-2.

On June 29, 2018, a further Case Management Order was entered, on consent. Pa74. This Order required the service of expert reports for plaintiffs by September 30, 2018 (Pa74) and extended the Discovery End Date to January 31, 2018. Pa75.

Plaintiff Edward Kloss Jr. was never named as a proposed expert witness, nor were his qualifications or a report served for plaintiffs.

On May 22, 2020, defendants-respondents filed a Motion for Summary Judgment. Pa77a *et seq.* This Motion was filed after the close of discovery. It included the report by plaintiff's *sole* proposed expert, National Consulting Company, an appraisal firm. Pa280.[2]

In response to the Motion of 2020, plaintiffs did not identify Mr. Kloss as a proposed expert, nor provide a curriculum or report by Mr. Kloss, nor seek to re-open discovery. *See* Pa364 *et seq*.

In September 29, 2020, the trial court granted partial summary judgment in favor of defendants-appellants. Pa1; 1T.

Thereafter, plaintiffs did not move to re-open discovery or otherwise move for leave to name Mr. Kloss as an expert.

On July 22, 2022, defendants-appellants filed a second motion for summary judgment after the close of all discovery. Pa441 *et seq.* The opposition for plaintiffs

[2] Plaintiffs' Appendix abridged that report for purposes of appeal.

did not include a cross-motion or other application foir leave to name Mr. Kloss as an expert. Pa449 *et seq.*

By written opinion and Order of December 7, 2022, the trial court dismissed the remainder of plaintiffs' claims. Pa3.

On December 27, 2022, plaintiffs filed an application styled as a Motion for Reconsideration. Pa499. In substance, plaintiffs sought, for the first time, to re-open discovery to name Edward Kloss Jr. as a new expert witness.

By written opinion and Order of January 20, 2023, the trial court denied plaintiffs' Motion for Reconsideration. Pa16.

CONCISE STATEMENT OF FACTS

The facts underlying the dispositive motions of 2020 and 2022, and their supporting documents, are laid out in detail as follows:

As to the 2020 motion, leading to the dismissal of most but not all of plaintiffs' claims, see the Statement of Material Facts in support of the Motion at Pa79, the Certification of Andrew Rusin at Pa91, the Certification of Counsel and its 26 accompanying Exhibits at Pa105 *et seq.*

As to the 2022 motion that yielded dismissal of the remaining claims, see the Statement of Material Facts at Pa443 and accompanying Exhibits.

To summarize:

Purchase of the Property

1. Edward Kloss, individually, purchased the Property by Deed dated April 13, 2005, from Joseph Longo and Longo's real estate entities, for a price of $2,350,000. Pa213. On the same day, Edward Kloss deeded the Property to EJK. Pa221. Thereafter, Edward Kloss, individually, had no ownership interest in the Property.

2. In 2005, the Property contained a single building known as the Longo Building at the northerly end of the Property. The rest of the site was wooded and undeveloped. Pa105, Site Plan April 11, 2005, page 4.

The Approved Site Plan

3. In 2005, Dynamic Engineering prepared a Site Plan for the Property. Pa105. This 2005 Site Plan called for the Longo Building "TO BE CONVERTED TO A FURNITURE STORE." It also called for the construction of a separate building at the southerly, undeveloped end of the Property. Id. **There is no claim for damages involving the new southerly building**.

4. Dynamic's Grading Plan of April 11, 2005 showed the finished floor elevation of the Longo Building as 443.15 feet. Pa105

5. EJK alleges that, at some undefined point in time, Mr. Kloss somehow discovered an "error" in Dynamic's 2005 Site Plan – that the actual elevation of the Longo Building's floor was 30 inches higher above sea level than the 443.15 feet

shown on the Plan prepared by Dynamic.[3] Pa30, Complaint, First Count, Paragraph 7.

6. However, the Dynamic Plans dated April 11, 2005 had already been submitted to and approved by the Borough of Morris Plains. Pa30, Complaint, First Count, Para 7.

7. EJK alleges that a second, corrected set of site plans were prepared by Dynamic, changing the elevations and grading. Pa30, Complaint, First Count, Paragraph 8. Those plans were not approved by the Morris Plains Board of Adjustment until July of 2009. Pa30, Complaint, First Count, Paragraph 11.

8. These dates are of critical importance, because Rigg laid out the benchmarks for excavation work in *March* of 2009 – before the revised plans had been approved. Pa91, Certification of Andrew Rusin. This timing sequence is conceded by EJK. Pa30, Complaint, First Count, Paragraph 11. Likewise, AKR performed its excavation work *per* Rigg's benchmarks in March of 2009, *before* the revised plans had been approved.

[3] It is unknown how Mr. Kloss detected this "error" in Plans prepared by Dynamic, a professional engineering firm hired by EJK.

The Longo Building Was Never Planned for or Approved as a Multi-Tenant Structure

9. The basis for EJK's damage claim is that the Longo Building "was to be developed and divided into multiple stores." Pa30, Complaint, First Count, Para. 10. The record demonstrates otherwise, and provides no support for that assertion.

10. Recapping the multiple Site Plans:

EXHIBIT	DATE	USE OF LONGO BUILDING
D	April 11, 2005	Furniture Store
E	December 22, 2009	Staples Store
F	May 17, 2010	Crème de la Crème Learning Center

G	August 17, 2010	Wholesale
H	November 18, 2010	Wholesale
I	March 10, 2011	Wholesale
J	April 7, 2011	Wholesale
K	May 24, 2011	Wholesale
L	September 6, 2013	Harley-Davidson Dealership

The site plans appear at Pa105 to 203; also filed in support of the 2023 motion.

11. The site plans for the Property underwent a total of 18 versions: the approved plans of 2005 (used by Rigg) and seventeen subsequent revisions. Pa105 to 203; Revision Blocks noting dates of revisions. *None* of these Site Plans showed a proposed multi-tenant occupancy for the Longo Building. *No* approval for such use was ever sought and none was ever given.

12. The Developer's Agreement of February 26, 2008 – *before* the grading error – also included a requirement that EJK reserve an area along Route 10 "for future right of way purposes." Pa319, p. 3, Section 3.

13. In fact, the reservation of the strip along the Route 10 frontage of the Property was part of the Developer's Agreement that EJK had signed with the Borough on February 26, 2008 (Pa319), pursuant to the site plan approval of April 23, 2007 (Pa313). The April 2007 approval and the February 2008 Developer's Agreement were based on use of the Longo Building by a single occupant. The

approval and Agreement preceded the benchmarking of the grades by Rigg and the excavation by AKR, which occurred in March of 2009.

The Longo Building is Sold at a Profit to a Single User

14. By Deed recorded November 12, 2014, the Longo Building and its associated parking area were sold by "EJK Realty, LLC now known as Etel Realty, LLC" to GSP Partners Realty, LLC for use as a Harley-Davidson motorcycle dealership. Pa358. The sale price was $4,000,000, being some $1,650,000 more than the $2,350,000 paid to purchase the entire Property. Edward Kloss was not the owner or grantor of the Longo Building.

The Opinion and Order of September 29, 2020

15. By Opinion (1T) and Order (Pa1), the court decided issues as follows.

16. EJK cannot sustain its position that the Longo Building could have been developed as a multi-tenant structure. The plaintiff's proposed expert appraiser merely assumed – but did not opine or state – that the Longo Building could have been developed for multiple tenancies. The appraiser's opinions as to damages were predicated upon that assumption. 1T 58-19 to 59-8. The Court therefore held:

> So part of the Court's order will provide, without a duly qualified expert testimony, plaintiff may not pursue a claim, but for the grading and elevation error, they could have obtained preliminary and site, and final site plan approval and all necessary variances and satisfy all conditions to allow for multiple tenants to occupy the Longo building. So, I can [*sic*: am] granting summary judgment on that claim. That claim is out.
>
> [1T, 58-11, 18]

17. The Court also dismissed EJK's claim that AKR was responsible for the erroneous placement of excavation benchmarks by Rigg, the licensed professional surveyor:

> On the respondeat superior, there is really no claim of a negligent retention or the like.
>
> [1T 5-17, 18]
>
> Again, when I look at the respondeat superior, there is no evidence that AKR Rusin exercised control over the manner and means of the work being performed. So, again, and they are not a GC, so there is no issue where your GC has a nondelegable duty.
>
> [1T 14-13, 17]
>
> I am going to grant the application on the respondeat superior, though, so there is no basis for the application of that doctrine, vis-a-vis AKR given the lack of control over the manner and means of the work being performed.
>
> [1T 57-10, 14]

18. The Court likewise dismissed the ancillary claim for the cost of applying for site plan approval:

> So, I, you know, have gone through it in my head multiple times, I cannot conceive of a circumstance where without properly served and identified and qualified expert testimony that the other side is on notice of there is just too many hoops to jump through. It's why engineers are on these boards. It's why planners are on these boards. It's why these boards all have attorneys who have specialized expertise in land use law and the like. Could there be something in the records or other documents that could be used and cobbled together and convince the trial judge to try and sneak this theory through? I don't know. But, you

> know, as I say, without designated expert testimony, you can't advance that claim.
>
> [1T 58-19 to 59-8]

EJK has no designated expert report to support these claims.

19. The Court also held that "other claims" by EJK required expert testimony, explaining:

> The other claims: loss of a rental opportunity, having to regrade, costs incurred as a result. Now, again, you know, you think of medical records, right? What does everybody know you are going to do on a personal injury case, if you want to get those medical bills, right? You really should get a doctor to look at the bills … So, but again, to get those legal bills, were they all related to the elevation issue or were they related to Kloss as a developer pushing the envelope in other areas?
>
> [1T 59-9, 23]

And, succinctly:

> [Y]ou need expert testimony on that. There is no question about it. Too many variables.

[1T, 60-7, 9]

The Opinion and Order of December 7, 2022

20. By Opinion and Order entered December 7, 2022, the Court dismissed the remaining claims against defendants. Pa3.

21, In sum, the Court held that plaintiffs failed to offer admissible expert opinion that the alleged grading error caused damages, or that the Longo Building could have been developed for multi-occupant use. Pa11 to 12. Edward Kloss was

never identified as an expert witness, did not provide a report or curriculum, and could not testify as a lay witness as to these required elements of expert proof. Pa 11 to 12.

Plaintiffs' Motion for Reconsideration

22. By Motion filed December 27, 2022, plaintiffs demanded, for the first time, leave to re-open the action and retroactively name Edward Kloss Jr. as an expert witness. Pa499.

23. By written Opinion and Order of January 20, 2023, the trial court denied plaintiffs' motion. Pa 16. In particular, the trial court found no basis to re-open the action, after two successive dispositive motions and multiple Case Management Orders, to allow a post-judgment expert to be named. Pa28 to 29.

LEGAL ARGUMENT

POINT I

THE COMPLAINT WAS PROPERLY DISMISSED FOR LACK OF ADMISSIBLE EVIDENCE AS TO LIABILITY AND DAMAGES

The events giving rise to this action began in 2005. This action was originally filed by plaintiffs in 2015, and withdrawn in 2017. See Pa301. Edward Kloss was never named as an expert in plaintiffs' prior action, nor in the present, refiled action commenced in March 2017.

Plaintiffs' claims required expert testimony to support them. Plaintiffs produced no expert reports or other proposed admissible evidence to support the claims or either liability or damages, despite ample opportunity to do so. By the Opinion below on September 29, 2020, the trial court held the claims could not proceed without such testimony. T1 58-19 to 60-9. Despite this literal roadmap laid out years ago, plaintiffs neither provided expert discovery nor requested an extension of time to do so. The court dismissed substantially all of the claims against the defendants, because of the lack of an expert opinion needed to sustain those claims. Plaintiffs never applied to re-open discovery to name Mr. Kloss as an expert or otherwise provided the required prima facie evidence to proceed.

In July of 2022, defendants moved to dismiss the remaining claims against them. See Pa77 *et seq*. This was after the close of discovery below. Plaintiffs again never applied to re-open discovery to name Mr. Kloss as an expert.

After several adjournments requested by plaintiffs, plaintiffs filed opposition to the Motion on November 8, 2022. See Pa364a *et seq.* Plaintiffs asserted, *for the first time*, that Mr. Kloss was either a lay witness to offer "opinions" in this action, or was somehow qualified, retroactively, as a previously undisclosed "expert" who had never rendered a report.

After comprehensive briefing and oral argument, this Court entered a comprehensive Opinion and Order on December 7, 2022, dismissing the remaining claims and terminating this action. Pa3.

A. Edward Kloss Could Not Testify as an "Expert"

It is well settled that damages cannot be based upon speculation or conjecture. *Wasserman's v. Twp. of Middletown*, 137 N.J. 238, 256 (1993), quoting with approval, *Kenford Co. v. County of Erie*, 493 N.E.2d 234 (N.Y. 1986); see *Kurtz v. Oremland*, 33 N.J. Super. 443, 453 (Ch. Div. 1954), aff'd. on op. below, 16 N.J. 454 (1954) (applying the same standard to contract and tort damages).

B. The Rules of Court Bar "Expert Testimony" by Edward Kloss

Edward Kloss was never been identified as an expert witness in this action.

> The language of *R.* 4:10-2(d) (1) is dispositive:
>
> (d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of R. 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (1) A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an expert who has conducted an examination pursuant to R. 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The interrogatories may also require, as provided by R. 4:17-4(a), the furnishing of a copy of that person's report.
>
> [emphasis added]

Edward Kloss is a person. The Rule does not exempt parties who provide expert testimony from its identification and disclosure requirements.

Under *R.* 4:10-2(d) (2), a person – again, any person - designated as an expert is subject to deposition. Since Mr. Kloss was never identified as an expert, the defense could not depose him as such.

> These are not mere formalistic requirements:
>
> R. 4:10-2(d)(1) requires that a party state in answers to interrogatories "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion * * *." This provision requires disclosure of competent and admissible evidence. Moreover, this provision and the remainder of R. 4:10-2(d)(1), incorporating R. 4:17-4(a) and requiring production of all the entire reports and a certification that no other reports, written or oral, are known to that party, were intended "to correct abuses which heretofore existed under R.R. 4:25-2 (report of physical and mental examination)

> * * *. Pressler, Current N.J. Court Rules, Comment to R. 4:17-1 at 577. See *Clark v. Fog Contracting Co.*, 125 N.J. Super. 159 (App. Div.), certif. den. 64 N.J. 319 (1973) in which a proposed expert witness was named in answers to interrogatories but no written report was annexed as requested. The answering party conceded that he received an oral report of the substance of the expert's expected testimony. In enforcing the obligation under R. 4:17-4(a) to furnish subsequently received reports, whether written or oral, the court precluded the expert from testifying. … These rules were designed primarily to prevent concealment of any expert information concerning facts and opinions and grounds for opinions "to which the expert is expected to testify * * *." R. 4:10-2(d)(1).
>
> [*Franklin v. Milner*, 150 N.J. Super. 456, 469-70 (App. Div. 1977); other cits. om.]

Where no written report has been prepared, the party must disclose the substance of the proposed expert's opinions. *Fanfarillo v. East End Motor Co.*, 172 N.J. Super. 309, 312-13 (App. Div. 1980); *Clark*, 25 N.J. Super. at 161-162. That never happened in this case.

The duty of full disclosure is continuing. *McKenney v. Jersey City Medical Center*, 167 N.J. 359, 370 (2001) and authorities cited. Here, plaintiffs had years to comply, but failed to do so.

On April 22, 2020, after the close of discovery, the defendants filed a dispositive Motion addressing the lack of an expert. Mr. Kloss was not identified as an expert at that time, though such an identification would have been untimely.

In September of 2020, the Court ruled on the requirement for expert testimony. Though by then grossly out-of-time, plaintiffs did not name Mr. Kloss as an expert or move to re-open discovery.

Defendants filed a further and final dispositive motion on July 6, 2022. Though again grossly untimely, plaintiffs did not even attempt to identify Mr. Kloss as an expert or otherwise comply with the Rules of Court.

On November 8, 2022, in opposition to that Motion, plaintiffs asserted, for the first time, that Mr. Kloss was an "expert witness." By then, the discovery end date had long since passed, and plaintiffs did not seek to re-open discovery. Moreover, while attempting to "name" Mr. Kloss as an "expert," plaintiffs provided none of the information or reports required by the Rules of Court.

The trial court reasonably, appropriately and logically dismissed this eleventh-hour gamesmanship.

C. The Plaintiffs' Sole Proposed Expert Expressly Disclaimed Any Evaluation of Liability and Based His Report Upon Contra-Factual "Assumptions"

Plaintiffs named *one* proposed expert and served that one proposed expert's report, being an Appraisal by National Consulting Company. Pa281 *et seq*.

The Appraisal simply *assumed* that the Longo Building would have been approved for use by six (6) tenants, and then compared its value as such to the price received by EJK when the Longo Building was sold.[4]

By Opinion and Order entered September 29, 2020, the court held that the appraisal report did not address whether the Longo Building would have been approved by the Zoning Board for multiple tenancies, and that an appropriate expert report would be needed to answer that question. The court also held that the question of AKR's fault for the alleged grading error required expert proof. 1T 10 to 14.

EJK served no other expert reports, despite ample time to do so and the trial court's explanation of what was missing and what plaintiffs needed to provide via expert testimony. Discovery ended. The final dispositive motion of 2022 was filed, adjourned repeatedly at plaintiffs' request, and still plaintiffs failed to fill their void of proof.

As the Report repeatedly makes clear, the expert simply *assumed* that a multi-tenant retail use of the Longo Building was intended (absent supportive facts), could be applied for (absent supportive facts), and would have been approved (absent supportive facts). Nor did the Report even opine as to the reasonableness of such assumptions. The Report's conclusions about loss of rent and value are based upon

[4] Although dating from April 2019, the Report was not served until November 27, 2019.

speculation, which is both unsupported by facts or documents and contradicted by facts and documents.

Thus, on page 1 of the Report (Pa 281), the proposed expert simply "assumes the subject [the Longo Building] would have been built as a 7-unit retail strip center."[5]

Again, on page 2 (da282), and with italic emphasis: "*the description, use and valuation of the subject under its* ***to be Built*** *scenario is referred to as a hypothetical condition and defined as follows: 1. A condition that is presumed to be true when it is known to be false …*"

On page 14 of the Report (Pa298):

> "11. It is assumed that all applicable zoning and use regulations and restrictions have been complied with unless a non-conformity has been stated, defined and considered in this appraisal report.
>
> 12. It is assumed that all required licenses, certificates of occupancy, or other legislative or administrative authority from any local, state or national governmental, or private entity or organization have been or can be obtained or renewed for any use on which the value estimates contained in this report are based."

Again, on page 16 (Pa300), the Report reiterates with italic emphasis the "*hypothetical condition*" caveat appearing on page 2 to explain the numbered "assumptions" including 11 and 12 quoted above.

[5] The Report also mis-states the nature of the development. The Longo Building existed when EJK purchased the property. It was not "built" by EJK.

These "hypothetical assumptions" are flatly contradicted by each of the 18 versions of the site plan. EJK never received, or even applied for, approval to develop the Longo Building for multi-tenant retail occupancy. On the contrary, each and every site plan called for a single-occupancy use: a furniture store, a day-care center, a "wholesale" establishment and finally a motorcycle showroom.

D. The Absence of Expert Evidence Also Disposed of Ancillary Claims

The *ad damnum* portion of the Complaint (Pa30 *et seq*.) included various subparagraphs, all predicated upon the unsupported assumption that the Longo Building could have been redeveloped for multi-unit retail occupancy. The trial court properly dismissed those claims as well.

> *(A) Loss of use of the Longo Building for subdivision into six retail stores with entrances at grade level, thereby avoiding any handicap requirements for access to the stores;*

As set forth in the Opinion and Order at 1T 59-17, 18, "That claim is out." The sole expert report for EJK was based on assumptions and is thus inadmissible. There were no other expert reports for EJK.

> *(B) Improper grade of the strip shopping center, requiring thirty inches of excavation for the entire tract of the strip shopping center;*
>
> *(C) Excavation of thirty inches of soil on the strip shopping center site and the expensive disposal of the thirty inches of soil. The entire site was lowered thirty inches unnecessarily due to the error;*

EJK had no engineering expert, and thus cannot prove that the "entire tract" (not just the area of the Longo Building) was "entirely excavated" excessively, or what the

"disposal" of the additional soil may have cost, or breaking out the incremental cost of the allegedly excessive excavation from the excavation EJK concedes was intended. Thus, there is no admissible proof that the grading error caused damage to the project *at all*.

> *(D) The creation of a costly retaining wall on the eastern boundary of the strip shopping center which was necessitated solely by the error;*

EJK had no expert report addressing whether that "retaining wall" was "necessitated solely by the error." EJK has no engineering expert report, and no expert report addressing the proceedings before the Zoning Board.

> *(E) The necessity to prepare plans for submission to the municipality to obtain proper approval of the site as improperly developed by AKR, with futile attempts to change the traffic configuration and grade in and about the eastern side of the Longo Building as well as the western side of the strip shopping center;*

EJK had no expert report addressing Zoning Board proceedings. As the Court held:

> It's why engineers are on these boards. It's why planners are on these boards. It's why these boards all have attorneys who have specialized expertise in land use law and the like. … But, you know, as I say, without designated expert testimony, you can't advance that claim.
>
> [1T 58-19 to 59-8]

> *(F) The loss of income and rental ability of the Longo Building as a multi retail store building and the need to find a single user of the building due to the inability to economically develop the property intended due to the grade differential on the eastern side of the Longo Building;*

This was a restatement of the barred claim that the Longo Building could have been developed as a multi-tenant retail building. There is also no engineering expert report that the grade differential prevented such a development. Further, none of the numerous site plans proposed by EJK even proposed such a development – all were for a single tenant.

> *(G) The increased cost in constructing the strip retail center thirty inches lower than designed;*

EJK had no engineering expert to substantiate what those "increased costs" may have been, if any, or that the lower grade impacted construction on the southerly portion of the parcel at all.

> *(H) The additional cost and expense of attorneys and engineering professionals to create plans and make appearances before municipal bodies and courts;*

As with "(E)" above, this claim was barred for lack of an expert and report. Also, there is no indication at all that EJK or its attorneys appeared "before courts" as to development of the property.

> *(I) The delay and loss of rentals for the opening of this strip retail store and the Longo Building;*

EJK had no expert to address the quantum of "delay," or attributing some period of "delay" to the grading issue.

> *(J) The cost and expense for the necessity of bringing this legal action to recover the damages incurred;*

EJK providesdno legal basis for abrogating the "American Rule" in this construction litigation seeking monetary damages. There is no allegation of fraud, and AKR is not a liability insurer.

> *(K) Such other costs, expenses and damages as may be developed through discovery.*

Discovery concluded long before the filing of the dispositive motion of 2022. The only substantive claim for damages was the asserted inability to develop the Longo Building as a multi-tenant structure. That claim was properly barred for lack of the required expert report.

E. Edward Kloss Cannot Testify as a "Lay Expert"

Plaintiffs' position below, and on appeal, is internally contradictory. On the one hand, plaintiffs argue that Edward Kloss is a "stealth expert" – never identified as an expert, never having rendered a report, and yet qualified to testify in derogation of the Rules governing discovery. Plaintiffs compound their error on appeal, asserting that "EDWARD KLOSS AND OTHER REAL ESTATE PROFESSIONALS" would testify on plaintiffs' behalf. See Title to Point II of plaintiffs' Brief on appeal.

On the other hand, plaintiffs assert that Mr. Kloss is a mere layman, transformed into "AN EXPERT OR LAY EXPERT." See Title to Point III of plaintiffs' Brief on appeal.

The Rules of Court and applicable law do not recognize the concept of a "lay expert." *If* an expert, then the witness must be identified as such, provide their expert credentials, render a report, and be subject to deposition and if needed a responsive expert for the defendants. Appending the word, "lay" does not abrogate the Rules governing discovery. Edward Kloss was never identified as an expert, provided no resume, rendered no report, could not have been and was not deposed as an expert, and was not subject to response via experts for the defendants.

N.J.R.Evid. 702 defines expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

That is:

> The primary justification for permitting expert testimony is that the average juror is relatively helpless in dealing with a subject that is not a matter of common knowledge. *Angel v. Rand Express Lines, Inc.*, 66 N.J. Super. 77, 85 (App.Div.1961). Thus, the proponent of expert testimony must demonstrate that testimony would "enhance the knowledge and understanding of lay jurors with respect to other testimony of a special nature normally outside of the usual lay sphere." *State v. Griffin*, 120 N.J. Super. 13, 20 (App.Div.1972).
>
> [*State v. Kelly*, 97 N.J. 178, 208-09 (1984)]

Rule 702 incorporates New Jersey decisional law as stated in *State v, Kelly* and elsewhere: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the act such

that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. *See* Official Comment to *R.* 702.

Perhaps realizing the clear impropriety of advancing Mr. Klosss as an "expert," plaintiffs apparently attempt to characterize his testimony as admissible lay opinion. That is governed by *N.J.R.Evid.* 701, which states:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:
>
> (a) is rationally based on the witness' perception; and
>
> (b) will assist in understanding the witness' testimony or determining a fact in issue.

Perception under R. 701 has a well-defined meaning: "the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." *State v. McLean*, 205 N.J. 438, 456-57 (2011); *accord, Velazquez v. City of Camden*, 447 N.J. Super. 224, 236-37 (App. Div. 2016) certif. denied, 228 N.J. 458 (2016) and *Gonzales v. Hugelmeyer*, 441 N.J. Super. 451, 460 (App. Div.2015), certif. denied, 223 N.J. 356 (2015) (applying the same definition in civil actions.) Examples of perception-based testimony include estimating the speed of a vehicle by visual observation or hearing, estimating distance via observation, describing some as intoxicated from observing their movements and conduct, and the witness testifying

about the value of their personal property. *State v. McLean*, 205 N.J. 438, 457 (2011) and authorities cited.

In sum: "Lay opinion testimony, therefore, when offered either in civil litigation or in criminal prosecutions, can only be admitted if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function." *State v. McLean*, 205 N.J. at 456.

This is not what plaintiffs propose here. Mr. Kloss would not testify as to what he saw or heard. Instead, he would testify as to opinions and conclusions – that is, as an undisclosed expert. The Rules of Court bar such concealment and gamesmanship.

POINT II

THE PURPORTED MOTION FOR RECONSIDERATION WAS PROPERLY DENIED

Plaintiffs' claims against the defendants began with their action filed in March of 2015. Da1. That action was dismissed without prejudice, at plaintiffs' request, while on the trial list. Edward Kloss was not named as an expert in that prior action.

Plaintiffs re-filed their action on March 3, 2017. Pa30.

By Case Management Order of October 6, 2017 (Pa70), plaintiffs were to name all proposed experts and provide their reports. Plaintiffs did name Mr. Kloss, nor provide a report from him/

By Case Management Order of June 29, 2018, plaintiffs' expert reports were required by September 30, 2018. Pa74. Again, plaintiffs did not identify Mr, Kloss as an expert, nor provide a report from him.

In May of 2020, defendants moved for summary judgment. Pa77. In opposition, plaintiffs neither identified Mr. Kloss as a potential expert nor moved to leave to do so.

In July of 2022, defendants moved to dismiss the remaining allegations of the Complaint. Pa441. Again, plaintiffs did not cross-move or otherwise seek leave to identify Mr. Kloss as a proposed expert.

By Motion for Reconsideration filed December 27, 2022, plaintiffs attempted to re-open discovery that has been closed for nearly three years, disregard the two dispositive Orders, impeach the Court's Opinion of December 7, 2022 as palpably erroneous and irrational, and retroactively anoint Mr. Kloss as their "expert" witness. Plaintiffs presenting nothing new beyond their dissatisfaction with the outcome. Pa499.

The grant of Reconsideration is a form of extraordinary relief. As this Court has explained:

> "Reconsideration should be utilized only for those cases [that] fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App.Div.1996) (quoting *D'Atria v. D' Atria*,

> 242 N.J. Super. 392, 401 (Ch. Div.1990)); see also *Fusco v. Newark Bd. of Educ.*, 349 N.J. Super. 455, 462 (App. Div. 2002). Trial courts should grant motions for reconsideration "only under very narrow circumstances." *Id.*
>
> [*Harmon v. Oshinsky*, 2018 N.J. Super. Unpub. LEXIS 3616 at *6 (Law Div., Morris County, March 16, 2018)][6]

Plaintiffs' motion presented no such very narrow circumstances.

> Further guidance is provided in *D'Atria*, 242 N.J. Super. at 401:
>
> A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court. Rather, the preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal or, if the Order is final, by a notice of appeal. Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the 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 significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process. The arbitrary or capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.

See *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996), quoting and adopting *D'Atria*.

[6] A copy of this opinion is annexed. Counsel is not aware of any contrary opinions.

These stringent criteria must be satisfied to justify Reconsideration; that is, before the Court need initiate the process at all. Reconsideration is not a substitute for appellate review, though we do not suggest that appellate review would benefit plaintiffs. Reconsideration is not a mere vehicle for expressing disappointment with a result. It is not, as *D'Atria* observed, a mere second - or here, third - bite at the apple.

R. 4:49-2 provides in full:

> Except as otherwise provided by *R.* 1:13-1 (clerical errors), a motion for rehearing or reconsideration seeking to alter or amend a judgment or **final** order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, **and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.**
>
> [emphasis added]

The word, "final" was added via Amendment adopted August 5, 2022, effective September 1, 2022. It clarifies and emphasizes the difference between an interlocutory Order (which can be amended at any time) and a final Order or Judgment (governed by *R.* 4:49-2). It echoes the guidance in *D'Atria* at 384 that "motion practice must come to an end at some point." The boldfaced sentence was also a part of *R.* 4:49-1 prior to September 2022. It focuses attention upon the

opinion of the Court – in this matter, a comprehensive and well-reasoned written opinion, well meriting affirmance.

After multiple Case Management Orders, the identification of *one* proposed expert (but not Mr. Kloss), and two comprehensive dispositive Motions, plaintiffs simple have no basis to flout the Orders and the result, or to oust the trial court of its role in governing discovery.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the Court affirm the dispositive Orders below in all respects, with costs in favor of defendants-appellants.

Respectfully submitted,

O'TOOLE SCRIVO, LLC
Attorneys for Defendants-Respondents, AKR Contracting, Inc. and Andrew Rusin

By: */s/ Peter V Koenig*
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DATED: January 8, 2024

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EJK REALTY LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, AND EDWARD KLOSS, JR., ***Plaintiffs-Appellants,*** *-vs-* AKR CONTRACTING, INC. AND ANDREW RUSIN, ***Defendants-Respondents,*** *-vs-* RIGG ASSOCIATES, P.A., BRUCE RIGG, AND DYNAMIC ENGINEERING CONSULTANTS, ***Third-Party Defendants.***	) SUPERIOR COURT OF NEW JERSEY) APPELLATE DIVISION)) DOCKET NO. A-1723-22)) Civil Action)) APPEAL SOUGHT FROM:) SUPERIOR COURT OF NEW JERSEY) LAW DIVISION: MORRIS COUNTY) DOCKET NO. MRS-L-518-17)) SAT BELOW:) FRANK J. DEANGELIS, J.S.C.

REPLY BRIEF ON BEHALF OF APPELLANTS, EJK REALTY LLC & EDWARD KLOSS JR.

On the Brief:
Allan Maitlin, Esq.
Peter Greene, Esq.

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LEGAL ARGUMENT

POINT I

RESPONDENTS' OPPOSITION BRIEF RELIES ON SEVERAL ARGUMENTS WHICH ARE FACTUALLY OR LEGALLY INCORRECT.

Respondents rely on several misstatements of fact or law to support their erroneous arguments, as follow:

A. CONTRARY TO RESPONDENTS' ASSERTION, THE REVISED GRADING PLAN, WHICH AKR FAILED TO PROVIDE ITS SURVEYOR IN A TIMELY MANNER, WAS IN FACT APPROVED BY THE MORRIS PLAINS BOARD OF ADJUSTMENT BEFORE, NOT AFTER, THE SURVEYOR BEGAN HIS STAKEOUT OF THE PROPERTY.

Surveyor Rigg Associates, under contract with and at the direction of AKR, began staking out the grading of EJK's property on March 23, 2009, using an outdated, inaccurate grading plan from 2005. (Pa236).

Respondents argue (at Db6, paragraphs 7 and 8) that it is "of critical importance" to their argument that the Morris Plains Board of Adjustment allegedly did not approve EJK's revised plans until July 2009, thus supposedly excusing AKR from providing updated plans to its surveyor in March 2009 because the new plans were not yet approved by the town.

However, Respondents' argument is factually incorrect. The revised, updated grading plan actually was approved by the Morris Plains Planning Board on January 26, 2009 and memorialized in the record on February 23,

2009, according to the official records of the Board produced through discovery in this case, and part of the Motion papers. (Pa405-Pa413).

Respondents erroneously rely on EJK's Complaint, paragraph 11, filed in March 2017, which mistakenly stated that the Board of Adjustment approved the revised plans in July 2009 (Pa32). The Board of Adjustment's own official records are obviously the best evidence of its official actions. The parties obtained these records during discovery. The records are included in Appellants' Appendix (Pa405-Pa413). Therefore, Respondents have no justification to rely on Appellants' 2017 Complaint to establish the date of Board approval of the revised grading plan. Board approval of the revised plans occurred well before stakeout of the property began.

B. CONTRARY TO RESPONDENTS' ARGUMENT, APPELLANTS DO NOT RELY ON THE THEORY OF RESPONDEAT SUPERIOR TO HOLD AKR LIABLE FOR THE ACTIONS OF ITS SURVEYOR, BUT RATHER ON THE DIRECT NEGLIGENCE OF AKR IN PROVIDING THE SURVEYOR WITH AN INACCURATE GRADING PLAN.

Respondents argue (at Db10, paragraph 17) that the legal doctrine of respondeat superior cannot work to hold AKR liable for the actions of Rigg Surveying. But this is not EJK's current theory of liability. Instead, we argue that AKR is liable based on its own direct negligence in failing to provide its surveyor with up-to-date grading plans for the site. Appellants originally

pleaded respondeat superior among other theories of negligence against AKR in the event Rigg was alleged to be negligent by AKR. This theory was dismissed in 2020 by Judge Bogaard as no argument was made by AKR that Rigg did anything wrong. (Pa2). However, other theories of liability against AKR remain in the case (See Plaintiff's Complaint filed March 3, 2017, Counts Two and Three, at Pa35-37), so it is irrelevant that Count Four, Respondeat Superior, was dismissed.

For example, it has been demonstrated without contradiction that AKR received seventeen subsequent revisions of the site plan after the 2005 approval of the plan supplied to Rigg by AKR.[1] (Db8, paragraph 11; Pa105-Pa203). AKR's negligence in failing to provide Rigg with any of these revised plans finally became evident when AKR called Rigg on March 24, 2010 to inquire why the elevations on Rigg's cut sheets did not correspond to the elevations on AKR's current plans (see Pb11, first full paragraph, for a full description of this revelatory moment). This was a full year after Rigg began its work with the improper plan.

Additionally, AKR failed to appreciate the source-note on Rigg's cut sheet, which should have alerted AKR that Rigg was working with outdated 2005

[1] The complete, full-size original site plans will be made available to the Court upon request.

plans. AKR also failed to respond to Rigg's warning on the cut sheet or notify Rigg immediately of any revisions to the site plan. (Pa432). If AKR had caught the mistake at that point, before the strip mall on the site was erected, the whole chain of errors could have been averted at little cost to Appellants.

C. RESPONDENTS DISTORT AND MISREPRESENT THE FINDINGS OF JUDGE BOGAARD IN HIS ORDER OF SEPTEMBER 29, 2020 REGARDING SUMMARY JUDGMENT.

We have previously discussed, at Point III of our initial brief, the true scope of Judge Bogaard's written order of partial summary judgement. (Pa2). But Respondents also distort and misrepresent the scope of Judge Bogaard's oral comments made during the hearing on their first motion for summary judgement, in 2020. These misrepresentations by Respondents become extremely significant, since Respondents employed these same misrepresentations and selective editing of Judge Bogaard's motion transcript to influence Judge DeAngelis in their second motion for Summary Judgement in 2022.

Sadly, Judge DeAngelis adopted Respondents' distortions as his sole stated justification for his finding in his Order of Summary Judgement of December 7, 2022 that Appellants required expert testimony to support all elements of their

damage claims.[2] (See, first paragraph of Page 8 of Judge DeAngelis' Statement of Reasons, at Pa12).

Now once more, in their brief in opposition to the instant appeal, Respondents repeat their same distortions of Judge Bogaard's remarks made during oral argument in 2020.

In the Transcript (1T59-10 to 60-8), Judge Bogaard first discusses the need for expert testimony to prove one single element of damages, i.e. the loss of opportunity to rent to multiple tenants, rather than just one tenant, in the Longo Building.[3] On this one element of damages, Judge Bogaard explains that too many variables and too many complexities exist to allow a jury to decide without expert testimony whether the alleged grading error proximately foreclosed plaintiff's ability to rent to multiple tenants for the Longo Building by applying for a variance. (1T59-10 to 60-8).

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[2] It has just been discovered that the September 29, 2020 Transcript filed with the Appellate Division contains an additional page to the caption, which was not part of the Transcript submitted to Judge DeAngelis on Respondents' Summary Judgment Motion. This has resulted in a discrepancy in the citations to the Transcript referenced by Judge DeAngelis in his Statement of Reasons (Pa5), and by the Respondents with the actual filed Transcript, by one page. The citations to the Transcript, in this Reply Brief, are to the filed Transcript.

[3] The approvals actually allowed up to three occupants without the necessity of any further application to the Board of Adjustment.

Then, Judge Bogaard switches subjects and turns his attention to plaintiffs' other damage claims, asking a series of rhetorical questions:

> "The other claims: loss of a rental opportunity, having to regrade, costs incurred as a result. Now again, you know, you think of medical records, right? What does everybody know you are going to do on a personal injury case, if you want to get those medical bills, right? You really should get a doctor to look at the bills and say and issue a two-sentence report, I have reviewed these bills and these bills are reasonably priced, cost out, consistent with certain guidelines and all bills incurred as set forth were a result of the injuries suffered in the accident on so and so a date. So, but again, to get those legal bills, were they all related to the elevation issue or were they related to Kloss as a developer pushing the envelope in other areas?" (1T60-9 to 23)

What comes next in the transcript, is Judge Bogaard's ruling on whether Appellants need an expert on all these "other" damage claims raised in the Complaint:

> "Again, I don't know the answer to that. I don't know if the attorneys have addressed that. It's not directly in front of me right now." (1T60-24 to 61-1) (emphasis added).

Continuing on in the motion hearing of September 29, 2020, Judge Bogaard returns to the limited subject of the possibility of multiple tenants in the Longo Building, and reemphasizes the need for an expert on that one issue:

> "But I do believe, given the multiple times discovery has been extended, given that this motion has been pending for several months, that the Court can rule on that, on that issue as set forth relating to the viability, feasibility, whatever you want to call it, of a multiple tenant structure. I, you just can't—you need expert testimony on that. There is no question about it. Too many variables." (1T61-1 to 9)

Upon reviewing this full excerpt from the 2020 motion hearing, it is clear that Judge Bogaard made no ruling on the need for expert testimony to support all of Plaintiff's damage claims ("It's not directly before me right now."). The only ruling Judge Bogaard did make was the need for expert testimony on the one issue of the viability of multi-tenant use of the Longo Building. (Pa2 at ¶6).

As we discuss in Point II of our initial brief, Appellants assert several different claims for damages arising from the grading error caused by Respondents' negligence. Most are simple, straightforward, directly causally connected, and do not require expert testimony (e.g. the added cost of needlessly removing and carting away thousands of square feet of topsoil due to the grading error, which job was performed and billed by AKR itself), or the additional legal, engineering and land surveying fees caused by the reapplication for site plan approval, which the town required.

Respondents made the same false argument at page 8 of their brief in support of their second motion for summary judgement, filed on November 14, 2022

before Judge DeAngelis. (Respondents' Motion Brief is not included in our Appendix herein due to the restrictions of R. 2:6-1(2).).

In seeming reliance on Respondents' distorted quotation of Judge Bogaard, Judge DeAngelis adopted Respondents' specious version of what Judge Bogaard said as his only cited support for his ruling that Appellants required expert testimony on all aspects of their damage claim. (Pa12, paragraph 1). Judge DeAngelis specifically cited the distorted transcript of Judge Bogaard's remarks, and nothing else, in support of this ruling. But surgically removed by Respondents from their citation to Judge Bogaard's ruling were the lines where Judge Bogaard said he would make no ruling on the need for an expert on most issues in this case.

To the extent that Judge DeAngelis relied on Respondents' misrepresentation of Judge Bogaard's position, he was misled by counsel. This Court should not be fooled by the same trick.

In fact, as argued in Point II of our original brief, most of the elements of damages we allege are straight-forward as to amount and proximate causation. All professional service providers were named in plaintiffs' disclosure filings. Copies of all legal billings were supplied for the work of applying for a new variance due to the mis-grading of the property caused by Respondents' negligence. All the attorneys, engineers, land surveyors and contractors who did

the work would be subject to cross examination. Respondents could even present their own witnesses to question the reasonableness, necessity or costs of the work if they so wish. Respondents cite no case law requiring that we present independent expert testimony to verify the reasonableness and necessity of construction and land development bills.

Therefore, this Court should conclude that no expert testimony beyond the testimony of the legal and construction industry professionals who performed the work should be required for Appellants to prove most, if not all of their damage claims in this case.

POINT II

THE CENTRAL ISSUE IN THIS CASE IS WHETHER RESPONDENT AKR FAILED TO PERFORM ITS OBLIGATIONS TO ACCURATELY EXECUTE APPELLANTS' CONSTRUCTION PLANS; PLAINTIFF EDWARD KLOSS, AS A FACT WITNESS, IS QUALIFIED TO PROVIDE ALL NECESSARY TESTIMONY ON LIABILITY AND DAMAGES TO DEMONSTRATE HOW AKR'S FAILURE TO PROVIDE SURVEYOR RIGG WITH ACCURATE, UP-TO-DATE GRADING PLANS UPON WHICH TO STAKE OUT ELEVATIONS ON THE PROPERTY CAUSED SIGNIFICANT INCREASE IN COSTS , LOSS OF PROFIT AND LONG DELAYS IN COMPLETION OF THE PROJECT.

This is a straightforward case of a simple mistake by AKR, fully understandable by a jury based on the factual testimony of Appellant Developer Edward Kloss, AKR's president Andrew Rusin, the engineers and land surveyors

who performed the work, the town engineer, and the supporting documents produced in discovery.

No judge has explained exactly what expert testimony would be required on liability or damages except regarding one particular issue—the relationship between the grading error and a potential loss of revenue from the Longo Building. All other issues of liability, damages alleged by Appellants, and their causal relationship to Respondents' mistakes, can be sufficiently demonstrated by the witnesses previously identified by Appellants. The grading did not meet the requirement of the Board of Adjustment mandate. When discovered, the township immediately stopped all work and would not issue occupancy permits to any of the buildings. Respondents' negligence was clear. Its obligations to Appellants were breached. The Court below was clearly in error when it failed to acknowledge the Appellants' right to show the municipality's action was available to the Appellants as proof of breaching the contract. The Court's statement that only the township could sue was wrong.

As set forth in our initial brief, not every case of professional or trade liability, such as ours against AKR, requires expert testimony on the standard of care. As argued in Point I of our initial brief, the doctrine of "common knowledge negligence" allows a number of cases similar to ours to proceed without expert testimony.

Another line of cases allowing Appellants to proceed without expert testimony arises from the insurance industry. In Rider v. Lynch, 42 N.J. 465 (1964), our Supreme Court reversed an order of dismissal and allowed a case to proceed against an insurance broker for failure to procure sufficient coverage, despite plaintiff's lack of an expert, based solely on an analysis of the facts of the case presented by fact witnesses. (Id. at 476; See also, Sobotor v. Prudential Property & Cas. Ins. Co., 200 N.J. Super. 333 (App Div. 1984).)

For similar reasons, the summary judgement dismissing the Complaint should be reversed and the case should be restored to the trial list.

POINT III

THIS COURT SHOULD CONSIDER AND DECIDE APPELLANTS' "COMMON KNOWLEDGE NEGLIGENCE" ARGUMENT, DESPITE ITS NOT BEING EXPLICITLY RAISED IN THE RECORD BELOW.

This appeal raises several closely-related questions regarding expert testimony, including: Is Appellant Edward Kloss qualified to testify as an expert witness on construction questions based on his knowledge and experience? Was Mr. Kloss sufficiently identified as an expert in this case? Is a written expert report required? Could Mr. Kloss give so-called "lay expert testimony?" Is expert testimony even required on Respondents' negligence? Is expert

testimony required on issues of damage and proximate cause, and if so, on which issues? Should discovery be reopened to permit the filing of expert reports?

To this panoply of questions, Appellants in our appellate brief have added a sub-category arguing that this case falls under the so-called "common knowledge doctrine," obviating the need for expert testimony on most, if not all issues.

Respondents have chosen not to rebut or even acknowledge the "common knowledge doctrine" as an argument in this appeal, despite having ample opportunity to address it in their Opposition Brief. We could argue that by their silence, Respondents concede the validity of our arguments.

However, we are aware that this Appellate Court is free to address this issue sua sponte and even to hypothetically refuse to consider it as "not raised below."

Therefore, to make a complete record, we argue that the "common knowledge doctrine" is an essential element in this case, that the Court should fully consider and address the doctrine, and in fact reinstate Appellants' case based on the doctrine, despite it not having been raised below in explicit terms. (Our argument concerning the "common knowledge doctrine" is set forth at length in Point I of our initial brief).

We call to the Court's attention the case of Bender v. Walgreen Eastern Co., Inc., 399 N.J. Super 584 (App. Div. 2008), which is closely on point on this

issue. In that case, a pharmacy customer sued his pharmacy for dispensing to him the drug "Prednisone" rather than the drug "Primidone" which had been prescribed by his physician. Being a medical malpractice case, an Affidavit of Merit (AOM), and later an expert report was seemingly required to be filed by the plaintiff. When plaintiff failed to file an AOM within the required timeframe, Defendant Walgreens moved for summary judgment under the AOM statute. Plaintiff opposed the motion on the grounds that a pharmacy was not a "licensed person" falling under the purview of the AOM statute. Plaintiff also sought an extension of time to file an AOM. The Court did not rule on Plaintiff's argument on the applicability of the AOM statute but did grant an extension of time to file an affidavit. Several months later, with Plaintiff still not filing an AOM, Defendant filed a second motion for summary judgment. In response to this second motion, Plaintiff, for the first time, raised the defense that no AOM or expert report was necessary because the case fell under the "common knowledge doctrine" where an average juror could assess that defendant's dispensing of the wrong drug was negligent, even without expert testimony. The trial court concluded that Plaintiff should have raised the "common knowledge doctrine" initially in response to Walgreen's first motion for summary judgement but agreed to consider the argument of "common knowledge," nonetheless, ultimately rejecting the argument and dismissing Plaintiff's case.

In the Appellate Division, Defendant again urged that the argument of "common knowledge" not be considered since it was not raised in a timely manner below. However, the Appellate Division did consider the "common knowledge doctrine" even though not timely raised below, and, on the basis of that doctrine, reversed the order of summary judgment against the Plaintiff and reinstated the case for further proceedings. Explaining its decision to consider the "common knowledge" defense even though not timely raised below, the Appellate Court held:

> "A dismissal for failure to provide an affidavit of merit entered without considering a "common knowledge" claim may well terminate the litigation for failure to comply with a statute not relevant in the case. Such an outcome would not further the interests of justice or the interests served by the affidavit of merit statute. Moreover, given the protection against unfair surprise and delay afforded by the discovery rules, the only possible prejudice to the defendant would be denial of a dismissal to which the defendant, because his or her negligence is apparent, is not entitled. See generally Ghandi v. Cespedes, 390 N.J. Super 193, 195 (App. Div. 2007) (discussing the proper exercise of discretion in matters that may result in termination of litigation for reasons unrelated to the merits)." (399 N.J. Super. at 594)

Appellants' then co-counsel (Peter Bray, Esq.) made a similar point in a letter to Judge DeAngelis dated January 17, 2023, which we quote at Pb41. In that letter, Mr. Bray states that by dismissal of Plaintiffs' claims on procedural grounds, such as by the court's refusal to allow supplemental reports (or to consider the

doctrine of common knowledge negligence), Plaintiffs would suffer extreme prejudice unrelated to the merits of the case through no fault of their own, whereas by allowing the case to continue, defendants would suffer no inconvenience other than to have to defend their actions on the merits. (Pa517) Mr. Kloss was extensively deposed by the Respondents, minimizing any such argument of inconvenience. This disproportionate impact should be avoided if at all possible. We fully endorse this sentiment.

CONCLUSION

For all the reasons set forth herein and in our initial brief, it is respectfully urged that this Appellate Court reverse the Order of Summary Judgement entered in favor of Respondents, reverse the order denying reconsideration of the summary judgment Order and reinstate this matter on the trial list of the Superior Court Law Division.

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Dated: February 14, 2024