

**DARYL B. FOX, TRUSTEE
OF THE DONALD M. FOX
2006 REVOCABLE TRUST**

Plaintiff-Respondent,

V.

SHAWN T. FOX AND DIANE FOX

Defendants-Appellant,

AND CHRISTOPHER FOX

Co-Defendant-Respondent.

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION

Docket #: A-002187-23 TEAM 01

Submitted: June 18, 2024

SUPERIOR COURT OF NEW
JERSEY, CHANCERY DIVISION,
PROBATE PART, MORRIS
COUNTY

Civil Action

Docket #: MRS-P-2730-2021

Sat Below:

Hon. Frank J. DeAngelis, P.J.Ch.

**DEFENDANTS-APPELLANT FORMAL BRIEF
IN SUPPORT OF APPEAL**

SHAWN AND DIANE FOX

4 Chandler Terrace | Rockaway, NJ 07866

Email: Shawn@FoxHomeHunter.com

Cell: (973) 277-7853 | *Pro Se Litigants*

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LIST OF PARTIES

Name	Designation	Trial Court Role	Trial Court Status
Shawn Fox	Appellant	Defendant	Participated Below
Diane Fox	Appellant	Defendant	Participated Below
Daryl Fox	Respondent	Plaintiff	Participated Below
Christopher Fox	Respondent	Co-Defendant	Participated Below

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Motion	September 13, 2023	6T
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Trial	December 14, 2023	8T

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05/10/2023	Order - Second Supplemental Complaint Denied	62a
02/14/2024	Order - Plenary Hearing, Rent, Frivolous Sanctions	91a

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PRELIMINARY STATEMENT

On July 24, 2021, Donald M. Fox (“Settlor”) passed away. The Donald M. Fox 2006 Revocable Trust (“Trust”) designated his three (3) children as equal death beneficiaries including Shawn Fox (“Shawn”), Christopher Fox (“Christopher”), and Daryl Fox (“Daryl”), who was appointed sole Successor Trustee. Diane Fox (“Diane”) is married to Shawn.

On July 28, 2021, Richard H. Beilin (“Mr. Beilin”) announced that his firm represents both Daryl and Christopher Fox. Furthermore, Mr. Beilin announced that Daryl (“Trustee”) accepted her trusteeship and all communications must take place through counsel.

At the time of the Settlor’s death, the Trust owned the real property described as 32 Charlottesburg Road, Boonton, NJ 07005 (“Boonton Property”) and the real property described as 120 West Crystal Drive, Sanford, Florida 32773 (“Florida Property”). The Trust also owned a Vanguard brokerage account with approximately \$500,000 on deposit.

In accordance with the Trust terms, as soon as practicable following the Settlor’s death, the Trustee was instructed to divide all property owned by the Trust, less any costs associated with the testamentary estate, into three equal shares, and transfer those shares outright and free of trust to the three beneficiaries. Furthermore, the Trust terms granted Shawn and Christopher the power to purchase Daryl’s share of the Boonton Property at fair market

value. Additionally, Daryl was granted the power to purchase Shawn and Christopher's shares of the Florida Property at fair market value.

On June 10, 2022, the Trial Court issued an Order delineating procedures for the disposition of Boonton and Florida Properties. Daryl, in her capacity as Trustee, sold the Florida Property to herself for \$360,000 and the Boonton Property to Christopher for \$601,000. These transactions were approved by the Trial Court and predicated upon outdated appraisals secured by the Trust. Shawn did not consent.

Defendants argue that the Trial Court and Trustee compelled Shawn by Court Order to relinquish his shares in the Boonton and Florida Properties, at deeply discounted prices. This contravenes the Trust language requiring that property shares be acquired at fair market value. Furthermore, this conflicts with the Settlor's primary or dominant plan requiring that all Trust property be divided equally.

Consequently, Defendants filed applications requesting permission to supplement their initial counterclaim to include new complaints involving breach of trust and unjust enrichment. These claims sought restitution for Shawn's share of (1) the fair market value of the Boonton and Florida Properties at the time of transfer to Christopher and Daryl and (2) the Trustee's misappropriation of Trust funds for adversarial litigation and other expenses. Defendants applications were denied on March 10, 2023.

On February 14, 2024, following a 2-day plenary hearing to determine amounts owed by Defendants to the Trust for mesne profits and attorneys' fees, the trial court issued an Order requiring that Defendants pay sanctions to Plaintiff for two frivolous motions, pursuant to Rule 1:4-8. These motions include: (1) Leave to File a Second Supplemental Complaint; and (2) Due Process Violation and Relief. Defendants argue that sanctions are not appropriate because they acted in good faith and their applications demonstrate merit. Furthermore, Defendants argue that the Plaintiff and Trial Court failed to strictly comply with the procedural requirements pursuant to Rule 1:4-8, which precludes an award.

Therefore, Defendants respectfully request that the Appellate Division (1) Modify the appropriate Order to require that Shawn is entitled to restitution for his one-third share of the fair market value of the Boonton and Florida Properties, pursuant to N.J.S.A. 3B:31-72; (2) Require that Shawn is entitled to restitution for his one-third share of the Trust funds spent on adversarial litigation, pursuant to N.J.S.A. 3B:31-72, which provides that a beneficiary may seek restitution for improper expenditures; (3) Reverse the May 10, 2023 Orders and confirm the Defendants' right to supplement and amend their pleadings and pursue their claims; (4) Reverse the February 14, 2024 Order with regard to frivolous sanctions imposed upon Defendants; and (5) Assign their case to a different judge, assuming remand is granted.

PROCEDURAL HISTORY ¹

On October 25, 2021, Daryl Fox (“Plaintiff”) filed a verified complaint against Shawn and Diane Fox (“Defendants”). **(573a)** The complaint delineated several requests for relief, including: (1) the ejectment of Defendants from the Boonton Property; (2) damages for mesne profits; (3) a court order mandating that Defendants return any trust assets currently under their control; and (4) a judicial declaration confirming that Defendants are not entitled to purchase the Boonton Property.

On January 7, 2022, Plaintiff’s First Amended Verified Complaint for Ejectment and Other Relief was filed. **(583a)** Christopher Fox (“Co-Defendant”) was added as an interested party.

On January 10, 2022, a hearing was conducted by Judge Berdote Byrne. **(1T)** On January 25, 2022, the Trial Court entered an Order (1) granting leave for Plaintiff’s amended complaint; (2) granting leave for Defendants’ counterclaim; (3) instructing the Trustee to order appraisals for the Boonton and Florida Properties based upon the Settlor’s date-of-death; and (4) instructing the parties, upon receipt of the appraisals, to attend a settlement conference with Deputy Surrogate Christopher Luongo. **(14a)**

¹ 1T - January 10, 2022
2T - May 27, 2022
3T - June 8, 2022
4T - August 10, 2022

5T - June 28, 2023
6T - September 13, 2023
7T - December 6, 2024
8T - December 14, 2024

On February 1, 2022, Defendants filed a counterclaim requesting relief including (1) construction of the trust; and (2) specific performance; and (3) appointment of an independent successor trustee; and (4) a demand for formal accounting. **(624a)**

On May 25, 2022, Defendants filed an application for a temporary injunction seeking to prevent the Trustee from conducting a sealed bid and selling the Boonton Property prior to judicial proceedings and a final determination on the merits of their case. **(467a)** On May 27, 2022, Judge DeAngelis conducted a hearing **(2T)** and granted the injunction. **(16a)**

On June 10, 2022, Judge DeAngelis ordered that (1) Plaintiff's motion for ejectment and rent was denied; (2) Defendants' motion for partial summary judgment to remove the trustee was denied; (3) Shawn and Christopher will have until July 14, 2022 to submit bids to determine which brother would purchase the Boonton Property; and (4) Plaintiff "having obtained an appraisal on said property 120 West Chrystal Drive, Sanford, Florida for \$360,000.00, shall close on said property by Thursday, August 18, 2022 for this price." **(18a)**

On August 31, 2022, the trial court ordered that (1) "Any attempt by plaintiff to purchase the Boonton Property in whole or in part is void as it would be in violation of her fiduciary duties as Trustee of the Trust" and (2) "Christopher Fox must purchase the Boonton Property individually for his

bid price of \$601,000.00 and must close on the Boonton Property by September 15, 2022.” **(31a)**

On September 6, 2022, Defendants filed a Motion for Emergency Relief for Stay Pending Reconsideration, along with Certifications explaining that Defendants discovered that Christopher was planning to purchase and flip the Boonton Property to a third-party who previously submitted an offer for \$800,000 to the Trustee. **(471a)** Pursuant to Rule 1:6-2(d), Defendants requested oral argument if their motion was opposed. On September 13, 2022, prior to opposition submitting positions, the trial court ordered that Defendants’ motion was denied without oral argument. **(37a)** There was no explanation as to why oral argument was denied.

On September 21, 2022, Plaintiff filed a motion to confirm the sale of the Boonton Property to Co-Defendant and to remove Defendants from the Boonton Property. **(477a)** Plaintiff requested oral argument. Defendants filed a cross motion to enforce litigants rights and requested oral argument if their motion was opposed. **(474a)** On October 12, 2022, the trial court granted Plaintiff’s motion without oral argument and denied Defendants’ motion, allowing Co-Defendant to oppose without oral argument. **(51a)** There was no explanation as to why oral argument was denied. Furthermore, the trial court ordered that (1) the September 15, 2022 sale of the Boonton

Property to Christopher for the sum of \$601,000 closed; and (2) Defendants were required to vacate the Boonton Property by December 1, 2022. **(51a)**

On February 16, 2023, Defendants submitted a motion for leave to file a Supplemental Complaint seeking damages resulting from (1) Plaintiff's breach of fiduciary duty as Trustee involving the sale of the Boonton Property to Christopher below fair market value; and (2) Co-Defendant's wrongful acts which resulted in Trust property being diverted to Co-Defendant, who was unjustly enriched, at Defendants' expense. **(480a)** Defendants requested oral argument if their motion was opposed. Plaintiff filed a cross-motion to request a plenary hearing for amounts due to the Trust from Defendants including mesne profits and attorneys' fees. **(486a)** Plaintiff requested oral argument.

On April 24, 2023, Defendants submitted a motion for leave to file a Second Supplemental Complaint seeking damages resulting from (1) Plaintiff's breach of fiduciary duty as Trustee by purchasing the Florida Property, for her own account, below fair market value; and (2) Plaintiff's breach of fiduciary duty as Trustee by failing to make required dispositions in accordance with the terms and purposes of the Trust and thereafter misappropriating Trust funds. **(489a)** Defendants requested oral argument if their motion was opposed.

On May 10, 2023, the trial court denied Defendants' Motion for Leave to File a Supplemental Complaint, allowing Plaintiff to oppose without oral argument. **(60a)** Furthermore, the trial court granted Plaintiff's motion to schedule a plenary hearing without oral argument. **(60a)** There was no explanation as to why oral argument was denied. Additionally, the trial court denied Defendants' Motion for Leave to File a Second Supplemental Complaint, allowing Plaintiff to oppose without oral argument. **(62a)** Again, there was no explanation as to why oral argument was denied.²

On May 25, 2023, Defendants submitted a Motion for Reconsideration for Leave to File a Supplemental Complaint and Second Supplemental Complaint, which were denied as per the May 10, 2023 orders of the court. **(491a)** Additionally, Defendants requested Reconsideration of the June 10, 2022 Order delineating the disposal of the Boonton and Florida Properties. On June 19, 2023, once again, the court denied Defendants' motion allowing Plaintiff to oppose without oral argument. **(69a)** There was no explanation as to why oral argument was denied.

On June 28, 2023, the trial court conducted a status conference to schedule a plenary hearing to determine amounts owed by Defendants for mesne profits and for attorneys' fees and costs. **(5T)** On July 5, 2023, the

² On February 14, 2023, Judge DeAngelis ordered that Defendants' Motion for Leave to File a Second Supplemental Complaint was frivolous and they must pay sanctions to Plaintiff for attorney fees.

trial court entered two Orders scheduling a 2-day plenary hearing for December 6, 2023 and December 14, 2023. **(75a, 77a)**

On July 5, 2023, Defendants filed a Motion for Leave to Appeal. This application sought to appeal the June 19, 2023 Order for Reconsideration of the May 10, 2023 Orders and the June 10, 2022 Order delineating the disposal of the Boonton and Florida Properties. On August 4, 2023, Defendants' Motion for Leave to Appeal was denied. **(80a)**

On October 4, 2023, the trial court denied Defendants' Motion to Determine Controlling Law. **(81a)** This motion challenged the Trustee's authority to commence and continue litigation for mesne profits, arguing that Plaintiff's legal duty of impartiality precluded an award exceeding \$2,500. **(6T 4-5)** The basis for this argument centered on the Trustee's demand that Shawn pay over \$50,000 in rent, while allowing Christopher a significantly lower rent of just \$2,500, despite evidence showing that both the Boonton and Florida Properties had the same approximate fair rental value. **(6T 4-5)**

Additionally, on October 4, 2023, the trial court denied Defendants' Motion for Due Process Violation and Other Relief. **(83a)** This motion argued that (1) the court's June 10, 2022 Order violated Defendants' right to fairness and due process; (2) the court's failure to conduct oral argument involving five separate motions violated Defendants' right to fairness and due process; (3) the court erred by granting Plaintiff the right to purchase the

Florida Property for \$360,000; and (4) the court erred by granting Co-Defendant the right to purchase the Boonton Property for \$601,000. **(396a)** ³

On February 14, 2024, the trial court issued an Order along with a Finding of Facts and Conclusion of Law. **(91a)** The Order determined that (1) “the Plaintiff has meet her burden of proof by a preponderance of the evidence with respect to her claims against Defendants with respect to the award of rental payments for the Boonton Property” and (2) “Defendants are to pay \$2,500 representing rental payments for their occupancy of the Boonton Property after decedent’s death” and (3) “Plaintiff has demonstrated her entitlement to an award of attorneys’ fees with respect to the motions for a second amended complaint and for due process pursuant to R. 1:4-8” and (4) “counsel is to provide a Certification of Services and invoices for the legal services provided to respond to the two motions within thirty days.”

On March 6, 2024, Plaintiff submitted a Certification of Legal Services. **(561a)** Defendants did not oppose the amount of \$8,024.92 set forth in the certification.

³ On February 14, 2023, Judge DeAngelis ordered that Defendants’ Motion for Due Process Violation and Other Relief was frivolous and they must pay sanctions to Plaintiff for attorney fees.

STATEMENT OF FACTS

On July 28, 2021, Mr. Beilin announced that his firm represents both Daryl and Christopher. **(253a)** Furthermore, Mr. Beilin announced that Daryl accepted her trusteeship and all communications must take place through counsel. **(255a, 256a)** Christopher's representation continued until September 30, 2021. **(159a ¶7)** During this time, Mr. Beilin prepared the written complaint against Defendants. **(161a)** Daryl used Trust funds to pay for Christopher's representation. **(159a ¶7) (8T 26-28)**

On October 19, 2021, Shawn submitted a written offer to purchase the Boonton Property along with an appraisal for \$555,000. **(267a)** On October 22, 2021, Daryl rejected Shawn's offer on the basis that it was "not a fair market value proposal." **(269a ¶2)** On October 25, 2021, the Trustee's complaint was filed. **(573a)** On November 27, 2021, Shawn received notification **(273a)** that Thomas and Lynn Campbell ("Campbells"), who previously rented the Boonton Property, had submitted a written offer **(670a)** to purchase the Boonton Property for \$800,000 from the Trust. Daryl provided Shawn with an opportunity to "match" the offer. **(273a ¶2)** During trial Shawn testified that:

I thought -- the first thing I thought, this can't be true. Why would they want to pay 800,000 for this house? It was so much work, and there were so many leaky pipes, and the driveway, and I thought to myself it can't be true. And then I thought what if it is, that's terrific. And my wife and I were debating and talking

and just a few days later, literally, on December 1st, we get a call that you [Mr. Beilin] want to do a sealed bid through [Deputy Surrogate] Christopher Luongo, and we're supposed to consent to Daryl and Chris buying the house, or myself, in a sealed bid. And at that point we realized geesh, Daryl and Chris are probably planning to buy the house and flip it to the Campbells. So at that point we didn't know what to do. **(8T 84)**

On December 9, 2021, Mr. Beilin provided notice **(278a)** that Daryl and Christopher submitted a written contract **(137a)** to jointly purchase the Boonton Property for \$651,000 from the Trust. Their offer was contingent upon removal of Defendants prior to purchase. **(278a)** Daryl testified that:

But what was going on here, it's quite simple. We knew we could get \$800,000 for the home. Shawn wanted and Diane -- Shawn wanted to pay 555. So, Chris said why don't we go in and buy it for 655. So, as a human being, knowing that we have an offer for 800, that's a good investment, right? It's a good investment. So, as a human being, that's why I went in on this, because it's a good investment. Also, as a trustee that's a hundred thousand more dollars for the trust. So, that's where my thinking was. **(7T 155-156)**

On January 7, 2022, Plaintiff's First Amended Verified Complaint for Ejectment and Other Relief was filed. **(583a)** Christopher was added as an interested party. Furthermore, Paragraph 42 was amended to state that:

The Trustee is attempting to sell the [Boonton] Property to a third party at [\$800,000] its true market value for the benefit of the beneficiaries, or, in the alternative, seeks to sell the [Boonton] Property to Chris, along with Daryl in her personal capacity, at the price of \$651,000 as set forth above, if deemed to be a fair market value offer. **(591a ¶42)**

On January 10, 2022, Judge Berdote Byrne presided over the first hearing of this litigation. **(1T)** Mr. Beilin requested that Shawn and his family be ejected from the Boonton Property. **(1T 6 Ln 22)** Shawn explained that ejection was not appropriate as Christopher was living rent free **(1T 10)** in the Florida Property and Daryl was “favoring herself and my brother.” **(1T 15 Ln8)** Furthermore, Mr. Beilin proposed that Shawn and Christopher submit sealed bids to determine which brother would purchase the Boonton Property. **(1T 8 Ln 1-17)** Note that Mr. Beilin did not request a court order to confirm the proposed sale of the Boonton Property to the Campbells for \$800,000.

Judge Berdote Byrne denied Plaintiff’s request for a sealed bid. Instead, the court granted Defendants’ request for appraisals on the Boonton and Florida Properties. **(14a)** Furthermore, Judge Berdote Byrne said:

And then we will have you sit down with Mr. Longo, who mediates these sort of disputes all the time. You can do it virtually. You can meet with him, look at the appraisals and determine what you would like to take as the next course. Do you want to list the property? Do you want to have a sealed bid process? These are the things that you should be thinking about. List the property on the open market; have a sealed bid process. Everything else can be determined on a later date: debits, credits, rentals and things like that. **(1T 24 Ln 21) (See also 1T 31)**

On May 19, 2022, upon receipt of both appraisals, Daryl provided written notice that she planned to open sealed offers for the purchase of the Boonton Property and bids would be accepted from Shawn and Christopher

on May 30, 2022. **(142a)** However, pursuant to Judge Berdote Byrne's January 25, 2022 Order, upon receipt of the appraisals, the parties were instructed to meet and discuss their options: list the properties or conduct a sealed bid. **(14a)** On May 25, 2022, Defendants filed an Order to Show Cause and Complaint for a temporary injunction, seeking to prevent the Trustee from conducting a sealed bid and selling the Boonton Property prior to judicial proceedings and a final determination on the merits of the case.

(467a) Shawn testified that:

We did not want a sealed bid. We rejected Daryl's December [2021] sealed bid consent order proposal. We suspected that Daryl and Chris were going to purchase and flip the Boonton property to the Campbells for profit, but we had no proof. The Trustee never provided us with any information as to whether the Campbells were still interested and still seeking to purchase the property. We were kept in the dark. **(8T 35)**

On May 27, 2022, Judge DeAngelis conducted a hearing. Shawn raised concerns that Daryl failed to obey Judge Berdote Byrne's January 25, 2022 Order requiring a settlement conference. **(2T 9 Ln 20)** Instead, the Trustee chose to conduct a sealed bid, without Shawn's consent. Shawn said "This is a bad faith move. It violates the trustee's duty to administer the trust in good faith in accordance with the terms and purposes of the trust." **(2T 12 Ln 15)** Shortly after concluding the hearing, on May 27, 2022, Judge DeAngelis granted Defendants' request for an injunction. **(16a)** The order explained:

Temporary restraints will remain in place until adjudication of Plaintiffs application for ejectment and removal, Defendants' counterclaim in opposition, and Defendants' application for removal of Plaintiff in addition to other injunctive relief, all currently scheduled for a hearing by this Court on June 8, 2022, at which time the Court hear argument on the merits of the underlying action and will thereafter enter an Order directing the parties on how they may proceed with the sale or transfer of the Property. **(16a)**

On June 8, 2022, Judge DeAngelis conducted the hearing. **(3T)** This session was originally scheduled to consider two motions: Plaintiff's motion to remove Defendants from the Boonton Property and Defendants' motion for partial summary judgment to remove the Trustee. Both of these applications had been submitted in accordance with procedural requirements and fully briefed. Therefore, topics related to these motions were discussed.

Additionally, Judge DeAngelis asked Mr. Beilin what the Trustee is looking to do with the Boonton and Florida Properties **(3T 4 Ln 17)** and how to interpret the language in the Trust. **(3T 6 Ln 2)** Mr. Beilin proffered that Daryl intended to purchase the Florida Property for \$360,000, which was the date-of-death appraised value. **(3T 4 Ln 21)** Furthermore, he suggested that there should be a procedure to determine which brother will purchase the entire Boonton Property, based upon the Trustee's powers. **(3T 11 Ln 16)** Mr. Beilin did not disclose the status of the Campbells offer for \$800,000.

Shawn testified that he opposed Daryl's efforts "to determine fair market value for herself," meaning that Daryl, in her capacity as Trustee, should not be deciding the sale price for the Florida Property to herself. **(3T 10 Ln 1-8)** Additionally, Shawn testified that he did not support a sealed bidding process for the Boonton Property. Instead, Shawn testified that "[i]f Chris would like to purchase the [Boonton] home with me, that's what the trust says that can be done, and I have no problem with that. I will buy half of Daryl's share, he can buy half of Daryl's share, and then we own the house. He owns 50 percent. I own 50 percent." **(3T 8 Ln 24)**

Christopher testified that he supported a bidding process to determine which brother would purchase the entire Boonton Property, explicitly stating that he did not want to purchase with Shawn. **(3T 16 Ln 24)** Alternatively, Christopher testified that, assuming the beneficiaries were having problems coming to an agreement, the Boonton Property should be sold on the open market. **(3T 17 Ln 8)**

On June 10, 2022, Judge DeAngelis entered an Order in favor of Daryl and Christopher who never filed a motion for the relief that they were granted. **(18a)** In the Statement of Reasons attached, Judge DeAngelis wrote:

Since the parties have come to an impasse as to how the bids are to be submitted and the properties disposed of, the Court will delineate the terms of these processes in the accompanying Order and in the event defendants submit a losing bid, they will be required to vacate by August 17, 2022. **(25a)**

Judge DeAngelis provided no explanation as to why Judge Berdote Byrne's Order, which directed the parties to attend a Settlement Conference to discuss their options, was abandoned.

On July 14, 2022, Shawn submitted a losing bid of \$501,000. **(306a)** Christopher submitted a winning bid of \$601,000. **(310a)** On July 22, 2022, Defendants filed a Notice of Motion for Clarification of the Court's June 10, 2022 Order and Bidding Process and For Emergency Relief. On August 2, 2022, Daryl filed a certification in opposition to Defendants motion. Daryl wrote that Christopher is the winning bidder and "[i]n my individual capacity I am also purchasing the New Jersey Property along with him. This is not prohibited by the Trust, is consistent with my powers, and is not a breach of my fiduciary duty." **(34a-35a) (697a ¶4)** Daryl attached a signed purchase contact for the Boonton Property dated August 1, 2022. **(708a)**

On August 10, 2022, the trial court conducted a hearing. **(4T)** Shawn asserted that Daryl and Christopher's transaction to purchase of the Boonton Property was void pursuant to N.J.S.A 3B:31-55(b). **(4T 8-9)** Furthermore, Shawn requested reconsideration of the June 10, 2022 Order explaining that reformation of trust language requires clear and convincing evidence. **(4T 12-15)** Finally, Mr. Beilin explained that Daryl was seeking Shawn's written consent and release with regard to her purchase of the Florida Property for \$360,000, which Shawn was unwilling to provide. **(4T 18-22) (720a)**

On August 12, 2022, Daryl purchased the Florida Property for \$360,000 from the Trust without Shawn's written consent and release. **(356a)** Shortly thereafter, Zillow reported the transfer and estimated fair market value to be \$439,800, approximately \$80,000 above Daryl's purchase price. **(455a)**

On August 31, 2022, the trial court ordered that "Christopher Fox must purchase the Boonton Property individually for his bid price of \$601,000.00 and must close on the Boonton Property by September 15, 2022." **(31a)** In the Statement of Reasons attached to the Order, the trial court explained that "plaintiff's attempt to effectuate a sale of a Trust asset, to herself in her individual capacity, while also the Trustee, violates her fiduciary duty of impartiality." **(35a)** Additionally, "as a beneficiary, defendants may void the transaction pursuant to N.J.S.A. 3B:31-55(b) and have exercised that right by submitting an objection in response to plaintiff's opposition papers. Thus, the Court finds that the proposed purchase of the Boonton Property by both Christopher and plaintiff is void." **(36a)** There was no explanation as to why Christopher was granted a second opportunity to purchase the Boonton Property.

Daryl's breach of trust commenced on December 9, 2021 when she and Christopher submitted a written contract **(137a)** to jointly purchase the Boonton Property for \$651,000 and extended until August 31, 2022 when Judge DeAngelis ordered that Daryl was not permitted to purchase the Boonton Property with Christopher, as doing so violated her fiduciary duties. **(31a)** Thus, Daryl's

improper conduct persisted for over eight (8) months. During this time, Daryl used Trust funds to cover legal expenses aimed at furthering her objectives.

On November 28, 2022, Shawn provided notice that his family vacated the Boonton Property. On December 5, 2022, a deed was recorded with the Morris County Clerk dated September 1, 2022 transferring ownership of the Boonton Property from the Trust to Christopher for the sum of \$601,000. **(145)** On January 11, 2023, a deed was recorded with the Morris County Clerk dated December 20, 2022 transferring ownership of the Boonton Property from Christopher Fox to Thomas and Lynn Campbell for the sum of \$750,000. **(151)** Thus, 22 days after taking possession of the Boonton Property and 15 days after recording the deed, Christopher sold the Boonton Property for a profit of \$149,000.

On September 13, 2023, during a motion hearing, Shawn testified that Daryl was seeking over \$50,000 in unpaid rent from Defendants for the Boonton Property, along with over \$100,000 in legal fees and costs. **(6T 4-5)** Meanwhile, Daryl permitted Christopher to rent the entire Florida Property for just \$2,500 total. Therefore, Plaintiff was appropriating Trust funds for litigation to potentially benefit herself and Christopher, at Shawn's expense, which violated her fiduciary duties of loyalty and impartiality. **(6T 4-5)**

On December 6, 2023 and December 14, 2023, the trial court conducted a 2-day plenary hearing to determine if Plaintiff had proven her case for mesne profits and legal fees. Defendants raised multiple defenses, primarily involving Plaintiff,

in her capacity as Trustee, violated her fiduciary duties coming into and throughout the instant litigation. However, the trial court omitted specific findings and conclusions with regard to Plaintiff's breaches of trust. **(93a)** Judge DeAngelis wrote in the February 14, 2024 Order Finding of Facts and Conclusions of Law:

While her testimony did not demonstrate that she breached her fiduciary duty to the Trust or the beneficiaries, it did demonstrate an implicit bias with respect to her dealings with Shawn. **(101a)**

The Court finds it equitable that the Defendants pay the same below market rental payment that Christopher paid, \$500 per month, and for only a period of five months. The Court does not believe that Christopher only resided at the Florida Property for five months, thus equity favors the equal treatment of Shawn and Christopher. The \$2,500 rental payment is to be taken from Shawn's next trust distribution. **(108a)**

[T]he Court does not find Christopher's testimony credible with respect to the circumstances surrounding his purchase and sale of the Boonton Property. He misrepresented to the Court with respect to his intent to move into the house, and during the extensive litigation regarding the sale of the Boonton Property never once mentioned any potential immigration issues that would preclude his family from occupying the Boonton Property. It appears to the Court that Christopher always intended to sell that Boonton Property after he purchased it, which was his right, but he misrepresented his intent during these proceedings. **(98a)**

On February 8, 2024, Mr. Beilin submitted a Supplemental Certification of Legal Services Pursuant to R 4:42-9. This document showed \$99,645.50 for legal services rendered and \$2,484.64 for expenses billed to the Trust, which did not include costs for the plenary hearing or billing outside the litigation, which was invoiced separately. **(157a)**

1. THE COURT ERRED IN DECIDING NOT TO ENFORCE JUDGE BERDOTE BYRNE’S ORDER (18a)

On June 10, 2022, the trial court issued an Order delineating procedures for the disposition of Boonton and Florida Properties. In the Statement of Reasons attached, Judge DeAngelis explained that “Since the parties have come to an impasse as to how the bids are to be submitted and the properties disposed of, the Court will delineate the terms of these processes in the accompanying Order and in the event defendants submit a losing bid, they will be required to vacate by August 17, 2022.” **(25a)**

With this decision, Defendants contend that Judge DeAngelis made a significant error by overlooking Judge Berdote Byrne’s prior Order, which instructed the parties to attend a Settlement Conference to discuss their options: either list the properties or proceed with a sealed bid process.

Additionally, Judge DeAngelis overlooked the Trustee’s non-compliance of Judge Berdote Byrne’s Order. Upon receipt of both appraisals, instead of scheduling a Settlement Conference, the Trustee chose to conduct a sealed bid process, without Shawn’s consent. **(142a)**

Pursuant to N.J.S.A. 3B:31-54, the Trustee was obligated to adhere to “applicable law,” which encompasses adherence to court orders. Therefore, Plaintiff’s failure to comply with Judge Berdote Byrne’s Order constituted a breach of this essential duty, meriting serious consideration for her removal.

Shawn raised concerns about the Trustee's non-compliance. On May 27, 2022, during the first hearing with Judge DeAngelis, Shawn testified that:

[W]e had our first hearing on the 10th of January. At that hearing, Judge Berdote-Byrne set forth instructions for all of us, and what the trustee is doing right now is not what the Honorable Berdote-Byrne instructed us to do. She said that after we get two appraisals done, that we would have settlement discussions with the Deputy Surrogate Christopher Luongo. **(2T 9-10)**

With this approach, Defendants argue that Judge DeAngelis disregarded Judge Berdote Byrne's Order, providing no explanation for his decision. This violates the principle of judicial continuity, which requires the enforcement of orders throughout the lifecycle of a case, irrespective of changes in judicial assignments, to ensure fairness and maintain consistency in legal proceedings. Thus, Judge DeAngelis departed from established policies without justification.

Moreover, the trial court's decision was manifestly unjust. Defendants believed that the controversy would be resolved through settlement discussions, as per Judge Berdote Byrne's guidance. Contrary to these expectations, Judge DeAngelis entered an Order abruptly changing direction. Instead of settlement discussions, Shawn was compelled to relinquish his property shares at reduced values and participate in a bidding procedure which he strongly opposed.

2. THE COURT VIOLATED DEFENDANTS' RIGHT TO FAIRNESS AND PROCEDURAL DUE PROCESS (18a)

New Jersey Trial Courts are governed by procedural rules that dictate how issues should be presented and decided. These rules mandate that significant matters be introduced through formal pleadings and motions. When a trial court decides on matters not properly introduced into the record, the requirement for judicial fairness and procedural due process can be compromised. On June 10, 2022, the trial court ordered that Daryl “having obtained an appraisal on said property 120 West Chrystal Drive, Sanford, Florida for \$360,000.00, shall close on said property by Thursday, August 18, 2022 for this price.” **(19a)** Additionally, the trial court ordered that Shawn and Christopher will have until July 14, 2022 to submit bids to determine which brother would purchase the Boonton Property. **(19a)**

Upon receipt, Shawn and Diane were compelled by Order to accept Daryl’s purchase of the Florida Property for \$360,000. Note that Daryl had not submitted a motion seeking this specific relief. Therefore, Defendants were not provided with an opportunity to formally oppose this transaction. Notwithstanding, during the June 8, 2022 hearing, Shawn did testify that he opposed Daryl’s efforts “to determine fair market value for herself,” meaning that Daryl, in her capacity as Trustee, should not be choosing the sale price for the Florida Property to herself. **(3T 10 Ln 1-8)**

Furthermore, Shawn and Diane were compelled by Order to engage in a sealed bidding procedure for the Boonton Property. Again, note that neither Daryl nor Christopher submitted a motion seeking this relief. Therefore, Defendants were not provided with an opportunity to formally oppose. Despite this, Defendants did express their opposition by petitioning the court for an injunction to stop the Trustee's sealed bidding procedure, which was granted on May 27, 2022. **(16a)**

Therefore, the trial court's Order for the disposal of the Boonton and Florida Properties circumvented the procedures set forth to ensure judicial fairness and procedural due process. The Appellate Division has provided guidance in the following opinion.

The opportunity to be heard contemplated by the concept of due process means an opportunity to be heard at a meaningful time and in a meaningful manner. *Ibid.* Indeed, our rules of court contemplate that motions be made in writing. R. 1:6-2(a). Moreover, ordinarily, motions must be filed and served not later than sixteen days before a specified return date. R. 1:6-3(a). Our summary judgment rule requires a motion seeking that relief to be filed not later than twenty-eight days before the time specified for the return date. R. 4:46-1. In addition, a party seeking summary judgment must file a brief and, at the very minimum, a statement of material facts in support of the motion. R. 4:46-2(a). The purpose of these rules is obvious, that is, to afford the party against whom relief is sought notice of the application, together with a meaningful opportunity to respond.

Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84 (App. Div. 2001)

On August 23, 2023, Defendants filed a Notice of Motion for Due Process Violation, raising this issue with the trial court. **(396a)** On October 4, 2023, their motion was denied. **(83)**⁴ The Statement of Reasons explained:

[T]his argument holds no weight because the Court issued a May 27, 2022 Order, in response to Defendants' own application for injunctive relief, specifically stating that at the June 8, 2022 hearing, the Court would "hear argument on the merits of the underlying action and will thereafter enter an Order directing the parties on how they may proceed with the sale or transfer of the Property." During the June 8, 2022 hearing and in Defendants' papers filed prior to the hearing, Defendants raised issues regarding how to proceed with the distribution of the Boonton Property, which the Court considered and made its findings as to how to proceed with the sale of the Boonton Property (the exact determination the parties were advised the Court would make in the May 27, 2022 Order). Accordingly, the parties had ample opportunity to be heard and there was no violation of due process. **(89a)**

However, the trial court's statement above does not satisfy the procedural requirement that an application be submitted. Specifically, neither Daryl nor Christopher filed a motion requesting the relief that they were granted. Instead, the basis for the court's decision came from oral argument. "The purpose of these rules is obvious, that is, to afford the party against whom relief is sought notice of the application, together with a meaningful opportunity to respond." Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84 (App. Div. 2001).

⁴ On February 14, 2024, Defendants' Motion for Due Process Violation and Other Relief was deemed frivolous and sanctions were imposed. Defendants also appeal that decision argued in Point #6 of this brief.

Additionally, the trial court's mention of "Defendants' papers filed prior to the hearing" needs further clarification. It should be emphasized that these documents were filed in relation to a completely separate motion for partial summary judgment for the Trustee's removal, which was fully briefed and previously scheduled for hearing on June 8, 2022, along with Plaintiff's motion for ejectment. Thus, these papers were written prior to the events and circumstances that unfolded surrounding the temporary injunction application, which was granted on May 27, 2022. **(16a)** Moreover, the trial court's abbreviated notice period of just 12 days falls significantly short of the minimum timeframes prescribed for filing and serving motions.

This deviation from established procedural rules undermines the integrity of the legal process and compromised Defendants' ability to fully and fairly engage in their defense, thereby infringing upon their rights to due process and a fair hearing as protected under the law. "Our ultimate goal is not, and should not be, swift disposition of cases at the expense of fairness and justice. Rather, our ultimate goal is the fair resolution of controversies and disputes." Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 83 (App. Div. 2001). "Shortcuts should not be utilized at the expense of justice." Ibid. In this context, by bypassing the required procedural steps and notice periods, the trial court has compromised Shawn and Diane's right to due process, resulting in an unfair and unjust resolution of the dispute.

3. THE COURT OVERLOOKED CONTROLLING LAW WITH REGARD TO TRUST INTERPRETATION (18a)

Trust interpretation involves finding the meaning of language already in the instrument. In re Nelson, 454 N.J. Super. 151, 159 (App. Div. 2018). Accordingly, we begin by reviewing the Trust. **(1a)** Pursuant to Paragraph 4.1, distributions should occur “as soon as practicable after” the Settlor’s death. Pursuant to Paragraph 1.2, the “Trust Estate” is defined as “Any and all property deposited with my Trustee or otherwise transferred to my Trustee or held hereunder.” Pursuant to Paragraph 4.1, the “Residuary Trust Estate” is defined as “the balance of the Trust Estate [...] after first making or providing for payment of those items specified in Section [Paragraph] 3.3.”

Pursuant to Paragraph 3.3, “Following my death, and to the extent that the assets of my testamentary estate shall be insufficient to do so, my Trustee shall pay from the principal of the Trust Estate the expenses of my last illness and funeral, costs of administration, including timely filed claims, costs of safeguarding and delivering devises, along with any federal and state estate and inheritance taxes assessed by reason of my death.” Thus, the Trust language permits expenditures for those items specified in Paragraph 3.3, which relate to the testamentary estate.

Pursuant to Paragraph 4.1(A), “My Residuary Trust Estate shall be divided equally between Shawn, if he shall survive me, Christopher, if he

shall survive me, and Daryl, if she shall survive me (the shares of my Residuary Trust Estate payable to Shawn, Christopher and Daryl shall each be termed a ‘Child's Share’).” Pursuant to Paragraph 4.2(A), “With respect to the equal Share for Shawn, Daryl and Christopher, each of their Shares shall be paid to them outright and free of trust.”

There are two property purchase provisions which are important in interpreting the Trust language. Pursuant to Paragraph 4.1(A)(a), “If the property located at 32 Charlottesburg Road, Boonton, New Jersey is still owned by the trust at the time of my death, I grant my son’s, SHAWN and CHRIS, the power to purchase their sister’s share of such [Boonton] property at the then fair market value.” Pursuant to Paragraph 4.1(A)(b), “If the property located at 120 West Crystal Drive, Sanford, Florida is still owned by the trust at the time of my death, I grant my daughter, DARYL, the power to purchase both her brother’s shares in such [Florida] property valued at the then fair market value.”

Pursuant to Paragraph 6.1, the Trustee is granted specific powers for “the administration of the Trust Estate,” which includes the power to employ legal counsel, pursuant to Paragraph 6.1(Q). However, the Trustee’s application of this power is restricted. Any action taken must adhere to both the Settlor’s directives, in accordance with the terms and purposes of the Trust, and the Trustee’s fiduciary duties, as defined by New Jersey law.

Fair Market Value. The Trust provisions for the Boonton and Florida Properties employ the legal term “fair market value.” Therefore, the judiciary’s definition of fair market value is crucial for accurately interpreting the Trust language. “Fair market value has been defined as the price which a willing buyer would offer and a willing seller would accept.” Oscar v. Simeonidis, 352 N.J. Super. 476, 487-88 (App. Div. 2002) (citing City of Trenton v. Lenzner, 16 N.J. 465, 476, 109 A.2d 409 (1954), cert. denied, 348 U.S. 972, 75 S.Ct. 534, 99 L.Ed.2d 757 (1955)). Furthermore, fair market value is “determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act.” State v. Silver, 92 N.J. 507, 513-14 (N.J. 1983) (citing Village of South Orange v. Alden Corp., 71 N.J. 362, 368 (1976); see also State v. Gorga, 26 N.J. 113, 115-16 (1958); City of Trenton v. Lenzner, 16 N.J. 465, 476 (1954), cert. denied, 348 U.S. 972, 75 S.Ct. 534, 99 L.Ed.2d 757 (1955)).

Property Purchase Provisions. Interpreting the Boonton and Florida Property Trust provisions starts by highlighting the distinction between purchasing shares of property and acquiring the properties themselves. In this context, the beneficiaries were granted the power to purchase ownership shares in the properties, as opposed to acquiring full ownership of the entire properties directly. Thus, strict accordance with the Trust language requires

that purchasing shares of the properties can only be accomplished after each beneficiary is deeded their one-third equal share. Subsequently, the beneficiaries would have the “power to purchase” each other’s “shares” in the “property valued at the then fair market value.” With this interpretation, the Boonton and Florida Properties could have been transferred to the beneficiaries quickly and efficiently for under \$1,000 in legal fees and costs.

However, this interpretation was disregarded by both the Trustee and the trial court (**3T 6-10**), rendering it effectively moot - except for the significant issue that the Trustee failed to administer the Trust “in accordance with its terms and purposes,” pursuant to N.J.S.A 3B:31-54. Instead, the Trustee favored a different interpretation, beneficial to herself and Christopher. Furthermore, the Trustee employed legal counsel and commenced adversarial litigation to achieve her personal objectives, utilizing Trust funds.

Trial Court Interpretation. On June 10, 2022, the trial court issued an Order delineating procedures for the disposition of Boonton and Florida Properties. (**18a**) With this Order, Judge DeAngelis interpreted the Trust language to compel Shawn to participate in a sealed bidding procedure with Christopher to determine which brother would purchase the entire Boonton Property. Christopher was the winning bidder and ultimately purchased for

\$601,000. Furthermore, the trial court compelled Shawn to accept Daryl's purchase price of \$360,000 for the entire Florida Property. Both of these transactions were predicated on fair market value appraisals secured by the Trust. Shawn did not consent to either transaction. It should be noted that the Trust appraisals were conducted retrospectively, dating back to the time of the Settlor's death, whereas the actual transfer of the properties occurred more than one year later, during a period of rapid home value appreciation in both markets. Furthermore, appraisals are not fair market value. Instead, they are an expert's opinion of fair market value.

Mutual Consent. The Boonton and Florida Property Trust provisions employ the legal term "fair market value." This term, which is defined by the judiciary, provides a means for ascertaining purchase prices with certainty, which requires mutual consent between the parties. Thus, Christopher's purchase of the Boonton Property for \$601,000 and Daryl's purchase of the Florida Property for \$360,000, required Shawn's consent. However, instead of securing Shawn's voluntary agreement, the Trustee and trial court compelled Shawn to relinquish his "shares" in the Boonton and Florida Properties at discounted prices. This approach conflicts with the judiciary's articulated definition of fair market value, emphasizing the necessity for

mutual consent between the parties. Consequently, the Trust's requirement that property "shares" be acquired at fair market value was not observed.

Moreover, the definition of fair market value - what a willing buyer and a willing seller would agree to - suggests that the Settlor anticipated negotiations between Shawn, Christopher, and Daryl to determine specific purchase prices. This is why Judge Berdote Byrne's Order requiring a Settlement Conference was so important. **(14a)** Assuming the beneficiaries could not come to agreement, the properties would need to be listed and sold in the open market, to achieve fair market value.

Finally, pursuant to the legal definition, fair market value can only be established on a specific date, provided that a buyer and seller come to agreement on price, at that specific time. Consequently, the date-of-death appraisals as utilized in this litigation are inherently flawed, since they do not meet this requirement. Wilburn v. Mangano, 851 S.E.2d 474, 478 (Va. 2020).

Dominant Purpose. With regard to interpretation, the Supreme Court of New Jersey has provided guidance, clarifying that subsidiary provisions should not be interpreted as to conflict with the dominant purpose of the legal document in question. Newark Publishers' Assn. v. Newark Typographical Union, 22 N.J. 419, 426-27 (N.J. 1956). Applying this principle, the subsidiary Trust provisions concerning the Boonton and Florida Properties

should not conflict with the Trust's obvious dominant purpose, which was to divide all property owned by the Trust, less any costs associated with the testamentary estate, into three equal shares, and transfer those shares outright and free of trust to the three beneficiaries. In this context, Defendants contend that the trial court's interpretation erroneously allowed Christopher and Daryl to purchase the Boonton and Florida Properties at reduced values, without Shawn's consent, which conflicts with the clear dominant purpose of the Trust instructing that each beneficiary receive a one-third equal share of all property owned by the Trust. "We should not tolerate interpreting a trust to provide benefits the settlor did not intend." In re Nelson, 454 N.J. Super. 151, 163 (App. Div. 2018). Clearly, the Settlor did not intend for Christopher to receive a \$149,000 profit upon purchasing the Boonton Property. By doing so, Christopher received more than his one-third equal share. Similarly, the Settlor did not intend for Daryl to purchase the Florida Property approximately \$80,000 below fair market value. Again, by doing so, Daryl received more than her one-third equal share.

4. THE COURT REFORMED THE TRUST WITHOUT CLEAR AND CONVINCING EVIDENCE (18a)

On June 10, 2022, the trial court issued an Order delineating procedures for the disposition of Boonton and Florida Properties. **(18a)** In the Statement of Reasons attached, Judge DeAngelis explained that the trial court reformed the Trust language based upon the doctrine of probable intent citing N.J.S.A. 3B:3-33.1(b).

The Court finds that the probable intent of decedent was for the Trust to dispose of both properties, granting a one-third share to each of his children, reserving a right for defendants and co-defendant Christopher Fox, individually and not jointly,¹ to purchase the Boonton Property, and reserving a right for plaintiff to purchase the Florida Property. **(25a)**

¹. At oral argument on June 8, 2022, co-defendant Christopher Fox roundly rejected the idea of purchasing the Boonton Property jointly with defendant Shawn Fox. [Judge DeAngelis included this footnote with his statement.] **(25a)**

“The court’s primary goal in interpreting a trust agreement is to fulfill the settlor’s intent.” In re Nelson, 454 N.J. Super. at 158. “The Court has acknowledged that in ascertaining intent, its focus really is probable intent.” Ibid. “The judicial effort to fulfill a settlor’s or testator’s probable intent takes two forms: interpretation, and reformation.” Id. at 159.

“The former involves finding the meaning of language already in the instrument.” Ibid. “On the other hand, reformation involves remaking or modifying an instrument, to correct mistakes, to fulfill an unexpressed

intention, or to address circumstances that were unforeseen.” Id. at 160. “The preponderance-of-the-evidence standard of proof applies to interpretation; however, the more rigorous clear-and-convincing standard of proof applies to reformation.” Ibid.

In this context, Defendants contend that the trial court reformed the Trust language concerning the property purchase provisions, without an evidentiary hearing. Specifically, Trust Paragraph 4.1(A)(a) originally stated: “If the property located at 32 Charlottesburg Road, Boonton, New Jersey is still owned by the trust at the time of my death, I grant my son’s, SHAWN and CHRIS, the power to purchase their sister’s share of such [Boonton] property at the then fair market value.” **(3a)** This was changed to: “I grant my son’s, SHAWN and CHRIS, individually and not jointly, the power to purchase the entire Boonton Property in accordance with a sealed bidding procedure.”

Additionally, Trust Paragraph 4.1(A)(b) originally stated: “If the property located at 120 West Crystal Drive, Sanford, Florida is still owned by the trust at the time of my death, I grant my daughter, DARYL, the power to purchase both her brother’s shares in such [Florida] property valued at the then fair market value.” **(3a)** This was changed to: “I grant my daughter, DARYL, the power to purchase the entire Florida Property at a date-of-death appraised value of \$360,000.”

“Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential.” 2010 UTC with Comments, Section 415, Page 78. “To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required.” Ibid. “In determining the settlor’s original intent, the court may consider evidence relevant to the settlor’s intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof.” Ibid. ⁵

With this approach, the trial court’s reformation of the Trust overlooked controlling law and the more rigorous clear-and-convincing standard of proof should have been applied. Christopher’s testimony “roundly” rejecting the idea of purchasing with Defendants, does not meet the standard. **(25a)** Further, Plaintiff’s desire to reform the Trust language in favor of herself and Co-Defendant, does not meet the standard. This mistake granted Daryl the power to sell the Florida Property to herself and the Boonton Property to Christopher, at below-market prices, contrary to the terms and purposes of the Trust. “We should not tolerate interpreting a trust

⁵ N.J.S.A. 3B:31-31 confirms explaining that “The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s probable intent if it is proved by clear and convincing evidence that there was a mistake of fact or law, whether in expression or inducement.”

to provide benefits the settlor did not intend.” In re Nelson, 454 N.J. Super. 151, 163 (App. Div. 2018).

Finally, Defendants note that Judge DeAngelis concluded, after trial, that Christopher misrepresented his intentions to the trial court with regard to the Boonton Property and his flip. **(98a)** This highlights why the more rigorous clear-and-convincing standard of proof should have been applied.

5. THE COURT ERRED IN DENYING LEAVE TO FILE SUPPLEMENTAL COMPLAINTS (60a, 62a)

On May 10, 2023, the trial court ordered without oral argument that (1) Defendants’ motion for leave to file a Supplemental Complaint is denied; (2) Defendants’ motion for leave to file a Second Supplemental Complaint is denied; and (3) the parties are to appear for a status conference to address the scheduling of a plenary hearing on the amounts due to the Trust from Defendants for rent and legal fees. A Statement of Reasons cited authorities:

New Jersey Court Rule 4:9-4 provides that, “[o]n motion by a party the court may, upon reasonable notice and on terms, permit that party to serve a supplemental pleading setting forth transactions or occurrences which took place after the date of the pleading sought to be supplemented.” R. 4:9-4. New Jersey Courts have held that leave to file supplemental pleadings, like amendments, should be freely granted. See Comment to R. 4:9-4, citing State v. Standard Tank, 284 N.J. Super. 381, 396 (App. Div. 1995). The Appellate Division noted that “if a claim does not arise until after a complaint has been filed, leave to amend to add that claim should be granted as of course so long as the moving party has exercised due diligence, and the amendment will not cause the trial to be unduly delayed or complicated.” Id. **(66a)**

Here, Defendants' supplemental pleadings **(224a)** **(335a)** set forth transactions and occurrences which took place after the date of their initial counterclaim and therefore leave should have been "freely granted." Furthermore, shortly after the disposal of both Trust properties, Defendants promptly submitted their additional pleadings prior to any case management conferences or discovery involving this litigation. Therefore, Plaintiff and Co-Defendant would not have been prejudiced.

Defendants' Motion for Leave to File a Supplemental Complaint established a cause of action for (1) Plaintiff's breach of fiduciary duty as Trustee involving the sale of the Boonton Property to Christopher below fair market value; and (2) Co-Defendant's wrongful acts which resulted in Trust property being diverted to Christopher, who was unjustly enriched. **(201a)**

Defendants' Motion for Leave to File a Second Supplemental Complaint established a cause of action for (1) Plaintiff's breach of fiduciary duty as Trustee by purchasing the Florida Property, for her own account, below fair market value; and (2) Plaintiff's breach of fiduciary duty as Trustee by failing to make required dispositions in accordance with the Trust terms and misappropriating funds. **(325a)** ⁶

⁶ On February 14, 2024, Defendants' Motion for Leave to File a Second Supplemental Complaint was deemed frivolous and sanctions were imposed. Defendants also appeal that decision which is argued in the next section (Point #6) of this brief.

Pursuant to N.J.S.A. 3B:31-72, Defendants sought legal restitution as a remedy for Shawn's share of (1) the fair market value of the Boonton and Florida Properties at the time of transfer to Christopher and Daryl; and (2) Shawn's share of the Trustee's misappropriation of Trust funds for adversarial litigation for personal gain and other expenses.

Pursuant to Rule 1:6-2(d), Defendants' motions requested oral argument if their applications were opposed. **(203a) (328a)** Notwithstanding, the trial court denied both motions, allowing Plaintiff and Co-Defendant to oppose without oral argument. **(60a) (62a)** There was no explanation as to why oral argument was denied. Both motions raised factual and legal issues that would have benefited from further clarification through oral argument.

With regard to Defendants' Supplemental Complaint, the Statement of Reasons explained that (1) the court previously contemplated the possibility that Co-Defendant might flip the Boonton Property and determined that doing so would not be improper **(66a)**; (2) the court previously considered and addressed Plaintiff's improper conduct surrounding the sale of the Boonton Property **(67a)**; and (3) therefore "the basis for Defendants' claims of breach of fiduciary duty and unjust enrichment asserted in the Supplemental Complaint have already been asserted and addressed." **(67a)**

With regard to Defendants' Second Supplement Complaint, the Statement of Reasons explained that (1) there can be no finding that Plaintiff acted improperly in purchasing the Florida Property for \$360,000 because the Florida Property was appraised for that value; (2) Defendants' allegations that Plaintiff breached her fiduciary duties with respect to distributions are unsupported because "[a]ny delay in outright distributions from the Trust was a result of the instant litigation, which was dragged out in part by Defendants' lack of cooperation and continued motion practice" and (3) therefore, "there is no basis to allow the filing of the Supplemental Complaint or Second Supplemental Complaint." **(67a)**

Seeking clarification, Defendants filed a motion for reconsideration **(491a)** which was denied on June 19, 2023. **(69a)** Again, there was no hearing or explanation as to why oral argument was denied.

Defendants argue that the trial court was required to "find the facts and state its conclusions of law" with regard to their applications, pursuant to Rule 1:7-4(a). Presumably, this would involve reviewing the proposed pleadings for legal sufficiency and determining whether the allegations, if proven true, would constitute viable legal claims. Instead, the trial court adopted opposition's viewpoints, rendering a decision in their favor, without a detailed analysis. **(65a-67a)** "Naked conclusions do not satisfy the purpose of [Rule] 1:7-4." Curtis v. Finneran, 83 N.J. 563, 570 (N.J. 1980).

Furthermore, Defendants argue that their supplemental complaints raised issues of disputed facts and law, which were not argued and decided previously. The fundamental principles of due process and fairness require that Defendants have an opportunity to present evidence, cross-examine witnesses, and argue the facts *before* the trial court makes a determination on those facts. Finally, Defendants highlight that their claims involving fair market value for the Boonton and Florida Properties did not *accrue* until Christopher and Daryl legally closed. For these reasons, Defendants respectfully request that the Appellate Division reverse the May 10, 2023 Orders and/or provide them with an opportunity to supplement and/or amend their pleadings and fully present their case.

6. THE COURT ERRED IN AWARDING SANCTIONS FOR FRIVOLOUS LITIGATION (91a)

On February 14, 2024, following a 2-day plenary hearing, Judge DeAngelis entered an Order directing that Defendants pay sanctions to Plaintiff for two frivolous motions, pursuant to Rule 1:4-8. **(91a)** These motions include (1) Leave to File a Second Supplemental Complaint; and (2) Due Process Violation and Relief. ⁷ The trial court's findings of fact and conclusions of law stated:

⁷ Defendants' Motion for Leave to File a Second Supplemental Complaint is also discussed in the previous section (Point #5) of this brief. Additionally, Defendants' Motion for Due Process Violation and Other Relief is also discussed in a previous section (Point #2) of this brief.

Here, it is clear that Defendants' motions to file a second amended complaint and for due process were without merit and far exceeded the scope of the approved pre-trial motions. The motions contained arguments previously denied by the Court on multiple occasions. Further, Plaintiff provided Defendants with a frivolous lawsuit letter pursuant to Rule 1:4-8 with respect to these applications. Thus, the Court finds it appropriate to award reasonable attorneys' fees and costs with respect to costs incurred by Plaintiff to address Defendants' frivolous motions.

Judge DeAngelis, February 14, 2024 Order, Findings of Fact and Conclusion of Law **(110a)** ⁸

Defendants contend that the trial court's decision to impose sanctions constitutes an error of both discretionary and legal considerations.

Rule 1:4-8(b)(1) requires that "[a]n application for sanctions under this rule shall be by motion made separately from other applications and shall describe the specific conduct alleged to have violated this rule." Here, Plaintiff did not file a motion. Instead, the trial court decided to impose frivolous sanctions in the February 14, 2024 Order, following the plenary hearing. With this approach, Defendants right to procedural due process was not observed.

Additionally, with regard to frivolous sanctions, the judiciary has determined that "The rule and statute must both be interpreted strictly against the applicant for an award of fees." Tagayun v. AmeriChoice of N.J., Inc.,

⁸ Defendants have included their Due Process Violation Brief **(402a)**, Plaintiff's Response **(500a)**, and their Reply Brief **(549a)** in the Appendix. Rule 2:6-1(a)(2) allows for inclusion of briefs in the appendix when "the brief is referred to in the decision." Here, as quoted above, the February 14, 2024 decision refers to the legal arguments contained in Defendants' motions as frivolous and without merit, thus justifying brief inclusion.

446 N.J. Super. 570, 579 (App. Div. 2016). Therefore, Plaintiff's failure to properly file a motion for frivolous sanctions precludes an award. Moreover, pursuant to Rule 1:4-8(b)(2), "A motion for sanctions shall be filed with the court no later than 20 days following the entry of final judgment." Therefore, Plaintiff's time for filing has expired.

Additionally, pursuant to 1:4-8(c), the trial court may impose sanctions for frivolous litigation on its own initiative. However, the trial court is required to enter an order to show cause, which did not happen. Therefore, neither the trial court nor Plaintiff strictly complied with the rule and the time for filing has expired. ⁹

Finally, the appellate division has explained that:

Sanctions for frivolous litigation are not imposed because a party is wrong about the law and loses his or her case. The nature of conduct warranting sanction under Rule 1:4-8 and under the statute has been strictly construed. The term frivolous should not be employed broadly or it could limit access to the court system. First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432–33, 918 A.2d 666 (2007). Imposing sanctions is not appropriate where a party "has a reasonable good faith belief in the merit of his action." J.W. v. L.R., 325 N.J. Super. 543, 548, 740 A.2d 146 (1999).

Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016)

⁹ Defendants have included Plaintiff's Frivolous Notice for the Second Supplemental Complaint Motion (**362a**) and the Due Process Violation Motion (**495a**) in the Appendix and note that these documents demonstrate issues of disputed facts and law, which suggests that the underlying claims have merit. While Judge DeAngelis did order the sale of the Boonton and Florida Properties, there was no prior fact finding or conclusions regarding fair market value or the Trustee's misappropriation of funds towards adversarial litigation for personal gain.

7. THE COURT OVERLOOKED NEW EVIDENCE SUPPORTING DEFENDANTS' CLAIMS (91a)

On December 6, 2023 and December 14, 2023, the trial court conducted a 2-day plenary hearing to determine if Plaintiff had proven her case for mesne profits and legal fees. Defendants raised multiple defenses, primarily involving Plaintiff, in her capacity as Trustee, violated her fiduciary duties coming into and throughout the instant litigation. Consequently, new evidence supporting Defendants' claims for breach of fiduciary duty was established during the trial. Defendants submitted a Proposed Finding of Fact and Conclusions of Law, highlighting the new evidence and urging the trial court to reconsider their claims. However, the trial court declined, omitting findings and conclusions regarding the Trustee's violations of fiduciary duties. Therefore, Defendants argue that the trial court overlooked new evidence supporting their supplemental claims and the court's decisions were not premised upon consideration of all relevant factors. Defendants hereby summarize the breach of trust allegations and new evidence ascertained.

Appraisals. During the trial, it was established that the Trust appraisals for the Boonton and Florida Properties did not determine fair market value. Instead, the appraisals were ordered for informational purposes and the

market values obtained therefrom were non-binding upon the parties, who were instructed to meet and discuss their options, by way of a settlement conference, pursuant to the January 25, 2022 Order. **(14a)** However, Plaintiff ignored the Order, which constitutes a breach of trust. Pursuant to N.J.S.A. 3B:31-54, the Trustee was obligated to adhere to “applicable law,” which encompasses adherence to court orders. **(8T 28-31)**

Florida Property. Contrary to the required compliance of Judge Berdote Byrne’s Order, Plaintiff opted to acquire the Florida Property at its appraised value, proceeding without Shawn’s consent. While the Trust did confer upon Daryl the authority to purchase Shawn and Christopher’s shares of the Florida Property herself, it simultaneously stipulated that any such purchase must be conducted at fair market value, pursuant to Trust Article 4, Paragraph 4.1(A)(b). However, Daryl purchased the Florida Property at a discounted price, which was premised upon the appraised value obtained by the Trust, with an effective date of over one (1) year prior. **(381a)** Consequently, the Trust’s stipulation requiring that property shares be acquired at fair market value was not observed. Therefore, the Trustee violated her fiduciary duty to administer the Trust “in accordance with its terms and purposes,” pursuant to N.J.S.A. 3B:31-54. Furthermore, the Trustee violated her fiduciary duty of loyalty, which obligated Daryl to manage the Trust “with undivided loyalty to

and solely in the best interests of the beneficiaries,” pursuant to N.J.S.A. 3B:31-55(a), which inherently includes securing the “best” possible price for the Florida Property.

Boonton Property. Again, contrary to the required compliance of Judge Berdote Byrne’s Order, Plaintiff initiated a sealed bidding process to decide which brother, Shawn or Christopher, would acquire the Boonton Property, proceeding without Shawn’s consent. **(8T 35)** During the trial, it was established that Daryl sought to purchase the Boonton Property with Christopher below-market value, which violated the Trustee’s fiduciary duties of loyalty and impartiality, pursuant to N.J.S.A. 3B:31-55(a) and N.J.S.A. 3B:31-56. **(8T 35-37)** Furthermore, Daryl ultimately sold the Boonton Property to Christopher for \$601,000, which was a deeply discounted price. **(145a)** In fact, just 15 days after recording the deed, Christopher flipped the Boonton Property for a profit of \$149,000. **(151a)** This transaction contravened the Trust’s explicit directive for a purchase at fair market value, pursuant to Trust Article 4, Paragraph 4.1(A)(a). Thus, Daryl violated her fiduciary duty to administer the Trust “in accordance with its terms and purposes,” pursuant to N.J.S.A. 3B:31-54. Furthermore, this transaction violated Daryl’s fiduciary duty of loyalty, which inherently includes securing the “best” possible price for the sale of the Boonton

Property. Moreover, Daryl violated her fiduciary duty of impartiality, as the Trustee favored one beneficiary over the other. Finally, it was established that Daryl failed to disclose the Campbells' ongoing interest in purchasing the Boonton Property for \$800,000, an omission which constituted a breach of her fiduciary duty to provide full disclosure to Shawn, pursuant to N.J.S.A. 3B:31-67(a). **(8T 99-100)**

Misappropriation. Defendants argue that the Trustee misappropriated Trust funds for adversarial litigation and other expenses. During the trial, it was established that Daryl, upon accepting her trusteeship on July 28, 2021, jointly retained legal counsel with Christopher, which continued until September 30, 2021. **(159a ¶7)** During this time, Mr. Beilin prepared a written complaint against Defendants for ejectment and rent, which violated the Trustee's fiduciary duties of impartiality and loyalty. **(161a)** Additionally, Daryl misappropriated Trust funds to pay for Christopher's representation during this time. **(159a ¶7)**

Plaintiff then commenced adversarial litigation against Defendants. This action directly violates the stipulations of N.J.S.A. 3B:31-55(a), which requires the Trustee to administer the Trust "with undivided loyalty to and solely in the best interests of the beneficiaries." Assuming the Trustee required assistance from the trial court, the appropriate action would have

been to petition the court for advice and direction under Rule 4:83-4(c) or to seek a declaration of rights under N.J.S.A. 2A:16-55(c).

Furthermore, during trial it was established that the Plaintiff's breach of trust concerning the Boonton Property commenced on December 9, 2021 when Daryl and Christopher submitted a written contract to jointly purchase the Boonton Property for \$651,000 and continued until August 31, 2022, when Judge DeAngelis ordered that Daryl was not permitted to purchase the Boonton Property with Christopher "as it would be in violation of her fiduciary duties." **(31a ¶2)** Therefore, Daryl's improper conduct persisted for over eight (8) months. During this time, Plaintiff misappropriated Trust funds to cover legal expenses aimed at furthering her improper goals involving both properties. **(8T 36-37)**

The situation escalated after the Trust's disposal of the Boonton and Florida Properties. Upon Shawn's formal petition to the Trustee and trial court for relief, Plaintiff persisted in using Trust funds to finance legal defenses, aimed at safeguarding the unjust advantages she and Christopher had improperly secured. **(158a)** This continued misuse of Trust funds underscores a sustained breach of fiduciary duty as these monies were expended not in the interest of the Trust or all its beneficiaries, but to protect personal gains obtained through wrongful means.

Plaintiff's misappropriation of Trust funds also extended to litigation costs for discovery and trial. In this context, Daryl was seeking over \$50,000 in unpaid rent from Defendants for the Boonton Property along with over \$100,000 in legal fees and costs. **(157a)** Meanwhile, Daryl permitted Christopher to rent the entire Florida Property for just \$2,500 total. **(108a)** Therefore, Plaintiff was appropriating Trust funds for litigation to potentially benefit herself and Christopher, at Shawn's expense, which violated her fiduciary duties of loyalty and impartiality.

Finally, upon conclusion of trial, having expensed over \$100,000 for litigation, the Trustee was awarded just \$2,500 for Defendants' occupancy. **(91a)** The trial court's decision explained that "[t]he Court finds it equitable that the Defendants pay the same below market rental payment that Christopher paid." **(108a)** This Order confirms the Plaintiff's improper and wasteful misappropriation of Trust funds for adversarial litigation to gain advantage at Shawn's expense.

REQUEST FOR RELIEF

Defendants respectfully request that the Appellate Division (1) Modify the appropriate Order to require that Shawn is entitled to restitution for his one-third share of the fair market value of the Boonton and Florida Properties, pursuant to N.J.S.A. 3B:31-72; (2) Modify the appropriate Order

to require that Shawn is entitled to restitution for his one-third share of the Trust funds spent on adversarial litigation, pursuant to N.J.S.A. 3B:31-72, which provides that a beneficiary may seek restitution for improper expenditures; (3) Reverse the May 10, 2023 Orders and confirm the Defendants' right to supplement and amend their pleadings and pursue their claims; (4) Reverse the February 14, 2024 Order with regard to frivolous sanctions imposed upon Defendants; and (5) Assign their case to a different judge, assuming remand is granted.

Defendants present the following Appellate Division opinion providing guidance with regard to assigning a case to a different judge.

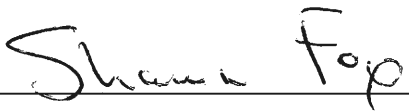
Since the motion judge has expressed opinions regarding the plaintiff's intent in the process of weighing the evidence and may have a commitment to his findings, we conclude that it is appropriate the matter be assigned another judge. In re Guardianship of R.G. and F., 155 N.J. Super. 186 , 195, 382 A.2d 654 (App.Div. 1977); New Jersey Div. of Youth and Family Services v. A.W., 103 N.J. 591 , 617, 512 A.2d 438 (1986)

Carmichael v. Bryan, 310 N.J. Super. 34, 49 (App. Div. 1998)

Defendants assert that Judge DeAngelis has consistently maintained that the Trustee's actions were appropriate when evaluating the evidence, possibly showing a bias towards his previous conclusions. Therefore, assigning this case to a new fact-finder would be appropriate.

CERTIFICATION

I, Shawn Fox, hereby certify that I am a pro se litigant in above captioned matter and that I prepared this Formal Brief in support of our appeal. Furthermore, I hereby certify that the documents included in the Appendix of this Formal Brief are true and accurate copies of the documents that I received or communicated. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Date: June 18, 2024

Shawn Fox, Pro Se Litigant

**DARYL B. FOX, TRUSTEE
OF THE DONALD M. FOX
2006 REVOCABLE TRUST,**

Plaintiff/Respondent,

-v-

**SHAWN T. FOX and DIANE
FOX, Defendants/Appellants,
and CHRISTOPHER FOX,
Defendant/Respondent.**

**SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
Docket No. A-002187-23 TEAM 01**

Submitted: July 17, 2024

Civil Action

**On Appeal From:
Chancery Division/Probate Part
Docket No. MRS-P-2730-2021**

**SAT BELOW:
Hon. Frank J. DeAngelis, P.J.Ch.**

**BRIEF OF PLAINTIFF/RESPONDENT,
DARYL B. FOX, TRUSTEE OF THE
DONALD M. FOX 2006 REVOCABLE TRUST**

**RICHARD H. BEILIN, ESQ.
Attorney ID No. 037401989
THE WACKS LAW GROUP, LLC
110 South Jefferson Road, Suite 304
Whippany, NJ 07981
Attorneys for Plaintiff/Respondent,
Daryl B. Fox, Trustee of the Donald
M. Fox 2006 Revocable Trust**

Richard H. Beilin, Esq., *on the brief*

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The Plaintiff incorporates the Table of Judgments, Orders and Rulings Being Appealed set forth in the Defendants’ brief.

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PRELIMINARY STATEMENT

This matter concerns a Trustee who has done everything in her power to administer a Trust in accordance with her late father's wishes, and a beneficiary who has tried endlessly to prevent it. Defendants, Shawn and Diane Fox, resided in Trust property for well over a year without making any payment to the Trust. The trial court established a fair bidding procedure for Shawn and the other beneficiary, Christopher Fox, who had rights to acquire the property under the Trust. After Shawn submitted the losing bid, they still did not vacate the property until an Order was entered for their ejection and they faced removal by the Sheriff. After they left, the Defendants engaged in a protracted flurry of motion practice consisting largely of meritless accusations against the Trustee, and seemingly intended to bankrupt the Trust.

In their brief, the Defendants find fault with virtually everything the trial court did in this matter but advance no competent factual or legal arguments for reversal. The Plaintiff urges the Appellate Division to deny the Defendants' appeal so administration of the Trust can be completed for the benefit of each of the beneficiaries.

PROCEDURAL HISTORY

The Plaintiff incorporates the Procedural History set forth in the Defendants' brief.

STATEMENT OF FACTS

On August 23, 2006, Donald M. Fox (the "Decedent") created the Donald M. Fox 2006 Revocable Trust. Thereafter, on September 28, 2018, the Decedent executed an amendment and restatement of the August 23, 2006 Trust (the amended and restated trust is referred to herein as the "Trust"). (Da1). At Section 9.1(A) of the Amended Trust, the Decedent designated his daughter, the Plaintiff, Daryl B. Fox, as his Successor Trustee, to serve in that capacity if the Decedent was unable to serve as Trustee for any reason whatsoever. (Da10). Accordingly, upon the Decedent's death on July 24, 2021, the Plaintiff became the Trustee.

The Decedent left three children, including his daughter Daryl (in her capacity as Trustee, Daryl is referred to herein as "the Plaintiff" or "the Trustee," and in her individual capacity as Daryl), and sons Shawn ("Shawn") and Christopher ("Chris"). The Trust owned two properties at the time of the Decedent's death, one of which is located at 32 Charlottesburg Road, Boonton, New Jersey (the "Boonton Property") and one at 120 West Crystal Drive, Sanford, Florida (the "Florida Property"). The operative provisions of the Trust concerning the properties are set forth at Article IV, Section 4.1A (hereinafter, "Section 4.1A"):

- a. If the property located at 32 Charlottesville Road, Boonton, New Jersey is still owned by the trust at the time of my death, I grant my son's [sic], SHAWN and CHRIS, the power to purchase their sister's share of such property at the then fair market value.
- b. If the property located at 120 West Crystal Drive, Sanford, Florida is still owned by the trust at the time of my death, I grant my daughter, DARYL, the power to purchase both her brother's [sic] shares in such property valued at the then fair market value.

(Da3).

Shawn and his wife, Diane (collectively "the Defendants") moved into the Boonton Property on or around December 1, 2020 and vacated on November 28, 2022, after the trial court ordered their ejection. (Da52). From the last four months of the Decedent's life through the day they left, on November 28, 2022, they did not make any payments to the Trust for occupying the Boonton Property. (7T69-11-13). During the entire time they lived there without payment, the Trust bore the carrying charges on the Boonton Property, including taxes and insurance. (7T76-8-13).

Shawn and Diane were made aware only four days after the Decedent's death that they could remain at the Boonton Property for a "reasonable time" as long as they paid rent. (Da256). They did not make payments or even propose to do so, causing the Plaintiff to make a written demand for possession on October 4, 2021. In that letter, counsel for the Plaintiff advised the Defendants' first attorney that a realtor would be brought to the Boonton Property and that suit to eject them would

be brought if they did not vacate. (Da258-259). In response, Shawn and Diane made a highly conditioned offer to pay rent of \$2,800, with no proposal to pay for the months that had lapsed. (Da262). Shawn opposed the listing of the Property. (8T77-15-17). Because the Property needed to be sold so that the Trust could be administered in accordance with the Trustee's duties, and Shawn and Diane were not making payments, the Trustee thereafter filed suit. (7T75-23 to 76-6).

The Trustee received an offer from Thomas and Lynn Campbell (the "Campbells") dated November 21, 2021, to purchase the Boonton Property for \$800,000, "as is," and the offer was sent to the Defendants' second attorney on November 24, 2022. (Da274). Shawn acknowledged that he was advised of the offer on November 27, 2021. (8T83-24 to 84-7). They reacted by filing a counterclaim against the Plaintiff in which they dismissed the Campbells' offer to purchase the Property as "bogus," "unscrupulous," and an attempt to "avoid obtaining a proper appraisal and selling the property to Shawn." (Da629; Da637). The Defendants themselves had submitted an offer for only \$555,000, conditioned on either repairs being made or the price being reduced if they accepted the property "as is." (Da268). They had already requested extensive repairs if they bought the Boonton Property, including a pool fence, removal and replacement of an oil tank, removal of a cesspool and replacement with a septic tank, which would have reduced the price by over \$90,000. (Da662-663).

Daryl, in her individual capacity submitted an offer to purchase the Boonton Property with Chris for \$651,000, but only if: (a) if the property could not be sold to a third party, and (b) the proposed price was determined to be at fair market value. (8T54-4-13). The Trustee testified that while she had made the offer and it would have generated more for the Trust than Shawn's offer, she "would have liked the Campbells to buy the home because that was the most money for the trust and the beneficiaries..." (7T156-2-7; 157-18-20).

The parties appeared for a hearing before Hon. Maritza Berdote Byrne on January 10, 2022. During the hearing, the court addressed the Defendants' occupancy of the Boonton Property:

...[Y]ou don't have a right to be living there. There is no right to live there right now. You are not on the deed. You don't have a lease. Legally there is no right to anyone being there."

(1T9-11-15).

Judge Berdote Byrne ordered date-of-death appraisals of the "fair market value" of both the Boonton and Florida Properties, and that upon receipt of the appraisals the parties were to have a settlement conference with the Deputy Surrogate. (Da15).

Appraisals were performed by the Court-appointed appraisers, who found: (a) a \$575,000 value for the Boonton Property, and (b) a \$360,000 value for the Florida Property. (Da23). The Trustee, through counsel, solicited sealed bids from Shawn

and Chris for the Boonton Property. Shawn responded by seeking injunctive relief. (Da18). At the time, the Defendants had a motion for partial summary judgment pending, and the Plaintiff had motion pending to eject the Defendants from the Boonton Property. On June 10, 2022, the Court entered an Order denying those motions without prejudice and established a sealed bidding procedure under which Shawn and Chris had the opportunity to submit bids to Christopher Luongo, Esq. of the Surrogate's Office. That Order also required that Shawn and Diane to vacate the Boonton Property if Shawn was not the successful bidder, and provided that Daryl could purchase the Florida Property for \$360,000. (Da19).

Both Shawn and Chris willingly submitted timely bids on the Boonton Property, with Chris making an offer of \$601,000 (an amount \$26,000 above the appraised price), and Shawn making an offer of \$501,000 (an amount \$74,000 less than the appraised price). (Da307, 310). Daryl thereafter sought to purchase the Boonton Property with Chris, informing the Defendants and the trial court of her intentions. (Da234-35, 18). The Defendants and Diane objected, and the Court ordered Chris to complete the purchase individually on or before September 15, 2022 in accordance with the terms of his bid. (7T81-8-12). Shawn and Diane filed another motion essentially seeking a stay, which the trial court denied on September 13, 2022, finding "all" or their arguments "without merit." (Da37; 43).

The closing of the Trust's sale of the Boonton Property to Chris occurred on September 15, 2022; the proceeds and deed were held in escrow because the Defendants had not vacated. The trial court quoted Chris's real estate attorney that this was "the only obstacle..." (Da55). Though the trial court had already ordered them to vacate upon completion of the closing (Da19, at ¶7), they did not, making it necessary for the Trustee to seek an order for their removal. (7T82:7-15). They filed a cross-motion, arguing that Chris had not closed. The Court found on October 12, 2022 that the closing had effectively occurred, and that the proceeds had not yet been distributed due to the "Defendants' own unclean hands." (Da51, 56, 59).

The Court ordered ejectment pursuant to the Ejectment Statute, N.J.S.A. 2A:35-1, et seq., and stated that if the Defendants did not leave by December 1, 2022 a writ of possession was to be issued. (Da52 at ¶3, Da56). The Court also stated that the Trustee's request for rent payments and counsel fees would be addressed at a plenary hearing. (Da57). (7T83:5-13; Da52). The Defendants finally left on November 28, 2022, only three days before the date in the Order. They took everything of value belonging to the Decedent and left the house dirty, with rat droppings; the Trustee spent three days cleaning it, without charge to the Trust. (7T84:3-21).

After they vacated, the Defendants only grew even more litigious. They filed five motions with the trial court in the first eight months of 2023 alone: (a) Motion

to file a supplemental complaint denied on May 10, 2023 (60a); (b) Motion to file a second supplemental complaint, denied on May 10, 2023 (Da62); (c) Motion for reconsideration of the two May 10, 2023 Orders, denied on June 19, 2023 (Da69); (d) Motion to determine what they asserted was the “controlling law” for the upcoming plenary hearing, denied on October 4, 2023 (Da81), and (e) motion alleging their due process rights had been violated, also denied on October 4, 2023. (Da83). In addition, they filed an unsuccessful motion for leave to appeal. (Da80).

The Trustee twice served “frivolous litigation” notices on Shawn and Diane aimed at their relentless motion practice ((Da362; Da495), including their motion to file a second amended complaint and their so-called “due process” motion, both of motions were been denied. Shawn acknowledged receiving both notices. 8T102-4-6; 108-21to 109:5.

The trial court held a plenary hearing on December 6 and 14, 2023, culminating in its Trial Order dated February 14, 2024. (Da91). The only portions of the Trial Order under appeal are the final two paragraphs, awarding the Plaintiff attorneys’ fees with respect to the motion to file a second amended complaint and the due process motion. (Da92).

The Plaintiff has performed her duties as required by the Trust and applicable law. She has provided Shawn and Chris with bank and account statements. 7T97-23 to 98-1. She has distributed the proceeds of the sales of both the Florida and

Boonton Properties. 7T85-15-20. After those distributions, she was ready to finish distributing the Trust assets and close things out, but the Defendants continued their motion practice. 7T85:21 to 86-7. The Trustee is looking to close out the Trust, by administering what is left “as quickly as [she] possibly could.” 1T98:2-11.

LEGAL ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DECIDING TO ESTABLISH A SEALED BIDDING PROCEDURE (Da18)

The sealed bidding procedure ordered by the trial court for the Boonton Property was not only proper, but necessary under the circumstances of the case.

A. The trial court was not Bound by the January 25, 2022 Order with Respect to a Settlement Conference.

The Defendants state that the trial court was obligated to compel the parties to attend a settlement conference pursuant to Judge Berdote Byrne’s January 25, 2022 Order (Da15, at ¶5) under a “principle of judicial continuity, which requires the enforcement of orders through the life cycle of a case, irrespective of changes in judicial assignments, to ensure fairness and maintain consistency in legal proceedings.” (Db 22). The Defendants do not cite any authority for such a principle, and a search of “judicial continuity” does not reveal a single reported New Jersey case in which that phrase appears.

It would be contrary to the role of a trial judge, and contrary to justice, to require a succeeding judge to follow prior rulings in a case where the only basis for doing so is the fact that another judge had entered those rulings. Circumstances change commonly in litigation and tying a trial court's hands in that manner deprives the court of the discretion necessary to oversee a case.

It appears that the Defendants are arguing something akin to the Law of the Case Doctrine, which is intended to prevent relitigation of a previously resolved issue. In re Estate of Stockdale, 196 N.J. 275, 311 (2008), citing Pressler, Current N.J. Court Rules, cmt. 4 on R.1:36-3 (2008). However, that doctrine is triggered only when the court faces a ruling on the merits made by a different, co-equal court on an identical issue. Lombardi v. Masso, 207 N.J. 517, 539 (2011). Judge Berdote Byrne's ordering of a settlement conference was not ruling a "on the merits." The Law of the Case Doctrine is also discretionary in nature. Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998), quoting State v. Reldan, 100 N.J. 187, 205 (1985).

A trial court is not obligated to give absolute deference to the interlocutory rulings of a prior judge. "Thus, [i]f a prior judge has erred or entered an order that has ceased to promote a fair and efficient processing of a particular case, the new judge owes respect but not deference and should correct the error." Lawson v. Dewar, 468 N.J. Super. 128, 135 (App. Div. 2021). Here, there was ample reason

for the trial court to conclude under the circumstances of this case that a settlement conference would be unproductive, rather than an efficient way to move the case forward, and that the sealed bidding procedure was the more appropriate way to proceed. As the trial court subsequently wrote in its Statement of Reasons supporting the October 12, 2022 Order removing the Defendants from the Boonton Property, “[t]he parties have essentially been unable to agree on every detail relating to the sale of the Property from the outset of the litigation. As such, it became necessary for the Court to establish the bidding procedure...” Da53.

Further, while a trial court is unquestionably within its power to order the parties to attend a settlement conference, it is equally obvious that settlement itself may not be forced upon the parties. A settlement of a lawsuit is a contract which “like all contracts, may be freely entered into ...” Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div. 1983). It follows that a court cannot compel parties to settle a case. The Defendants claim that decision not to compel a settlement conference was “manifestly unjust” because the Defendants “believed that the controversy would be resolved through settlement discussions, as per Judge Berdote Byrne’s guidance.” (Db22). The Defendants’ beliefs with regard to the prospects for settlement (even taken at face value notwithstanding their documented refusal to accept a sale of the Boonton Property to anyone but themselves and their tender of

a bid for less than the fair market value of the Boonton Property), do not render unjust the trial court's decision not to compel a settlement conference.¹

Finally, the trial court's decision to impose a bidding procedure actually did show great deference to Judge Berdote Byrne's thoughts on the case. At the January 10, 2022 hearing, Judge Berdote Byrne observed that "the bidding process" suggested by Plaintiff's counsel "seems to be the most efficient way to resolve the dispute with respect to the [Boonton] property." (1T9:22-25). Moments later, she again recommended either listing the Boonton Property or conducting a sealed bidding process. 1T11:23 to 12:2. If Shawn had not objected, 1T13:23-25, it is likely that Judge Berdote Byrne would have ordered a sealed bidding procedure along the very same lines as the one ordered by the trial court.

B. The trial court's Decision to Order a Sale was Reasonable and Appropriate Under the Circumstances.

The trial court acted within its discretion in ordering a sealed bidding procedure, and that discretion should not be disturbed. A court sitting in equity has broad discretion to fashion a remedy. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 514 (2019). Chancery Courts are "charged with the responsibility to fashion equitable remedies that address the unique setting of each case." US Bank

¹ It also goes without saying that the Defendants (like any litigants) were free at all times to contact the other parties with any settlement proposals they had, and that negotiations could have taken place outside a formal court-ordered settlement conference.

Nat'l Ass'n v. Guillaume, 209 N.J. 449, 476 (2007). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011), quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007).

There was ample reason to impose a sealed bidding procedure. At the time of the June 10, 2022 Order, the Defendants were still residing in the Boonton Property without payment while the Trust continued to incur expenses for taxes and insurance; the trial court observed in its Statement of Reasons supporting its decision that it was for that very reason that the Trustee had filed suit:

...[T]he Court will emphasize that defendants are presently living in the Boonton property, without paying rent...It is precisely because defendants ceased rent payments and continued to reside at the Boonton Property after decedent passed away that the present litigation ensued.

(Da29).

The Defendants' utter lack of a legal right to occupy the Boonton Property had been made perfectly clear to them months before, during the January 10, 2022 hearing before Judge Berdote Byrne:

...[Y]ou don't have a right to be living there. There is no right to live there right now. You are not on the deed. You don't have a lease. Legally there is no right to anyone being there. The property has to get sold...If I hear that you are interfering with the sale of the property, I am going to have to eject you, because you don't have a legal right to be there. You are not on the deed, you don't have a lease.

(1T9:11-21).

Judge Berdote Byrne had herself suggested either listing the Boonton Property and giving Shawn and Chris a right of first refusal, or doing a sealed bid process. (1T11:23-12:12). The Defendants rejected the Court's suggestion (which was supported by the Trustee), that the properties simply be listed for sale and that the beneficiaries be provided the opportunity to match any offer that was received:

THE COURT: Why don't we just list both properties? Why don't we just list both properties and if someone wants to match an offer, they can match an offer?

MR. BEILIN [Attorney for the Plaintiff]: Your Honor, we are amenable to that,,I think, Your Honor, that putting it on the market and seeing what the market will bear based on what we already know is going to get by far the best price for the property.

THE COURT: Mr. Shawn Fox, do you disagree with that?

MR. S. FOX: ...I am not agreeable to that.

(1T13:9-24).

Prior to the hearing, on November 24, 2021, the Trustee had advised the Defendants through their second attorney, Jennifer McInerney, Esq., that a written

offer had been received from Thomas and Lynn Campbell (the “Campbells”) to buy that property, “as is,” for \$800,000. Da274. Shawn and Diane dismissed it at the time in a verified pleading as “bogus,” “unscrupulous,” and an attempt to “avoid obtaining a proper appraisal and selling the property to Shawn.” Da629; Da637.

Once Shawn had submitted what he concedes was his losing bid of \$501,000 (Db17) (which resulted in the trial court naming Chris the successful bidder and Chris’s purchase and resale of the Boonton Property to the Campbells), Shawn constructed what can only be described as an alternate reality, stating in a February 16, 2023 certification that he had been “excited” about the Campbells’ November 2021 offer (Da211, at ¶18).

However, the evidence shows otherwise, including: (a) his dismissive statements about the Campbells’ offer when it was made (Da629; Da637);² (b) his rejection of the trial court’s January 10, 2021 suggestion that the Boonton Property be listed for sale (1T13:9-24), and (c) his inability to point to a single communication between the parties in which he indicated that he would consent to or even consider the sale of the Boonton Property to anyone but himself.

Shawn’s shifting positions and versions of the facts were such that in its decision following the plenary hearing, the trial court stated that while it found

² Shawn later admitted at trial that “as it turns out, they were serious about putting in the offer and purchasing for 800,000...” (7T6818-20).

Shawn's testimony to be generally credible, "he did contradict himself a number of times with respect to the value of the Boonton Property and the willingness of a third-party to purchase the Boonton Property. Certainly, as to those issues, Shawn lacked credibility." Da104.³ Deference is given to a trial court's findings regarding credibility, State v. Hubbard, 222 N.J. 249, 264 (2015), as credibility findings are "often influenced by matters such as the character and demeanor of witnesses and common human experience that are not transmitted by the record. State v. Locurto, 157 N.J. 463, 474 (1999).

Viewed against the intractability of the Defendants' position which had them opposing any purchaser of the Boonton Property beside themselves, and their ongoing rent-free occupation of the Boonton Property, the sealed bidding procedure ordered by the trial court was not only proper but necessary. The trial court could not order that the Boonton Property be listed for sale because the Trust language provided Shawn and Chris with the opportunity to buy out Daryl's interest. Da3. Shawn and Chris could not purchase the Boonton Property together because Chris would not agree to co-ownership -- Chris stated during oral argument on June 8, 2022 that he would not agree to purchase the Property with Shawn (3T17:1-2), and the trial court took care to note in its June 10, 2022 opinion that Chris had "roundly

³ The Court also found that the Plaintiff was a credible witness and that "[o]verall, her testimony made sense when taken as a whole with the evidence that was introduced at trial." (Da101).

rejected” joint ownership. (Da25). Again, the Defendants opposed the listing of the Boonton Property and dismissed the sale to the Campbells as “bogus.” (1T13:9-24; Da629; Da637). That left a bidding procedure between Shawn and Chris as the logical, and quite possibly the only, alternative.

Further, the conduct of the sealed bidding procedure was perfectly fair. It was overseen by the Court, with the bids to be sent directly to the Surrogate, allaying the Defendants’ misplaced concerns that they would be prejudiced by a procedure overseen by the Plaintiffs’ counsel. It provided both Shawn and Chris with exactly the same opportunity to bid on the Boonton Property. The bidding procedure was therefore a reasonable and appropriate remedy under the circumstances.

II. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANTS’ RIGHT TO DUE PROCESS (Da18)

The Defendants’ argument that their right to due process was violated has already failed twice. They made it in their unsuccessful motion for leave to file an interlocutory appeal. (Da518 (Defendants’ Brief in Support of Motion for Leave to Appeal); Da80 (Order Denying Leave to Appeal)). They then made a virtually identical argument before the trial court (Da412) and their motion was denied (Da83), for reasons set forth by the trial court. (Da86-90).

In essence, the Defendants’ due process argument is predicated on their contention that they were not provided with adequate notice that the trial court might,

on June 10, 2022, order a sealed bidding procedure for the Boonton Property and approve the sale of the Florida Property to the Trustee in her individual capacity. Db23-24. In an effort to show that they were unfairly taken by surprise, the Defendants grossly mischaracterize the trial court's June 10, 2022 Order and the proceedings that led to it.

The trial court heard oral argument on June 8, 2022 on the Defendants' motion for partial summary judgment. The June 10, 2022 Order denied that motion without prejudice, and likewise denied the Plaintiff's motion to eject the Defendants from the Boonton Property. (Da18-19). The trial court's order of a sealed bidding procedure for the Boonton Property and authorizing the sale of the Florida Property to the Trustee in the June 10, 2022 Order were fully in keeping with its decision on those motions.

The Defendants assert that because the Plaintiff had not requested the sealed bidding procedure or authorization for the sale of the Florida Property in her motion, they were deprived of "the opportunity to oppose." (Db24). This is disingenuous, if not outright misleading. It was the Defendants themselves who had put these issues in play before the trial court. In their notice of motion, the Defendants sought rulings based on Section 4.1A of the Trust that Daryl Fox had waived her right to purchase the Florida Property and that Chris had waived his right to purchase the Boonton Property, and further sought an order requiring the Trustee to offer the

Boonton Property to Shawn and the Florida Property to either Chris or Daryl. (Da466). The trial court fashioned remedies addressing these matters.

Further, the Trustee had sought to conduct her own sealed bidding procedure for the Boonton Property. Shawn had filed an application for injunctive relief to prevent it, and the trial court issued an Order on May 27, 2022 stating it would hear oral argument on June 8, 2022, following which argument the Court would “enter an Order directing the parties on how they may proceed with the sale or transfer of the Property.” (Da16-17). Nor was the Plaintiff’s decision to buy the Florida Property any secret; notice of the Plaintiff’s intent to buy the Florida Property in her personal capacity had been circulated in March 2022, about three months before the Order. (3T4:22-5:1).

The Defendants cite Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76 (App. Div. 2001) in support of their due process argument. In that case, the plaintiffs had sued based on injuries sustained in a construction site accident. On the day before the trial, the trial judge noted that after the plaintiffs put on their case, the defendants would have the opportunity to move to dismiss. The trial judge proposed a procedure that he defined as a “shortcut,” under which the plaintiffs’ attorney would essentially put his “best case” on the record, and the court would hear argument and then make a ruling. Id. at 81-82. The court then implemented this shortcut procedure, resulting in the dismissal of the defendant. The plaintiffs sought

reconsideration, and during the course of oral argument, the court stated it felt that the Plaintiffs' expert report was a net opinion. The motion for reconsideration was denied, without any further opinion. Id. at 82.

The Appellate Division discussed the procedure for summary judgment, and showed that by comparison, the Klier plaintiffs had not had an opportunity to adequately prepare and argue a dispositive motion. Instead, the trial court had implemented a summary procedure and dismissed their complaint. Id. at 83. This was what deprived the Klier plaintiffs of their right to procedural due process:

For example, had defendants filed a motion, plaintiffs would have had the opportunity to respond to the objection to their expert's opinion. Instead, plaintiff came to court prepared to pick a jury, but rather, was required to defend a motion, brought by the court *sua sponte*, to dismiss his complaint.

Id. at 84. Here, the trial court's June 10, 2023 Order arose directly from the Defendants' own motion for partial summary judgment, and they not only had the opportunity to brief and argue the issues, they were the parties who raised them.

III. THE TRIAL COURT PROPERLY INTERPRETED THE TRUST, AND DID NOT OVERLOOK CONTROLLING LAW (Da18)

The Defendants argue variously that the trial court incorrectly interpreted the Trust, and that the trial court reformed the Trust. It is clear that the trial court properly interpreted and implemented its provisions.

The goal of the court in interpreting a will or a trust is to ascertain the probable intent of the testator or creator of the trust. In re Estate of Payne, 186 N.J. 324, 335 (2006), citing Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 564 (1962). This entails an examination of the instrument itself, as well as the “surrounding facts and circumstances.” Fidelity Union Trust Co. v. Robert, 36 N.J. at 564-565. Once intent is determined, the court may not refuse to effectuate it by “indulging in a merely literal reading” of the will or trust. Wilson v. Flowers, 58 N.J. 250, 260 (1971). The New Jersey statutes incorporate this concept, defining the “terms of a trust” to include the “manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” N.J.S.A. 3B:31-3.

The Defendants’ suggested interpretation of the Trust ignores these principles. Initially, it is noted that the trial court’s application of testamentary intent actually worked toward the Defendants’ benefit, as it permitted them to remain at the Boonton Property as long as it was possible that they might be the purchasers, notwithstanding the Defendants’ utter lack of a legal right to be there and failure to make any payments: [A]lthough defendants do not have a legal right to reside at the Boonton Property, the Court will deny plaintiff’s motion for ejectment since a contrary result may defeat the Doctrine of Probable Intent.” (Da25).

The Defendants offer two specific contentions with to support their claim that the trial court did not properly interpret the Trust: (a) that the trial court did not properly interpret the term “fair market value” as used in the Trust, and that (b) the Court “disregarded” the property purchase provisions of the Trust. (Db29-30).

A. The Trial Court Did Not Misapply Either the Terms of the Trust or Applicable Law Concerning Fair Market Value.

The Defendants cite authority that fair market value is the price a willing buyer would offer and a willing seller would accept. (Db29). From there, they veer sharply off course, asserting that because Shawn did not consent to the sale of either property, the sales were not for fair market value and that “appraisals are not fair market value. Instead, they are an expert’s opinion of fair market value.” (Db31).

This completely ignores the ability of a court to rely upon expert testimony to determine a fact in issue, N.J.R.E. 702, and creates a situation in which any litigant would have complete control over the definition of fair market value because unless all the litigants agree to it, it cannot be set. Again, it was precisely the inability of the parties to reach an agreement that caused the trial court to set the sealed bidding procedure: “The parties have essentially been unable to agree on every detail relating to the sale of the Property from the outset of the litigation. As such, it became necessary for the Court to establish the bidding procedure...” (Da53).

Date-of-death valuations are the norm in estate matters. See, Estate of Warshaw v. Dir., Div. of Taxation, 27 N.J. Tax 287, 292 (App. Div. 2013), observing that for estate tax purposes, the value of a decedent's gross estate is determined by the value of the property in the estate "at the time of death," and that "[o]rdinarily, events subsequent to death are not considered in fixing fair market value of a decedent's gross estate."

Moreover, the approach to fair market value now urged by the Defendants is directly contrary to the position they took in open court and in their pleadings, where they fully embraced and even urged a date-of-death approach based on appraisals. Prior to the parties' first court appearance in this matter, the Defendants filed a counterclaim, seeking a fair market value appraisal of the Boonton Property. (Da22). During that first appearance, Shawn noted that prior to the hearing he had asked the Court to order appraisals (1T12:15-17), and stated to the Court that "the way I read the provision is that it was bequeathed to me or my brother at a fair market value at the time of [the Decedent's] death." (1T14:16-18). The January 25, 2022 Order specified that the appraisals of both the Boonton and Florida Properties were intended to establish their fair market value, as of July 24, 2021, the Decedent's date of death. (Da15, at ¶¶ 3 & 4).

The craven self-interest and disingenuousness in the Defendants' present position on value is perhaps best illustrated by their motion for partial summary

judgment. In their notice of motion, they asked the trial court to approve a sale of the Boonton Property to Shawn at the date-of-death appraised value. However, at the same time they sought to have Daryl purchase the Florida Property at “current market value.” (Da466, at ¶8-9). As the Trust language concerning the two properties is identical with respect to valuation, there was not the slightest basis to draw that distinction other than that it would have enabled Shawn, as a beneficiary, to extract from Daryl his share of any appreciation in the value of the Florida Property since the Decedent’s date of death, without having to pay his share of any such appreciation if he acquired the Boonton Property.

As long as it suited them to do so, the Defendants continued to fully accept the date-of-death Boonton Appraisal as determinative of fair market value. In his bid submitted to the Court on July 14, 2022, Shawn stated: “Please be advised that I am hereby exercising my right to purchase the property at fair market value, which was determined to be \$575,000 by a licensed appraiser.” (Da307). As that page shows, he actually offered only \$501,000, an amount \$74,000 less than what he acknowledged to be the fair market value.

Shawn admitted at the plenary hearing that he had actually arrived at his bid of \$501,000 because “that was all we could afford.” (8T71:20-72:3). Thus, their earlier resistance to having the Boonton Property listed, or sold to the Campbells, or sold to Chris following the bidding for an amount \$100,000 above their offer, was

not tied to any legal principle. Rather, it was based on the fact that they could not pay fair market value, but were not willing under any circumstances to allow anyone else to have the Boonton Property.

It was only later, after Shawn's bid turned out to be the losing one and the Trust had sold the Boonton Property to Chris pursuant to the Court's Order, that the Defendants began to float their current, unsustainable position on fair market value with respect to the Boonton Property. They did so solely because it was now in their best interest to disavow the very date-of-death, fair market value appraisals that the trial court had ordered at their behest, and that they had previously used as proof of fair market value.

Likewise unsustainable are the Defendants' efforts to dismiss the appraisals as something to be simply disregarded. They make the shockingly baseless statement that "[d]uring the trial, it was established that the Trust appraisals for the Boonton and Florida Properties did not determine fair market value. Instead, the appraisals were ordered for informational purposes..." (Db44). No citation to the Court's Trial Order or Statement of Reasons is referenced to support that assertion, and none exists because it simply did not happen. The January 25, 2022 Order unambiguously states the opposite – that the purpose of the appraisals was to establish fair market value as of the Decedent's date of death. (Da15).

B. The Trial Court Properly Interpreted and Applied the Property Purchase Provisions of the Trust.

The Defendants’ interpretation of the Trust language on the purchase of the two properties has likewise changed over time. Shawn’s own statements during the hearing on January 10, 2022 reveal his recognition that the Trust language is not very complicated, or difficult to understand. Instead, he recognized that there were only two ways to interpret the Trust language with respect to the Boonton Property: “I believe his testamentary intent was that my brother and I, or my brother or I, receive the house. I believe it was bequeathed at a fair market value price for my brother and I. It’s pretty straightforward.” (1T14:7-11). A short while later, he added his view that “the trust is very clear. I don’t think it’s ambiguous at all.” (1T17:14-15).

Once again, it was only later that the Defendants’ view changed, after Shawn had submitted his losing bid and the Boonton Property was sold to Chris. At that point they manufactured the argument that the Trustee was under a duty to first convey both properties to all three of the beneficiaries, only after which the shares could be bought out. (Db30) This argument is also one of the claims asserted in his proposed second supplemental complaint (Da338, at ¶23).

This is unworkable as a matter of common sense. A trustee has the obligation to beneficiaries to exercise “that degree of care, prudence, circumspection and foresight, that an ordinary prudent person” would employ in managing their own

affairs. Blauvelt v. Citizens Trust Co., 3 N.J. 545, 554 (1950). Again, the trial court ordered the bidding procedure because the parties could not agree on anything having to do with the Boonton Property. Da53.

The courts will not enforce the literal terms of a will or trust where to do so would result in a frustration of testamentary intent. In re Estate of Ericson, 74 N.J. 300 (1977) (upholding the trial court's application of the Doctrine of Probable Intent to excise from a will a provision that would have defeated the testator's intent to provide for his wife). The overly literal interpretation of Section 4.1A of the Trust urged by the Defendants would lead to a result that the Decedent could not conceivably have intended.

The Decedent presumably designated the Trustee to serve because he trusted her to assure that the provisions he had made for the disposition of his property would be followed.⁴ The Defendants' interpretation would have resulted in the Trustee abdicating her powers and duties to administer these two substantial assets, as once the Trust no longer owned the properties, it obviously would have no control over them. The three beneficiaries would have been left to squabble among themselves. Even Shawn acknowledged during the plenary hearing that the beneficiaries might have ended up in court if his interpretation had been implemented (8T82:1-15). This, in turn, likely would have resulted in the

⁴ It is significant to note that in the earlier version of the Trust, both the Trustee and Shawn were designated as trustees (Da649) and that the Decedent chose to remove Shawn when he revised his Trust (Da10).

implementation of the very same remedy for the Boonton Property, because bidding was the most appropriate course to take.

In fact, the remedy fashioned by the trial court and effectuated by the Trustee completely accomplished the Decedent's intent. Again, Shawn himself, under oath, described that intent as being that either Shawn and Chris, or Shawn or Chris, receive the house. (1T14:8-11). The latter would require that the two purchase the house together. The Court ascertained that Chris was unwilling to purchase the Boonton Property jointly with Shawn (Da25). Such joint ownership would have made little or no apparent sense, as Chris stated during oral argument: "I have my own family. He has his own family. That is absurd to think that I would go 50/50 with him to purchase that property. I don't think that's what my father meant and it doesn't make any sense." (3T17:2-6).

The remedy fashioned by the trial court was consistent with this interpretation, and in fact, the Decedent's intent was fully realized. The Boonton Property was sold to Chris and the other two beneficiaries received their due share of the proceeds. The Florida Property was sold to Daryl and the other two beneficiaries received their due share of those proceeds. This is precisely what a logical reading of Section 4.1A required under the circumstances of the case.

IV. THE TRIAL COURT DID NOT IMPROPERLY REFORM THE TRUST (Da18)

The Defendants assert that in its June 10, 2022 Statement of Reasons, “Judge DeAngelis explained that the trial court reformed the Trust language based upon the doctrine of probable intent citing N.J.S.A. 3B:3-33.1(b).” (Db34). This is a mischaracterization; the trial court did not “explain” why it “reformed” the Trust, and in fact the word “reform” does not even appear in that opinion. Instead, the Court interpreted the Trust language, and as argued at Point IV, above, fashioned a remedy to enable the Decedent’s intent to be achieved, and as shown above, the Decedent’s intent was in fact achieved. Reformation is “remaking or modifying an instrument, to correct mistakes, to fulfill an unexpressed intention, or to address circumstances that were unforeseen. In re Trust of Nelson, 454 N.J. Super. 151, 160 (App. Div. 2018). The trial court did not do anything of the kind.

In arguing variously that the trial court improperly interpreted or reformed the Trust, the Defendants urge an interpretation of the Trust that cannot possibly be supported. They argue that Section 4.1A(a) and (b) should be read to vest the three beneficiaries with one-third of both properties, after which they could negotiate buyouts: “[S]trict accordance with the Trust language requires that purchasing shares of the properties can only be accomplished after each beneficiary is deeded their one-third equal share.” (Db29-30).

Such a reading would render both subsections of Section 4.1A superfluous. If the Decedent's intent was as the Defendants propose, there would have been no reason to even include subsections 4.1A(a) and (b) in the Trust. The properties would have been divided equally between the three beneficiaries pursuant to Section 4.1A, after which they could have negotiated buyouts or, as the Shawn admits might be the case, engaged in even more litigation. (8T82:1-15). It is a fundamental rule that legal documents should not be interpreted in a manner that would render a provision superfluous. *See, e.g., Caruso v. John Hancock Mut. Life Ins. Co.*, 136 N.J.L. 597, 598 (E. & A. 1948), observing that the interpretation of a contract should not leave a portion of it useless or inexplicable).

V. THE TRIAL COURT PROPERLY DENIED THE DEFENDANTS' TWO MOTIONS TO FILE SUPPLEMENTAL COMPLAINTS (Da60; Da62)

The Defendants argue that the trial court erred in denying their two motions to file supplemental complaints. While motions to amend "are ordinarily afforded liberal treatment, the factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." *Bonczek v. Carter-Wallace, Inc.*, 304 N.J. Super. 593, 602 (App. Div. 1997), *certif. denied*, 153 N.J. 51 (1998). *See also, Fisher v. Yates*, 270 N.J. Super. 458, 467 (App. Div. 1994): "[W]hile motions for leave to amend pleadings are to be liberally granted, they nonetheless are best left to the sound discretion of the trial

court in light of the factual situation existing at the time each motion is made." An amended pleading should not be allowed where it lacks legal merit: "[C]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Mustilli v. Mustilli, 287 N.J. Super. 605, 607 (Ch. Div. 1995).

The proposed first supplemental complaint alleges that the Trustee breached her fiduciary duty (Da242), which the Defendants had been asserting from the onset in Count Three of their counterclaim (Da633-634). Shawn asserted during the first court appearance on June 10, 2022 that the Trustee was acting in "bad faith" (for reasons including merely filing suit against them). (1T15:8-11). The proposed supplemental complaints are more of the same.

The claims are unsustainable as a matter of law. A cause of action cannot be maintained against the Trust or the Trustee simply because Chris, having outbid Shawn for the right to purchase the Boonton Property, later sold it to the Campbells; that cause of action is both factually and legally deficient. Shawn and Chris had a perfectly equal opportunity to bid. The June 10, 2022 Order set a July 14, 2022 deadline for Shawn and Chris to submit bids by electronic mail to the Morris County Surrogate. (Da19, at ¶3). Chris submitted a timely bid of \$601,000, an amount

\$26,000 above the fair market value as determined by the appraisal, while Shawn submitted a timely bid of only \$501,000 (Da307, 310).

Chris's bid of \$601,000 was approved by the trial court on August 31, 2022, provided that he close by September 15, 2022. (Da31, at ¶3). The Defendants had opposed that approval (in fact the August 31, 2022 Order states that the matter had been opened to the Court by their own motion seeking to void Chris's bid, among other relief). (Da31). In that Order, the trial court set September 15, 2022 as the deadline for Chris to close his purchase of the Boonton Property.

Prior to September 15, 2022, the Defendants tried yet again to stymie the sale by filing a motion for a stay. (Da472). That motion, as recognized by the trial court, had "no basis in law or fact." Da38. In its Statement of Reasons, the trial court noted that one of the asserted bases for the Defendants' motion was their understanding that Chris did not intend to move into the Boonton Property, but rather intended to purchase it as an investment property and resell it. (Da44). The trial court found that the owner of the property "is permitted to occupy and/or sell the home and the Trust places no restrictions on how the owner may or may not dispose of the Boonton Property." (Da44). Given that the Trust did not require either Shawn or Chris to reside at the property as a condition to purchasing it (or even have any language that could be construed in that manner), the trial court could not have imposed such a requirement.

The claim asserted by the Defendants in the proposed first supplemental complaint is in keeping with their entire approach to this matter – that nobody other than Shawn should have ever been able to buy the Boonton Property, that they had the right to continue to file meritless motions aimed at impeding the Plaintiff's administration of the Trust, and that the Plaintiff had no responsibility to anyone other than Shawn. His testimony at the plenary hearing showed that even at that late date, well over a year after he submitted what was indisputably the losing bid, he continued to cling to the belief that the Plaintiff should have sold the Property to him even though it would have cost the Trust \$100,000 and the sale to Chris had been judicially approved:

Q. Okay. So the Court set up a bidding procedure, a sealed bidding procedure. Correct?

A. Yes.

Q. And there were two bids, one was 601,000, and one was 501,000. Correct?

A. Correct.

Q. Okay. So what in the world was the Trustee's power to just disregard the 601,000 dollar offer and take the lower bid?

A. The Trustee has a legal duty to protect me and my interests to sell the house at a fair market value. She has a legal duty. Just because there's a court order instructing her to do something that she and Chris asked for doesn't relieve her of her legal duty as a Trustee to obtain the best possible price for me....

(8T72:13 to 73:2).

As the trial court had put it in denying one of the Defendants' multiple unsuccessful motions to stop the sale to the high bidder: "Defendants appear to be taking the position that any outcome in which they are not the guaranteed owners constitutes "irreparable harm." (Da43). However, the Trust was not drafted for Shawn's benefit alone. It was drafted for all three beneficiaries.

The trial court specifically authorized the bidding procedure and the sale itself, and neither the trial court's decision nor the Trust itself prohibited the resale of the Boonton Property. Therefore, the Trustee cannot possibly be liable for the resale. If anything, the Trustee would have been in breach of her obligations if she had refused to sell the Boonton Property to Chris, the high bidder. Yet the resale is the gravamen of the proposed first supplemental complaint.

The proposed second supplemental complaint has, if possible, even less to recommend it. Count One claims the Trustee breached her fiduciary duty by purchasing the Florida Property in her individual capacity, and the Defendants' prayer for relief is addressed almost entirely to claims relating to that purchase. (Da342; 348-350). That purchase was specifically authorized by Article IV, Section 4.1A(b) of the Trust, and unlike the Boonton Property, there were no other beneficiaries who had her right to purchase. (Da3). Pursuant to the January 25, 2022 Order, the Trustee obtained an appraisal (that the Defendants themselves had requested), which valued the Florida Property at \$360,000. (Da383).

The Defendants raised the issue of the Florida Property in their motion for partial summary judgment that gave rise to the Court's decision, seeking to have the Florida Property offered to "Chris and Daryl Fox, individually or jointly, at the current appraised value..." (Da466, at ¶9) (a questionable request in its own right, since the Trust gave only Daryl the right to purchase that property). The trial court specifically approved her purchase of the Florida Property for \$360,000 in its June 10, 2022 Order. (Da19, at ¶8). The claim asserted in the First Count of the proposed second supplemental complaint had been decided by the trial court the year before, and Shawn had received his share of the proceeds. (8T106:12-15).

In the Second Count, the Defendants likewise seek to revisit issues that had already been decided or are legally unsustainable. The Defendants point to the trial court's ruling that the Trustee's effort to purchase the Boonton Property along with Chris violated her duty of impartiality. (Da346, at ¶67). The Trustee complied and did not purchase the Property, and as Chris had submitted a higher bid than Shawn, Chris and Chris alone purchased the property. (Da146). Even Shawn acknowledged at trial that Chris was the sole purchaser of the Boonton Property. (8T73:13-18). Therefore, this could not possibly have resulted in losses. See, N.J.S.A. 3B:31-72(a), stating that a "trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not

occurred; or (2) the profit the trustee made by reason of the breach.” Here, the trust property was not impacted by the allegedly wrongful acts of which the Defendants complain, nor was there any profit to the Trustee as she did not purchase the Boonton Property with Chris. As such, there is no claim.

Further, the Defendants’ injuries with respect to their loss of the Boonton Property were entirely based on the simple fact that Shawn, having a perfectly equal opportunity to bid on the property, submitted the losing bid after rejecting the proposed listing of the property and dismissing the prospect of a sale to the Campbells. Their claim is barred by their own actions, as self-inflicted injuries cannot be the basis of a claim for damages. See, e.g., Gennari v. Weichert Co. Realtors, 288 N. J. Super. 504, 546 App. Div. 1996, aff’d as modified, 148 N.J. 582 (1997); Frink v. Adams, 36 N.J. Eq. 485, 487 (Ch. 1883) (observing that a party “can have no redress for a self-inflicted injury).

Even absent that fatal flaw, it would be impossible for the Defendants to establish by what right, exactly, the Trustee could pursue Chris to recover his profit from the resale of the Boonton Property, or to have prevented that sale from taking place. Shawn acknowledged as much during the plenary hearing:

Q. And Chris did buy the house by himself. Correct?

A. Correct.

Q. Okay. And he got title to the house then he sold it to the Campbells. Correct?

A. Correct.

Q. Okay. And once he got title to the house, the Trust was out of the picture. Correct?

A. Correct.

(8T76:6-14).

There would have been no basis in law or fact for the Trustee to pursue Chris for his profits, and the Defendants could not possibly have a claim against the Trustee for failing to pursue that which was not pursuable. “The prescribed measure of duty requires a fiduciary to exercise...that degree of care and caution, skill, sagacity, and judgment, industry and diligence, circumspection and foresight that an ordinarily discreet and prudent person would employ in like matters of his own and in the same or similar circumstances.” In re Estate of Beales, 13 N.J. Super. 222, 228 (1951).

Certainly, a trustee’s duty of care does not require that they pursue meritless claims. It seems to be the Defendants’ position that Chris deprived the Trust (and therefore Shawn and Daryl) of proceeds that could have been brought into the Trust had the Trust sold the Property directly to the Campbells. This was not an opportunity that ever even existed, because of the Defendants’ own refusal to entertain a sale to the Campbells, the listing of the property, or anything other than their own purchase of the Property (which they sought to accomplish for less than its appraised value).

The other claims against the Trustee in the Second Supplemental Complaint border on the completely nonsensical, but will be briefly addressed. The Defendants allege that the Plaintiff had a duty, upon the Decedent's death, to distribute the Trust's assets, including a Vanguard account and the Boonton and Florida Properties, to the three beneficiaries "as joint owners" upon the Decedent's death. Da338, at ¶23. That claim requires that one ignore the fact that Shawn had his attorney, in the early afternoon on the very Saturday their father died, send his sister a letter saying that nothing "no transfers of any assets should be made, regardless of whether not [sic] they are in any trust..." (7T56-22-24; 8T86:25-87:6; Da394).

Further, the Defendants later objected when the Trustee did make a distribution. The Trustee advised the Defendants on September 2, 2022 that each of the beneficiaries would receive an \$80,000 distribution from the Vanguard account. On September 6, 2022, in the Defendants' never-ending effort to derail the sale of the Boonton Property they were occupying for free, sought a stay. (Da472). In seeking that stay, they objected to the distribution, arguing it violated the Trustee's duty of impartiality because the money could be used by Chris to complete the purchase of the Boonton Property. (Da45). As the trial court wrote in rejecting that argument:

Defendants misunderstand the duty of impartiality and are misapplying the law to the present set of facts. Plaintiff is authorized as Trustee to distribute Trust funds and there are no Trust provisions which restrict when she may or

may not distribute the funds. The timing of distribution is of no legal consequence as long as the distributions are being done in equal amounts to all the beneficiaries, pursuant to the terms of the Trust...Paradoxically, defendants are essentially requesting Trustee not to distribute assets to themselves.

(Da45).

The Defendants' claims with respect to the Trustee's alleged failure to make distributions are particularly astonishing because their own actions have delayed them, as recognized by the trial court in denying their motions to file the first and second supplemental complaints: "Any delay in outright distributions from the Trust was a result of the instant litigation, which was dragged out in part by Defendants' lack of cooperation and continued motion practice." (Da67).

Finally, the proposed second supplemental complaint seeks damages based on what the Defendants allege was the wrongful expenditure of Trust funds toward counsel fees. (Da347, at ¶69). This argument is self-serving, considering that they occupied that property without payment from even before the Decedent's death until even after the property had been sold by the Trust to Chris; they finally left on November 28, 2022, only two days before they faced removal by the Morris County Sheriff upon issuance of a writ of possession. (7T83:5-13; Da52).

The Trustee unquestionably had the authority to file suit against the Defendants under the terms of the Trust, the Probate Code and New Jersey's Ejectment Statute. Article VI of the Trust vests the Plaintiff, as Trustee, with typical,

broad powers, including the powers including the right to “sell or exchange any property at public or private sale,” to manage any property, to “settle, compromise or refer to arbitration, any claim or obligation in favor of or against the Trust Estate,” to employ legal counsel, to distribute any Trust property “in such manner as the Trustee shall deem equitable,” and “in general, and without limitation by any specific enumeration herein, to manage, control, operate,...sell, exchange, lease...or otherwise encumber and deal with the Truste Estate, for and on behalf of this Trust and the Beneficiary(ies), to the same extent and with the same powers that any individual would have in respect to his own property and funds.” (Da7-8).

The powers enumerated in the Trust are in addition to those granted by statute, which empowers a Trustee, “without authorization by the court,” to exercise the “powers conferred by the terms of the trust” as well as “all powers over the trust property which an unmarried competent owner has over individually owned property” and “any other powers appropriate to achieve the proper “investment, management, and distribution of the trust property” and any other powers authorized by the Probate Code. N.J.S.A. 3B:31-69. In its Trial Order following the plenary hearing, the trial court found that the Trust language, along with these statutory powers, “indisputably confers upon Plaintiff, as Trustee, the power to bring claims related to rental income of the Trust properties during the time they were Trust assets,

as well as claims for reimbursement for legal fees and expenses related to litigation on behalf of the Trust. (Pa95).

A trustee has non-delegable duty to collect and preserve the estate's assets. In re Mild's Estate, 25 N.J. 467, 481 (1957). The duty includes collecting rents, which are trust property collected for the beneficiaries. In re Boyle's Estate, 133 N.J. Eq. 149 (1943). The Trustee's claims to remove Shawn and Diane from the Boonton Property and to collect payment for their occupancy of it were asserted under New Jersey's Ejectment Statute, N.J.S.A. 2A:35-1, *et seq.* In an ejectment action, a plaintiff is authorized by statute to recover from the defendant "any and all incidental damages, including mesne profits, and the full value of the use and occupation of the premises for the time, not exceeding 6 years, before the commencement of the action, during which the defendant was in possession thereof." N.J.S.A. 2A:35-2.

The Defendants' claims with respect to the supposed wrongfulness of the Trustee suing them had already been addressed by the trial court well before they sought to raise it in the proposed second supplemental complaint. In their motion for partial summary judgment that was denied on June 10, 2022 Order, Da19 at ¶2, they argued that the Plaintiff was committing waste by suing them, and sought an order requiring her to "personally restore the value of Trust property spent on litigation involving Shawn and Diane during her administration..." (Da466). That argument was firmly rejected by the trial court:

As for Defendants' argument that plaintiff is committing waste, the court will emphasize that defendants are presently living in the Boonton property, without paying rent...It is precisely because defendants ceased rent payments and continued to reside at the Boonton Property after decedent passed away that the present litigation ensued.

(Da29).

The Plaintiff's suit against the Defendants was meritorious, and the Plaintiff prevailed on it. The trial court ordered the Defendants to vacate the Property in its October 22, 2022 Order. (Da52, at ¶2). The decision was expressly based on the Ejectment Statute, with the Court finding in its Statement of Reasons that ejectment under that statute was appropriate. (Pa56). Following the plenary hearing, the Court then found that the Plaintiff had met her burden of proof with respect to her claims for rent payments. (Pa91).

VII. THE TRIAL COURT PROPERLY AWARDED COUNSEL FEES TO THE PLAINTIFF (91a)

The trial court acted within its authority in awarding the Plaintiff legal fees and costs incurred by the Trust in opposing two of the Defendants' motions, specifically: (a) their motion to file a second supplemental complaint, and (b) their motion alleging violations of their right to due process. Prior to the plenary hearing, Plaintiff, through counsel, provided the Court and the Defendants with counsel's

legal invoices, which were admitted into evidence during the plenary hearing without objection. (8T6:3-1886:8-11). Following the plenary hearing, Plaintiff's counsel submitted a Certification of Services noting that attorneys' fees and costs were being sought for the entire litigation, but that with respect to the two motions these fees and costs were also being sought under the Frivolous Litigation Statute; counsel stated that the Plaintiff sought to file a motion under R. 1:4-8 unless fees and costs were awarded based on the Certification. Pa159, at ¶(6).

The Defendants had a full and fair opportunity to address the Plaintiff's claims for counsel fees and costs. During the plenary hearing, Shawn acknowledged having received the frivolous litigation notices sent with respect to both motions. (8T101:18-102:6 as to the April 26, 2023 notice concerning the motion file a second supplemental complaint; 8T108:21-109:5 as to the August 30, 2023 notice concerning the due process motion⁵). Both notices fully comply with the requirements of R. 1:4-8. (Da362; Da495). The question of whether the motions were frivolous was the subject of extended testimony by Shawn during the trial. In fact, fully fourteen pages of the plenary hearing transcript consist of cross-examination of Shawn concerning the two motions that form the basis of the Plaintiff's arguments concerning frivolous litigation. (8T101:18-114:18). During

⁵ Though Shawn testified the notices were sent by email, they were also sent by regular and certified mail. Da362; Da495, and there is no allegation that they were not properly served.

the course of that discussion, Shawn had the opportunity to voice his reasons why he felt the motions were not frivolous. See, e.g., 8T112:16-113:5. Nor is there any dispute as to the amount sought, as the Defendants did not voice any objection to the amount with the trial court and have not raised it here.

For all intents and purposes, the court handled the matter in the same way it would have on motion. Frivolous litigation notices were served on the Defendants consistent with the statute and rule, and the Defendants were fully provided with the opportunity to withdraw the offending motions. The Defendants were also afforded the opportunity to testify as to the issue and to brief it, in proposed findings of fact and law. (8T128:7-14). The Court made the requisite findings in its decision:

[I]t is clear that Defendants' motions to file a second amended complaint and for due process were without merit and far exceeded the scope of the approved pre-trial motions. The motions contained arguments previously denied by the Court on multiple occasions. Further, Plaintiff provided Defendants with a frivolous lawsuit letter pursuant to Rule 1:4-8 with respect to these applications. Thus, the court finds it appropriate to award reasonable attorneys' fees and costs with respect to costs incurred by Plaintiff to address Defendants' frivolous motions.

(Da110-111).

As discussed at Points II and V of this brief, there was no legal merit to either of the motions and both concerned matters that had previously been unsuccessfully raised by the Defendants. They were both filed during a period when the Defendants

seemed particularly determined to bankrupt the Trust through litigation. During 2003 alone, they filed five motions and a motion for leave to appeal (none of which were successful). (8T103:22-104:4).

The trial court observed that even in cases where litigation is instituted in good faith, it can become frivolous and sanctionable by the “continued prosecution of a meritless claim...” (Da110, citing DeBrango v. Summit Bancorp., 328 N.J. Super. 219, 227-228, 230 (App. Div. 2000)). Given the already vexatious approach that the Defendants had taken to the case, including their staggeringly inconsistent litigation positions, their filing of multiple motions in an unsuccessful effort to prevent the sale to the high bidder, and their failure to vacate until after the trial court ordered their ejectment and they faced removal by the Sheriff (Da51), the trial court’s finding was certainly justified.

**VII. THE TRIAL COURT DID NOT OVERLOOK “NEW EVIDENCE”
(91a)**

The Defendants assert that at the plenary hearing they introduced “new evidence” supporting their claims. In fact, they brought nothing new to light, and even if they had, it would not breathe life into claims that have no legal merit. Indeed, it is difficult to determine what, exactly, the new evidence is supposed to be.

Without citing any reference to the record, the Defendants assert that during trial it was “established” that the appraisals did not determine fair market value and instead were ordered for “informational purposes...” (Db44). As noted above at Point IIIA, the appraisals were specifically ordered on their request, for purposes of establishing fair market value, and there followed multiple instances in which the Defendants cited the appraisals as dispositive of fair market value with respect to the Boonton Property.

Similarly, with respect to both the Florida and Boonton properties, the Defendants introduce the idea that the Trustee had a duty that is completely absent from the Trust, to secure the “best” possible price for both properties. Db46-47. This is a blatant mischaracterization of the Trust. Again, if that had been the Decedent’s intent, the Trust could have simply provided a mechanism, such as listing the properties and giving the respective beneficiaries rights of first refusal, and at any rate, the Defendants resisted listing the Boonton Property. (8T77-15-17).

Elsewhere, the Defendants assert that the Trustee “failed to disclose the Campbells’ ongoing interest in purchasing the Boonton Property for \$800,000,” but this is simply a bald accusation with no facts to support it; they cite Shawn’s own testimony (at 8T99-100) but there is nothing in the cited pages that could be construed as “new evidence” (in fact, Shawn offered evidence to the contrary, noting

that the Campbells had put their own home on the market and then taken it off⁶). or as anything other than speculation. Nor do they offer any explanation as to why the Trustee would have been under any duty to pursue a sale to the Campbells, after the Defendants had dismissed their offer as a “bogus” attempt to “avoid obtaining a proper appraisal and selling the property to Shawn” (Da629) and had done everything in their power to thwart a sale to anyone but themselves.

Finally, the Defendants claims concerning the alleged “misappropriation” (which is, essentially, based on the Trustee’s having filed suit against them) had been previously asserted in their proposed second supplemental complaint. The trial court’s Statement of Reasons accompanying the denying their motion to file that complaint observed that “it seems from Defendants’ allegations that this ‘misappropriation’ stems from Plaintiff’s payment of counsel fees for the instant litigation). (Da65). Nothing that took place at the plenary hearing added anything to breathe life into this claim.

As noted above, the Trustee unquestionably had the authority to file suit on behalf of the Trust and to seek relief under the Ejectment Statute, and the trial court ordered the Defendants to leave the property under that statute. (Da51, Da56). The Trial Order specifically found that the Plaintiff “met her burden of proof by a

⁶ It is noted that both Defendants, Shawn and Diane, are real estate agents. (8T62:4-7).

preponderance of the evidence with respect to her claims against Defendants with respect to the award of rental payments for the Boonton Property” (Da91) and the Defendants have not appealed the portions of the Trial Order pertaining to the Boonton Property.

Finally, the Defendants include a Request for Relief at the end of their brief, asking among other things that if the case is remanded, it be assigned to a different judge. (Db50). As set forth above, the trial court’s findings were supported in each instance under appeal. Appellate courts “do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]” In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008), quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-484 (1974).

The Defendants assert that the trial judge has showed “a bias toward his previous conclusions.” (Db50). In the case they cite, Carmichael v. Bryan, 310 N.J. Super. 34 (App. Div. 1998), the trial court had made findings concerning the intent of one of the litigants on a motion for summary judgment “without the benefit of a plenary hearing.” Id., at 49. Here, the Defendants seek this relief while appealing a two-day plenary hearing, as well as several other proceedings in which the Defendants appeared pro se and under oath.

The Defendants make the legally and factually deficient argument that the trial court “consistently maintained that the Trustee’s actions were appropriate when evaluating the evidence...” Db50. Elsewhere in their brief, they prove their own contention false, pointing to the trial court’s August 31, 2022 Order in which the trial court found, on the Defendants’ own motion, that any attempt by the Plaintiff to purchase the Boonton Property would be in violation of her fiduciary duty. Db5-6, 18; Da31.

At any rate, “[b]ias cannot be inferred from adverse rulings against a party.” Strahan v. Strahan, 402 N.J. Super. 298, 318 (App. Div. 2008) (declining to remand the matter to a different judge). In making this request, the Defendants betray their true intention – to indefinitely prolong this litigation by recirculating their meritless arguments where they have not already been heard over and over again.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court deny the Defendants’ appeal in its entirety.

Respectfully submitted,

THE WACKS LAW GROUP

By: /s/Richard H. Beilin

Richard H. Beilin

Attorneys for Plaintiff, Daryl B. Fox, Trustee of the
Donald M. Fox 2006 Revocable Trust

**DARYL B. FOX, TRUSTEE
OF THE DONALD M. FOX
2006 REVOCABLE TRUST**

Plaintiff-Respondent,

V.

SHAWN T. FOX AND DIANE FOX

Defendants-Appellant,

AND CHRISTOPHER FOX

Co-Defendant-Respondent.

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION

Docket #: A-002187-23 TEAM 01

Submitted: August 5, 2024

SUPERIOR COURT OF NEW
JERSEY, CHANCERY DIVISION,
PROBATE PART, MORRIS
COUNTY

Civil Action

Docket #: MRS-P-2730-2021

Sat Below:

Hon. Frank J. DeAngelis, P.J.Ch.

**REPLY BRIEF OF DEFENDANTS-APPELLANT
IN SUPPORT OF APPEAL**

SHAWN AND DIANE FOX

4 Chandler Terrace | Rockaway, NJ 07866

Email: Shawn@FoxHomeHunter.com

Cell: (973) 277-7853 | *Pro Se Litigants*

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LIST OF PARTIES

Name	Designation	Trial Court Role	Trial Court Status
Shawn Fox	Appellant	Defendant	Participated Below
Diane Fox	Appellant	Defendant	Participated Below
Daryl Fox	Respondent	Plaintiff	Participated Below
Christopher Fox	Respondent	Co-Defendant	Participated Below

TABLE OF TRANSCRIPTS

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Motion	August 10, 2022	4T
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Motion	September 13, 2023	6T
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02/14/2024	Order - Plenary Hearing, Rent, Frivolous Sanctions	91a

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Note: The Trial Judge's Statement of Reasons are included with the Orders in the Appendix along with the February 14, 2024 Order Finding of Facts and Conclusions of Law.

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1. THE COURT ERRED IN DECIDING NOT TO ENFORCE JUDGE BERDOTE BYRNE’S ORDER (Da18)

Defendants contend that this issue involves both a matter of law and a potential abuse of discretion by the trial court. Defendants argue that the Trustee violated a court order by failing to attend a settlement conference upon receipt of both appraisals. **(Da14-15)** As explained by Judge Berdote Byrne, the purpose of the conference was for the parties to discuss their options: either list the properties or proceed with a sealed bid process. **(1T24-25 & 1T31)**

Contrary to the required compliance, upon receipt of both appraisals, the Trustee initiated a sealed bidding procedure for the Boonton Property, without obtaining Shawn’s consent. **(Da142)** This violation is a legal issue because it concerns the Trustee’s obligation to comply with court orders, which is mandated by law. Furthermore, the Trustee’s failure to comply with the court order also constitutes a breach of fiduciary duty under N.J.S.A. 3B:31-54, which requires trustees to administer the trust in “good faith” and adhere to applicable law, including court orders.

Additionally, the Trustee’s decision to initiate a sealed bidding procedure constitutes a breach of her fiduciary duties of loyalty and impartiality pursuant to N.J.S.A. 3B:31-55 and N.J.S.A. 3B:31-56.

This is because Daryl and Christopher were bidding together, against Shawn, to purchase the Boonton Property. **(Da587 ¶28) (Da591 ¶42)**

Defendants argue that Judge DeAngelis's decision to allow the Trustee to disregard a court order and breach her fiduciary duties constitutes an abuse of discretion. The law mandates that trustees adhere to court orders and act impartially and loyally. A trial court judge has a duty to uphold the law, which is foundational to the integrity and function of the judicial system.

Furthermore, Defendants argue that Judge DeAngelis's decision was manifestly unjust. As a consequence of the trial court's ruling, Shawn was compelled, by Order, to relinquish his property shares at reduced values and participate in a bidding procedure he strongly opposed. This was clearly unfair and resulted in significant harm, as both Shawn and Diane suffered direct financial loss and emotional distress.

To maintain the integrity of the judicial system and protect beneficiary rights, it is imperative that the court uphold the law and ensure justice. Failing to address these breaches sets a dangerous precedent that threatens the rule of law and erodes trust in the judicial process.

2. THE COURT VIOLATED DEFENDANTS' RIGHT TO FAIRNESS AND PROCEDURAL DUE PROCESS (Da18)

PLAINTIFF: “In essence, the Defendants’ due process argument is predicated on their contention that they were not provided with adequate notice that the trial court might, on June 10, 2022, order a sealed bidding procedure for the Boonton Property and approve the sale of the Florida Property to the Trustee in her individual capacity [for the date of death appraised value of \$360,000].” **(Pb17-18)**

DEFENDANTS: This statement is correct. Defendants contend that no motion, summary or otherwise, was brought before the trial court by Plaintiff or Co-Defendant requesting these determinations. Instead, the basis for the trial court’s decision came from oral argument. **(3T4-17) (3T11-16) (3T16-24)**

Furthermore, Defendants argue that the May 27, 2022 Order did not explicitly provide notice that the trial court would be making these specific determinations. The Order explained:

Temporary restraints will remain in place until adjudication of Plaintiffs application for ejectment and removal, Defendants’ counterclaim in opposition, and Defendants’ application for removal of Plaintiff in addition to other injunctive relief, all currently scheduled for a hearing by this Court on June 8, 2022, at which time the Court hear argument on the merits of the underlying action and will thereafter enter an Order directing the parties on how they may proceed with the sale or transfer of the Property. **(Da16-17)**

Additionally, Defendants contend that the May 27, 2022 Order was entered just twelve (12) days prior to the upcoming hearing, providing Defendants with insufficient time to prepare or even anticipate the legal and factual issues that the court would be deciding “on the merits.”

PLAINTIFF: “Here, the trial court’s June 10, 2023 Order arose directly from the Defendants’ own motion for partial summary judgment, and they not only had the opportunity to brief and argue the issues, they were the parties who raised them.” **(Pb20)**

DEFENDANTS: The June 10, 2022 order “arose” from oral argument on June 8, 2022, which included Plaintiff’s desire to purchase the Florida Property for the appraised value of \$360,000 **(3T4-17)** and both Plaintiff and Co-Defendant’s desire to conduct a bidding process for the Boonton Property. **(3T11-16) (3T16-24)** Since no formal motion was presented to the trial court to support this relief, Defendants were denied the “opportunity to brief and argue the issues.” Contrary to Plaintiff’s assertion, Defendants did not address the issue of a sealed bidding process in their motion for partial summary judgment. **(Da533)** Additionally, the issue of Plaintiff purchasing the Florida Property for \$360,000 was not briefed. However, in response to Daryl’s “note” emailed to the trial court announcing her plan to purchase the Florida Property for the appraised value **(3T4-25)**, Defendants opposed, arguing she should pay the current value. **(Da533)**

3. THE COURT OVERLOOKED CONTROLLING LAW WITH REGARD TO TRUST INTERPRETATION (Da18)

PLAINTIFF: “The Defendants cite authority that fair market value is the price a willing buyer would offer and a willing seller would accept. From there, they veer sharply off course, asserting that because Shawn did not consent to the sale of either property, the sales were not for fair market value.” (Pb22)

DEFENDANTS: “Fair market value has been defined as the price which a willing buyer would offer and a willing seller would accept.” Oscar v. Simeonidis, 352 N.J. Super. 476, 487-88 (App. Div. 2002) (citing City of Trenton v. Lenzner, 16 N.J. 465, 476, 109 A.2d 409 (1954), cert. denied, 348 U.S. 972, 75 S.Ct. 534, 99 L.Ed.2d 757 (1955)).

Defendants contend that the Trustee and trial court compelled Shawn, by Order, to relinquish his “shares” in the Boonton and Florida Properties at discounted prices. (Da18) This approach conflicts with the judiciary’s articulated definition of fair market value, which emphasizes the necessity for mutual consent between the parties. By forcing Shawn to sell his property shares without his consent, the transactions fail to meet the criteria of a fair market value sale. Consequently, the Trust’s requirement that Shawn’s property “shares” be acquired at fair market value was not observed.

PLAINTIFF: Defendants assert that ‘appraisals are not fair market value. Instead, they are an expert’s opinion of fair market value.’ **(Pb22)**

DEFENDANTS: This is correct.

PLAINTIFF: “This completely ignores the ability of a court to rely upon expert testimony to determine a fact in issue, N.J.R.E. 702.” **(Pb22)**

DEFENDANTS: There was no “expert testimony” involved in this case to determine fair market value for the Boonton and Florida Properties. In fact, there was no evidentiary or plenary hearing conducted with regard to fair market value for the Boonton and Florida Properties.

PLAINTIFF: This “creates a situation in which any litigant would have complete control over the definition of fair market value because unless all the litigants agree to it, it cannot be set.” **(Pb22)**

DEFENDANTS: This statement is incorrect. If the parties could not come to agreement, fair market value could be established by listing and selling both properties on the open market. This is why Judge Berdote Byrne’s Order requiring a Settlement Conference was crucial. **(Da14-15)** The Trustee had a legal duty to comply with the Order, negotiate in good faith, and obtain Shawn’s consent before selling the Florida Property to herself and the Boonton Property to Christopher. Failing to do so risked causing harm to Shawn, especially if the properties were sold at significantly discounted prices.

Alternatively, if the beneficiaries could not come to agreement on listing and selling both properties on the open market, the Trustee could have petitioned the court for advice and direction under Rule 4:83-4(c) or sought a declaration of rights under N.J.S.A. 2A:16-55(c). These legal avenues would have provided a structured and transparent resolution, ensuring that the Trustee acted within her fiduciary duties.

PLAINTIFF: “Moreover, the approach to fair market value now urged by the Defendants is directly contrary to the position they took in open court and in their pleadings, where they fully embraced and even urged a date-of-death approach based on appraisals.” **(Pb23)**

DEFENDANTS: While Defendants did request a court order for appraisals based upon the Settlor’s date of death, Shawn did not agree to Daryl’s purchase price of \$360,000 for the Florida Property and Christopher’s purchase price of \$601,000 for the Boonton Property.

Furthermore, the fact that Defendants advocated for their own best interests does not constitute wrongdoing. Unlike the Trustee, Defendants owed no fiduciary duties to the other parties. Therefore, Shawn had the right to advocate for his own best interests, especially since the Trustee had commenced adversarial litigation against Defendants, thereby violating her fiduciary duties of loyalty and impartiality pursuant to N.J.S.A. 3B:31-55 and N.J.S.A. 3B:31-56.

Additionally, nothing in the January 10, 2022 Hearing Transcript **(1T)** or the January 25, 2022 Order **(Da14-15)** indicates that the appraisal results were intended to be final and binding for determining the purchase prices of the Boonton and Florida Properties. Instead, the appraisals were meant to provide relevant information to assist the parties in negotiating buyout terms. **(1T24-25) (1T31)**

PLAINTIFF: “At that point they manufactured the argument that the Trustee was under a duty to first convey both properties to all three of the beneficiaries, only after which the shares could be bought out.” **(Pb26)**

DEFENDANTS: A strict interpretation of the Trust language requires the Trustee to deed each beneficiary their one-third equal share of both properties. Subsequently, the beneficiaries would have the power to purchase each other’s shares at the then fair market value. With this interpretation, the Boonton and Florida Properties could have been transferred to the beneficiaries quickly and efficiently, incurring less than \$1,000 in legal fees and costs.

PLAINTIFF: “The overly literal interpretation of Section 4.1A of the Trust urged by the Defendants would lead to a result that the Decedent could not conceivably have intended.” **(Pb27)**

DEFENDANTS: Plaintiff provides no evidence to support this assertion. Furthermore, Defendants highlight that both properties were owned

by the Trust “free and clear,” making them ready for immediate transfer to the beneficiaries upon the Settlor’s death, thereby avoiding any delays and potential disputes associated with the probate process. Additionally, there is nothing in the Dispositive Provisions of Trust Article 4 that explicitly instructs the Trustee to “sell” the properties after the Settlor’s death. **(Da3)**

PLAINTIFF: “The Defendants’ interpretation would have resulted in the Trustee abdicating her powers and duties to administer these two substantial assets, as once the Trust no longer owned the properties, it obviously would have no control over them.” **(Pb27)**

DEFENDANTS: The Trustee had a legal duty to administer the Trust in accordance with its terms and purposes pursuant to N.J.S.A. 3B:31-54. According to the Trust terms, as soon as practicable following the Settlor’s death, the Trustee was instructed to divide all property owned by the Trust, less any costs associated with the testamentary estate, into three equal shares, and transfer those shares outright and free of trust to the three beneficiaries. This includes the Boonton and Florida Properties as well as the Trust brokerage accounts with approximately \$500,000 on deposit. Again, this process could have been completed quickly and efficiently for under \$1,000 in legal fees and costs. **(Da3)**

PLAINTIFF: “The three beneficiaries would have been left to squabble among themselves.” **(Pb27)**

DEFENDANTS: While this may be true, the most important consideration is that the Trust assets would have been distributed in accordance with the Settlor's instructions.

PLAINTIFF: "This, in turn, likely would have resulted in the implementation of the very same remedy for the Boonton Property, because bidding was the most appropriate course to take." **(Pb27-Pb28)**

DEFENDANTS: The most appropriate course of action would have been to adhere strictly to the Settlor's instructions, which required the Trustee to divide and distribute the Trust assets, including the Boonton Property, into equal shares among the beneficiaries. **(Da3)** By implementing a sealed bidding procedure, the Trustee undermined the Settlor's explicit intent and failed to uphold her duties of impartiality and loyalty as Daryl and Christopher were bidding against Shawn. **(Da587 ¶28) (Da591 ¶42)**

PLAINTIFF: "In fact, the remedy fashioned by the trial court and effectuated by the Trustee completely accomplished the Decedent's intent." **(Pb28)**

DEFENDANTS: The clear dominant purpose of the Trust was to ensure that each beneficiary received an equal one-third share of all property owned by the Trust. This was absolutely not achieved. The Settlor could not have intended for Christopher to receive a \$149,000 profit upon purchasing the Boonton Property, thereby receiving more than his one-third share.

(Da145-156) Similarly, the Settlor could not have intended for Daryl to purchase the Florida Property for approximately \$80,000 below its fair market value, giving her more than her one-third share. **(Da455)** Additionally, the Settlor could not have intended for Daryl to spend over \$100,000 on protracted litigation, advocating for herself and Christopher at Shawn’s expense. **(Da158)**

Finally, Defendants contend that the remedy fashioned by the trial court was implemented without an evidentiary or plenary hearing to properly establish the facts. Upon concluding oral argument on June 8, 2022, disputed facts remained regarding both properties, including purchase price and right to purchase the entire property or shares. **(3T)** “If a factual issue remains, the court must conduct an evidentiary hearing.” In re Nelson, 454 N.J. Super. 151, 162-63 (App. Div. 2018) (citing Matter of Estate of Baker, 297 N.J. Super. 203, 212–13 (App. Div. 1997)). Additionally, on June 19, 2023, the court denied Defendants’ motion for reconsideration, explaining that “[the] Court found, and still finds, that the Trust terms are ambiguous.” **(Da73)** “If an ambiguity exists, then resolution of the document’s intended meaning is a fact issue.” In re Nelson, 454 N.J. Super. 151, 161 (App. Div. 2018) (citing Michaels v. Brookchester, Inc., 26 N.J. 379, 387–88, 140 A.2d 199 (1958)). Therefore, Defendants argue the trial court erred by not conducting an evidentiary hearing to resolve these ambiguities and factual disputes.

4. THE COURT REFORMED THE TRUST WITHOUT CLEAR AND CONVINCING EVIDENCE (Da18)

PLAINTIFF: Strict interpretation of the Trust language “would render both subsections of Section 4.1A superfluous.” **(Pb30)**

DEFENDANTS: Defendants argue that both subsections of Trust Article 4.1A are not superfluous but instead serve to clarify the Settlor’s instructions and intentions. **(Da3)**

PLAINTIFF: “If the Decedent’s intent was as the Defendants propose, there would have been no reason to even include subsections 4.1A(a) and (b) in the Trust. The properties would have been divided equally between the three beneficiaries pursuant to Section 4.1A, after which they could have negotiated buyouts.” **(Pb30)**

DEFENDANTS: Subsections 4.1A(a) and (b) would be applicable only if a beneficiary chose to exercise their “power to purchase” a property. Otherwise, the Trustee could list and sell the property on the open market. Thus, these provisions were necessary to provide a clear procedure for both scenarios.

Additionally, Defendants note that Plaintiff’s interpretation required Trust reformation to modify the Trust instrument by adding and deleting words. Moreover, Trust reformation necessitates an evidentiary hearing conducted by the trial court judge, which did not occur. Furthermore,

pursuant to N.J.S.A. 3B:31-31, the more rigorous clear-and-convincing standard of proof applies to reformation, which was not properly applied by the judge. Thus, Defendants contend that the trial court erred by interpreting and/or reforming the Trust language concerning the property purchase provisions without conducting an evidentiary or plenary hearing.

5. THE COURT ERRED IN DENYING LEAVE TO FILE SUPPLEMENTAL COMPLAINTS (Da60, Da62)

On May 10, 2023, the trial court denied leave for Defendant's Supplemental (**Da224**) and Second Supplemental (**Da335**) Complaints, stating that the claims of breach of fiduciary duty and unjust enrichment had already been addressed and there was no basis to allow the filing. (**Da67**) On June 19, 2023, the trial court denied Defendants' motion for reconsideration for leave to file their supplemental complaints, stating that "Defendants' proposed claims were unsustainable as a matter of law." (**Da72**)

Defendants contend their supplemental claims were not properly addressed in the prior proceedings. While Judge DeAngelis ordered the sale of the Boonton and Florida Properties, there was no prior fact-finding or conclusions regarding fair market value or the Trustee's misappropriation of funds. "If a factual issue remains, the court must conduct an evidentiary hearing." In re Nelson, 454 N.J. Super. 151, 162-63 (App. Div. 2018).

6. THE COURT ERRED IN AWARDING SANCTIONS FOR FRIVOLOUS LITIGATION (Da91)

PLAINTIFF: “For all intents and purposes, the court handled the matter in the same way it would have on motion.” **(Pb44)**

DEFENDANTS: Defendants maintain that the trial court’s decision to impose sanctions was procedurally flawed due to non-compliance with Rule 1:4-8. Furthermore, the nature of the Defendants’ conduct does not meet the stringent criteria for sanctions as outlined in Rule 1:4-8 and case law. Thus, Plaintiff’s assertion that the trial court handled the matter appropriately is inaccurate and should not be upheld. “The rule and statute must both be interpreted strictly against the applicant for an award of fees.” Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 579 (App. Div. 2016).

7. THE COURT OVERLOOKED NEW EVIDENCE SUPPORTING DEFENDANTS’ CLAIMS (Da91)

PLAINTIFF: “As noted above, the Trustee unquestionably had the authority to file suit on behalf of the Trust.” **(Pb47)**

DEFENDANTS: While trustees are granted general powers under **N.J.S.A. 3B:31-69**, including the authority to file suit on behalf of the Trust, the exercise of a power is “**subject to**” fiduciary duties.

In this case, the Trust instrument explicitly instructs the Trustee to divide all Trust property into equal shares and distribute it among the beneficiaries “[a]s soon as practicable” after the Settlor’s death. **(Da3)** This directive requires the Trustee to prioritize prompt and efficient disposal of assets. Therefore, delaying distributions and commencing adversarial litigation against a beneficiary violated the Trustee’s fiduciary duty to administer the Trust in accordance with its terms and purposes, pursuant to N.J.S.A. 3B:31-54. Furthermore, commencing adversarial litigation against Shawn for rent, ejectment, and legal fees created a conflict between the Trustee’s fiduciary and personal interests, violating the Trustee’s fiduciary duty of loyalty, pursuant to N.J.S.A. 3B:31-55.

Moreover, commencing adversarial litigation against Shawn, but not Christopher, who was occupying the entire Florida Property rent-free and later paid below-market rent of \$500 per month, violated the Trustee’s fiduciary duty to act impartially in managing and distributing Trust property, pursuant to N.J.S.A. 3B:31-56. This unequal treatment demonstrates partiality and failure to act equitably. **(Da108)** Finally, Defendants note that the Trustee’s litigation did not preserve Trust assets. Instead, it resulted in the depletion of over \$100,000 in Trust funds **(Da158)**, causing significant waste of Trust resources and financial losses, thereby violating the Trustee’s fiduciary duty of prudent administration, pursuant to N.J.S.A. 3B:31-57.

CERTIFICATION

I, Shawn Fox, hereby certify that I am a pro se litigant in above captioned matter and that I prepared this Reply Brief in support of our appeal. Furthermore, I hereby certify that the documents included in the Appendix of this Formal Brief are true and accurate copies of the documents that I received or communicated. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



A handwritten signature in cursive script that reads "Shawn Fox". The signature is written in black ink and is positioned above a solid horizontal line that extends across the width of the signature.

Date: August 5, 2024

Shawn Fox, Pro Se Litigant