FILED, Clerk of the Appellate Division, April 24, 2024, **A-002481-22**

LARRY SCHWARTZ; NJ 322, LLC, Plaintiffs-Appellants, v. NICHOLAS MENAS, ESQ.; COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.C, ERIC FORD; PULTE HOMES; BRAD INGERMAN; MBI DEVELOPMENT COMPANY, INC.; and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants-Respondents.	::	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002481-22 Docket No. Below: MON-L-3904-11 Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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POINT I

THE TRIAL COURT MADE NUMEROUS ERRORS OF FACT ACTING AS A REBUTTAL EXPERT TO DR. POWELL AND CONTESTING THE FACTS ESTABLISHED BY BERSHTEIN (1282a-1296a)

The Trial Court made clear errors of fact that constitute an abuse of discretion requiring reversal of its decision. The Trial Court acted as though it were the rebuttal expert to Dr. Robert S. Powell, Jr. ("Dr. Powell") and contested facts established by the deposition testimony of Martin Bershtein, Esq. ("Bershtein"), without any expert opinion in the record rebutting Dr. Powell or any facts in the record that contested the testimony of Bershtein. It was neither the role nor in the expertise of the Trial Court to dispute whether Dr. Powell's or Bershtein's factual statements and/or unrebutted expert opinions were correct.

The Trial Court's misplaced preoccupation with the arguments that Plaintiff Schwartz was not an affordable housing developer was nothing more than a disguised "new business rule" ignoring the realities of 100% affordable housing developments as expertly and irrefutably set forth by Dr. Powell and Bershtein. The record is clear that Plaintiff Schwartz paid the required consideration as set forth in the 322 West-NJ 322 Assignment and General Release, thus becoming the equitable owner of Duncan Farms. 274a. Plaintiff Schwartz paid legal fees, other professional fees, property taxes, and governmental fees in pursuit of the real estate transaction and development of the affordable housing project. 274a; 6T, 107:5-7.

Plaintiff Schwartz was also a real estate investor, having among other things, purchased and rehabbed various real estate. 6T, 70:10-13. However, all these alleged issues of the need of investment capital, prior construction or affordable housing development experience, etc., are all imaginary issues which have no application in this matter. The Trial Court erroneously failed to accept these uncontroverted facts established in the record and by Dr. Powell and Bershtein.

The facts are that MBI did not expend $1.00 ultimately to purchase Duncan Farms. 6T, 65:17-22. MBI did not expend $1.00 to construct the affordable housing development on Duncan Farms. 6T, 65:17-22. Whatever money MBI expended, if any, in pursuing the affordable housing development project – land cost, property taxes, governmental fees, legal fees, other professional fees, and whatever costs expended for the application process for the financing of the affordable housing project and its development – were all covered by the financing provided by the NJHMFA and through the 9% tax credit scheme. This would have been the case irrespective of whoever was the developer, whether MBI, Plaintiff Schwartz, or anyone else, and whether a first-time "novice" developer or an experienced developer. 6T, 65:23-66:18. That is the uncontested testimony and expert opinion of Dr. Powell and Bershtein.

Dr. Powell's expert report and Bershtein's deposition testimony were never refuted in the record or at the Rule 104 Hearing. Only the Trial Court chose to

refute them, without any authority to act as a rebuttal expert and contester of uncontested facts. First, but for the actions of Defendants Menas and Ford, Plaintiff Schwartz could have commenced the application process with the NJHMFA in April/May 2007 upon Monroe Township's rezoning of the Duncan Farms to 100% affordable housing. 6T, 116:4-23. Plaintiff Schwartz, pursuant to the 322 West-NJ 322 Assignment, already had control of Duncan Farms since June 29, 2006. 274a. Second, if Plaintiff Schwartz was not subjected to the tortious actions of Defendants Menas and Ford, Plaintiff Schwartz could have commenced, as did MBI, the NJHMFA application process in mid-2007 with the assistance of an affordable housing development financial advisor such a Bershtein, Dr. Powell, or any other reputable affordable housing development financial advisor, completed the process in 2008 or 2009, or at a later date, and obtained the financing for the affordable housing project, as did MBI. 6T,102:8-104:17; 116:14-23;139:16-143:3. Upon obtaining approval of said financing, Plaintiff Schwartz would have proceeded and obtained the preliminary site approval from Monroe Township. Obviously, said preliminary site plan would have been, as it was for MBI or any other developer, a pro forma exercise, because Monroe Township sua sponte changed the zoning of Duncan Farms to 100% affordable housing in April/May 2007. 6T, 116:14-23.

Third, even if Plaintiff Schwartz desired or deemed it warranted to enter into a partnership with an affordable housing developer or for whatever reasons waited until after the aforesaid NJHMFA rule change actually became effective and then entered into partnership with an affordable housing developer having already participated in two prior affordable housing projects, it would still have no effect on Dr. Powell's expert report. 6T, 139:16-142:24. As Dr. Powell opined, also confirming Bershtein's deposition testimony, whether before or after the rule change became effective, Plaintiff Schwartz could have easily entered into a 60%-40% partnership with an affordable housing developer. 6T, 126:10-128:3; 139:16-142:24.

Dr. Powell's expert opinion is not only within a reasonable degree of certainty, but is, as Dr. Powell affirmed in response to opposing counsel's question, an absolute economic certainty. 6T, 47:19-48:25. Dr. Powell's analysis, as he testified, and as opposing counsel did not and could not contest, was done on the real, certain, actual data and information of the actual affordable housing development. 6T, 33:24-34:22. Therefore, as Dr. Powell testified, Dr. Powell's expert report on lost profits damages is not only an opinion of said damages within a reasonable degree of certainty, but is an absolute economic certainty. 6T, 33:24-34:24; 47:19-48:25.

Moreover, Dr. Powell testified that his opinion of lost profits damages is not and cannot be remote, speculative, or uncertain, because it is based on an analysis of the real, certain, actual data of the developed affordable housing development and on profit projections utilizing commonly accepted industry and capital market methodology for making such projections of profits, as developers, investors, and the NJHMFA do to determine the value and profits of any 100% affordable housing project. 6T, 24:15-25:22; 33:24-34:22; 47:19-48:25.

Likewise, Dr. Powell testified that based on the irrefutable facts of the peculiarities of the financing of 100% affordable housing developments through the NJHMFA, Plaintiff Schwartz having control of the land and said land having been rezoned by Monroe Township for a 100% affordable housing development, was evidence that Plaintiff Schwartz, if he desired or deemed it warranted, was more than capable of entering into a 60%-40% partnership with an affordable housing developer. 6T, 32:17-33:20; 126:10-128:3; 139:16-142:24.

Further, Dr. Powell testified, confirming Bershtein's deposition testimony, that prior to NJHMFA voting the aforesaid rule change in January 2009, which became effective later in time, Plaintiff Schwartz could have developed the affordable housing project on his own without entering into a partnership with an affordable housing developer. 6T, 139:24-140:13. Dr. Powell testified that MBI did not expend a dime in developing the 100% affordable housing development on

Duncan Farms. 6T, 65:17-22. As Dr. Powell and Bershtein explained, in 100% affordable housing projects, developers, whether MBI, Schwartz, or anyone else, do not need and do not put any money in the development of affordable housing projects. 6T, 61:12-63:1, 64:16-66:24, 79:10-81:1, 81:23-84:25, 124:2-125:20; 1008a-1009a, 18:8-23:2; 1013a, 39:11-40:2; 1013a-1014a, 40:18-43:13; 1015a, 48:11-20; 1015a-1016a, 49:15-50:13. Dr. Powell further explained that developers actually take money out by way of the 15% developer fee. 6T, 66:1-18. Also, Dr. Powell explained that in addition to said 15% developer fee, Plaintiff Schwartz's lost profits also include, after the mandatory 15-year hold period, profits generated by the sale of the affordable housing development or refinancing of the balance of the NJHMFA mortgage. 274a; 6T, 66:1-18; 91:18-92:20.

Dr. Powell's expert opinion is not only an expert opinion within a reasonable degree of certainty, but based on the uniquely distinct peculiarities of federal and state laws and regulatory schemes regarding affordable housing developments and the unique realities of financing 100% affordable housing developments by and through the NJHMFA and the 9% tax credit scheme for such developments, which are diametrically opposed to the realities of market rate real estate developments, Dr. Powell's lost profits damages report is far more than just within a reasonable degree of certainty – it is an absolute economic certainty. 6T, 47:18-48:25.

Dr. Powell did not "ignore" Plaintiff Schwartz's novice status. Instead, Dr. Powell repeatedly explained, with the support of Bershtein's testimony, that Plaintiff Schwartz's novice status simply did not matter in this unique context. The Trial Court does not have the expertise in affordable housing developments to refute this fact, and Defendants did not submit any rebuttal expert report to refute this fact. Rebutting the unrebutted testimonies of Dr. Powell and Bershtein is not "careful scrutiny", it is a failure to carefully scrutinize and recognize that these expert opinions were wholly uncontested and is an abuse of discretion. The Court should have accepted Dr. Powell and Bershtein's unrebutted testimonies establishing that Plaintiff Schwartz's novice status should have been deemed irrelevant in this particular, unique, and exceptional context. Failure to do so was clear abuse of discretion, since the Court ignored and contradicted unrebutted facts.

In this unique case, the "newness" of Plaintiff Schwartz's business was irrelevant, as unrebutted expert testimony and the uncontroverted record established that affordable housing developments are often developed by first time developers. In this unique case, the factor of the "newness" of the business in determining reasonable certainty, whether "preeminent" or just one of the factors to be considered equally, is met on its face, because the unrebutted expert testimony explained that the newness of the business in this unique context is irrelevant. Dr. Powell's testimony did not "fail" to take into account the newness of

Plaintiff Schwartz's business; rather, Dr. Powell explained that the newness of Plaintiff Schwartz's business in this particular enterprise, was immaterial, since any person or entity who has control of the land, new business or otherwise, could have developed the land precisely as Dr. Powell and Bershtein expertly explained. The Trial Court's errors of fact, and the Trial Court's impermissible contesting and rebutting of the uncontroverted facts in the record and established by Dr. Powell and Bershtein, were a clear abuse of discretion requiring that the Trial Court's Order barring Dr. Powell's expert report be reversed.

POINT II

THE TRIAL COURT ERRONEOUSLY BARRED DR. POWELL'S EXPERT REPORT BY CREATING ITS OWN STANDARD AND FAILING TO CORRECTLY APPLY THE STANDARD SET FORTH BY THE SUPREME COURT OF NEW JERSEY (1282a-1296a)

The Supreme Court of New Jersey in Schwartz v. Menas, 251 N.J. 556, 577 (2022), overturned the New Business Rule, and reiterated "the general rule under New Jersey law that lost profits may be recoverable if they can be established with a reasonable degree of certainty . . . ." Dr. Powell's expert report absolutely establishes lost profits above and beyond a reasonable degree of certainty, because the data and information reviewed and analyzed by Dr. Powell to arrive at his conclusions was not hypothetical data or information from some hypothetical affordable housing development imagined to be constructed on Duncan Farms or a comparison to some other similar parcel of land somewhere else. 6T, 23:13-25:9.

Instead, Dr. Powell reviewed and analyzed the real, certain, and actual data required by the NJHMFA for the processing of the application for financing of the 100% affordable housing development, which was approved. 6T, 33:21-34:9. Said data and information in the record is data and information that opposing counsel could not refute because it is the actual, certain, and real data provided by MBI and reviewed by the NJHMFA, in processing MBI's application submitted for financing the affordable housing development, which was approved and permitted MBI to develop the affordable housing development. 6T, 23:13-25:9; 33:21-35:7.

Dr. Powell made no assumptions, because none were necessary; he simply analyzed the real, certain, and actual data provided by MBI, as required, in its application to the NJHMFA. 6T, 23:13-25:9; 33:21-35:7. Yet, the Trial Court erroneously invented a standard that the Supreme Court did not establish. As the Trial Court stated:

> Although the Court did not establish a per se requirement that an expert analysis include an assessment that accounts for the novice status of a new business, patent in the Court's analysis was that consideration of a Plaintiff's novice status was preeminient among the constellation of factors to be determined.

[1285a-1286a].

The Trial Court acknowledged that the Supreme Court did *not* establish a per se requirement that an expert include an assessment that accounts for the novice status of a new business, yet in the same breath impermissibly created a

standard that the Plaintiff's novice status is the "preeminent" factor in the Court's analysis. The Trial Court did not have authority to invent this standard where the "novice" status of a business is so "preeminent" as to overlook expert testimony explaining that in this particular set of facts the newness of the business was in fact irrelevant. This invented standard effectively acted as the new business rule, erroneously barring Plaintiffs' expert report simply because the business was new, and the Trial Court erroneously ignored the surrounding facts and testimony establishing that the newness of this business in this unique context was irrelevant.

The Trial Court goes on to acknowledge that "the Court did not require expert comparisons and modeling to similarly situated new businesses in adopting the reasonable certainty standard." 1286a. Yet, in the same breath, the Trial Court held that the absence of comparisons to other novice businesses was fatal here. The Trial Court again acknowledged the lack of a requirement established by the Supreme Court, but then immediately created a requirement. The Trial Court did not have authority to create this standard. Moreover, even if such a standard existed, the Trial Court should have recognized that the facts and unrebutted expert testimony in the record established that comparisons to other novice businesses were especially unnecessary in this case. As Dr. Powell and Bershtein repeatedly explained, the newness of the business in these particular circumstances was irrelevant. 6T, 34:17-39:20, 91:23-95:6, 105:5-106:6, 131:4-25, 137:10-138:22,

138:23-143:5, 149:2-151:7; 1008a, 18:8-23:2; 1013a, 39:5-20; 1013a, 40:18-42:18; 1014a, 43:7-13; 1014a, 44:23-45:12; 1015a, 48:12-20; 1015a, 49:15-50:13; 1016a, 53:10-54:17. Any person or entity owning or controlling the land could have developed the property. That is the uncontroverted testimony of Dr. Powell and Bershtein that the Trial Court in its abuse of discretion failed to recognize.

Under the correct standard of reasonable certainty, a Plaintiff's inability to fix its lost profits with precision will not preclude recovery of damages. Tessmar v. Grosner, 23 N.J. 193, 203 (1957). So long as a plaintiff is able to provide reasonably accurate and fair calculations of lost profits, damages are recoverable. V.A.L. Floors, Inc. v. Westminister Communities, Inc., 355 N.J. Super. 416, 424 (App. Div. 2002). Failing to calculate damages with precision does not bar recovery of lost profits, and it would be a "travesty to deny a Plaintiff essential justice because the absence of means for precision precludes perfect justice." Id. at 427 (quoting Am. Sanitary Sales Co. v. State, Dep't of Treasury, Div. of Purchase & Prop., 178 N.J. Super. 429, 435 (App. Div. 1981)). Indeed, where there is uncertainty as to lost profits, fairness dictates that the uncertainty be laid "at the door of the wrongdoer who altered the proper course of events instead of at the door of the injured party." See id.

Here, Plaintiffs' lost profits are far beyond merely "reasonably certain" because the development they were prevented from developing exists in the same

way it would have, had they been allowed to develop the project. Thus, Dr. Powell's expert report calculates Plaintiffs' lost damages with reasonable certainty, and more. Absent Defendants' wrongful conduct, Plaintiffs would have constructed and developed the affordable housing development with the assistance of Bershtein. Bershtein testified that he had successfully counseled and assisted novice developers who had even less experience than Plaintiff Schwartz in developing affordable housing projects, and that he would have helped Plaintiff Schwartz develop the affordable housing project at Duncan Farms. 1008a (18:8-23:2); 1013a-1016a (39:3-51:6).

Contrary to the argument of Defendants, Bernstein testified that the Baptist Church was not the only novice developer for whom Bernstein successfully formed partnerships to develop 100% affordable housing. 1008a (18:8-23:2); 1013a-1016a (39:3-51:6). In fact, it was the unrebutted and uncontroverted testimony of Dr. Powell and Bernstein that most affordable housing developments involve novice developers or partnerships. 1008a (18:8-23:2); 1013a-1016a (39:3-51:6); 6T, 83:2-84:18. Plaintiff Schwartz would have been able to hire attorneys, design professionals (as he did), contractors, etc., and Bernstein testified that he would have absolutely done for Plaintiff Schwartz what he routinely does and has done for first time developers who control or own land zoned for affordable housing. 1008a (18:8-23:2); 1013a-1016a (39:3-51:6). There was no speculation in this

testimony, no rebuttal testimony, and no rebuttal expert. The Trial Court did not have the expertise to disagree with the unrebutted and uncontroverted testimonies of the experts in the field of affordable housing.

The Trial Court's error essentially resurrects the buried new business rule disguised as a reasonable certainty test. The Trial Court erroneously obsessed on the novice nature of Plaintiffs' business despite uncontroverted facts in the record and the expert testimony of Dr. Powell and Bershtein establishing that the novice nature of Plaintiffs' business was irrelevant in this unique context. There is no doubt that the Trial Court barred Dr. Powell's expert report for no other reason than the Trial Court's belief that Plaintiff Schwartz was engaged in a new business, while completely ignoring the unrebutted testimonies of Dr. Powell and Bershtein that the newness of a business in 100% affordable housing development is completely irrelevant.

In addition, in failing to determine that Plaintiffs' lost profits could be calculated with reasonable certainty, the Trial Court did not recognize that the calculation of damages is a question for the jury and that courts "permit considerable speculation by the trier of fact as to damages." V.A.L. Floors, 355 N.J. Super. at 424. This legal error calls for reversal of the decision below. Above all, the Trial Court's invention of a standard, its invention that the novice status of a business is the "preeminent" factor, its failure to apply the uncontroverted facts

in the record and in the testimony of Dr. Powell and Bershtein establishing that the novice status of the business in this unique context was irrelevant, and its failure to apply the standard as simply set forth by the Supreme Court of New Jersey, was fatal and reversible error.

The Supreme Court in Schwartz v. Menas, 251 N.J. 556 (2022) stated:

> If the trial court determines that Plaintiffs' lost profits evidence is sufficient to establish their claim for damages with reasonable certainty despite Plaintiffs' inexperience in developing housing, it should deny Defendants' motions to bar the evidence and for summary judgment.

[1279a].

Here, since the uncontested testimonies of Dr. Powell and Bershtein established that Plaintiffs' alleged inexperience in developing housing was irrelevant in the particular context of 100% affordable housing development, Plaintiffs' lost profits evidence should have been deemed sufficient to establish their claim for damages with reasonable certainty. In other words, the factor of "Plaintiffs' inexperience in developing housing", whether "preeminent" or not, was met on its face when Dr. Powell and Bershtein repeatedly established that such inexperience was totally irrelevant in this particular, unique, and exceptional context.

Finally, The Supreme Court in Schwartz v. Menas, 251 N.J. 556 (2022) stated, "In its role as gatekeeper, a trial court should carefully scrutinize a new business's claim, that but for the conduct of the defendant, it would have gained

substantial profit in a venture in which it had no experience." 1277a. First, the lack of a definitive, precise number of damages is irrelevant. Jury instructions and verdict sheets make the definitive amount of damages, if any, a jury question. Dr. Powell's "range" of damages accounting for the difference in damages if Plaintiff Schwartz ultimately developed the Duncan Farms alone, or developed it in a partnership, does not affect the reality that substantial damages exist, but for the wrongful conduct of Defendants.

Furthermore, the Trial Court's failure to accept the uncontroverted facts and realities set forth by Dr. Powell and Bernstein was not "careful scrutiny". Uncontested facts are uncontested. It was *careless* scrutiny for the Trial Court to ignore the unrebutted expert testimony of Dr. Powell and the uncontested testimony of Bernstein. Moreover, Dr. Powell and Bernstein clearly explained why in this exceptional context, lack of "experience" for this new venture was utterly irrelevant. As such, Dr. Powell's expert report passed the new test with flying colors, since the newness of Plaintiff Schwartz's venture was absolutely irrelevant in this particular, unique, and exceptional context. The Trial Court's error should be reversed and the case should be remanded to the Law Division for trial.

Dated: April 24, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LARRY SCHWARTZ and NJ 322, LLC, Plaintiffs/Appellants, v. NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; BRAD INGERMAN; MBI DEVELOPMENT COMPANY, INC. and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants/Respondents.	DOCKET NO.: A-002481-22 Trial Court No. MON-L-3904-11 Civil Action On Appeal from Superior Court of New Jersey, Law Division, Monmouth County Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

BRIEF OF DEFENDANTS/RESPONDENTS, PULTE HOMES AND ERIC FORD, IN OPPOSITION TO PLAINTIFFS/APPELLANTS' APPEAL

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PRELIMINARY STATEMENT

Plaintiff Larry Schwartz ("Schwartz"), an operator of dry-cleaning establishments, with no experience in constructing or operating large residential housing projects, instituted this action in 2011 claiming interference with his attempts to develop a substantial $25 million low income, tax credit subsidized, housing project, involving an extremely complex and highly regulated process, projecting a profit of over $8 million dollars. Since this would have been a new business venture, for which Schwartz had no prior experience, the trial court dismissed the Complaint filed by Schwartz and his single-purpose entity, NJ 322, LLC ("NJ 322" and, collectively, "Plaintiffs") in 2019 based upon New Jersey's then existing "New Business Rule" (hereinafter "NBR"), which per se prohibited the pursuit of lost profits damages by businesses with no prior history of operation.

In 2021 the Appellate Division affirmed the dismissal.

In 2022 the Supreme Court modified New Jersey's bright line rule prohibiting lost profits damages claims by new businesses. The Court rejected the NBR as a *per se* bar on all lost profits damages claims and, instead, held that the "reasonable certainty" standard applied. However, the Court expressly recognized that it is "***substantially more difficult***" for a new business (such as Plaintiffs) to prove lost profits damages with reasonable certainty. Thus, it remains a significant threshold

for businesses with no track history. Further, anticipating the need to limit the presentation of marginal cases, the Supreme Court instructed that trial courts should function as "gatekeepers," eliminating on motion any such claims which cannot meet that standard.

The Supreme Court then remanded the case to the trial court for an assessment of Plaintiffs' claims utilizing the new standard. On remand the trial court appropriately undertook its "gatekeeper" function and after a Rule 104 hearing determined that given Plaintiffs' prior experience and abilities, or complete lack thereof, and considering the complexity of the proposed business endeavor, Schwartz could not establish the capacity to undertake the development and earn a profit with "reasonable certainty." Stated differently, as the court recognized, Schwartz's contention that he could have built this project successfully, was highly speculative. In fact, Plaintiffs' claim that anyone, even a party lacking in experience, could undertake this type of project productively, was simply fanciful.

PROCEDURAL HISTORY[1]

This matter arises out of Plaintiffs' Complaint for legal malpractice against Defendants/Respondents, Nicholas Menas, Esq. and Cooper, Levenson, April,

[1] "Pa" denotes the Plaintiff/Appellant's Appendix.

Niedelman & Wagenheim, P.A. ("Cooper") (collectively "Cooper Defendants"). Pa 1.

Plaintiffs filed an Amended Complaint, inter alia, joining Defendants/Respondents Pulte Homes ("Pulte") and Eric Ford (collectively, the "Pulte Defendants"), and others, seeking damages based on an alleged tortious interference and conspiracy to commit tortious interference. Pa 1-Pa 17. In summary, despite having no prior experience, Schwartz claimed defendants interfered with his attempts to develop property known as "Duncan Farms," a substantial $25 million-dollar low income, tax credit subsidized, housing project, an extremely complex and highly regulated developmental process, projecting a profit of over $8 million dollars. This would have been a completely new business venture for Schwartz.

On August 15, 2017, Plaintiffs' expert, Dr. Robert S. Powell, issued a report assessing the profits that a developer, not necessarily the Plaintiffs, would have made if it had successfully constructed a low income, tax credit subsidized project at Duncan Farms. Pa 274.

Defendants moved to bar the Powell report, which was denied by the Honorable Daniel S Weiss, J.S.C. on August 21, 2018, without making a decision on the applicability of the NBR. PA 298. The Court based its denial of the

Defendants' Motions on the existence of a dispute about the applicability of the NBR.

On September 12, 2019, the Pulte Defendants filed a Motion to Bar the Powell report based on the NBR. Pa 259.

On October 12, 2018, the trial court held oral argument and on October 15, 2018, the Honorable Lourdes Lucas entered an Order striking Powell's Report and precluding him from testifying at trial ("Order Barring Expert"). Pa 308.

On October 22, 2018, Plaintiffs filed a Motion for Reconsideration of the Order Barring Expert. Pa 310.

On November 30, 2018, the Motion Judge held oral argument on Plaintiffs' Motion for Reconsideration. 2T.

On February 15, 2019 the Court entered an Order denying Plaintiffs' Motion for Reconsideration. Pa 1094.

On January 30, 2019, the Defendants filed Motions for Summary Judgment and on February 15, 2019, the Honorable Lourdes Lucas granted both summary judgment motions (Pa 1176 and Pa 1178), dismissing Plaintiffs' Amended Complaint against all remaining Defendants, with prejudice.

Plaintiffs appealed, arguing that the NBR should no longer apply when an inexperienced entity with no proven track-record in the enterprise it undertakes seeks

lost profits. By Opinion and Order dated November 6, 2020, the Appellate Division rejected Plaintiffs' arguments and affirmed the trial court's Orders. Pa 1221

On April 21, 2021, the Supreme Court granted Plaintiffs' Petition for Certification.

In an August 17, 2022 Opinion, the Supreme Court initially "concurred with the trial court and the Appellate Division that the development projects that gave rise to both cases[2] constituted new businesses." Schwartz v. Menas, 251 N.J. 556 (2022). However, it rejected the NBR as a *per se* ban on claims by new business for lost profits damages. Instead, it held that the "reasonable certainty" standard applied, while maintaining a distinction between the proofs required for a new business to meet that standard versus an established business.

The Supreme Court remanded the matter "solely for the purpose of ensuring that the trial court evaluates Plaintiffs' lost profits claims in accordance with the governing test." Id. at 577. In doing so, the Court was careful to note that "[w]e make no suggestion that the lost profits proofs presented to the trial court in either case meet the standard of reasonable certainty." Id.

From a procedural standpoint, the Court provided the following directions:

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[2] The Supreme Court granted certification on consolidated appeals arising from two separate lawsuits filed by Plaintiffs with respect to two separate development projects.

> In its role as gatekeeper, a trial court[3] should carefully scrutinize a new business's claim that, but for the conduct of the defendant, it would have gained substantial profit in a venture in which it had no experience. ***If a new business seeks lost profits that are remote, uncertain, or speculative, the trial court should bar the evidence supporting that claim and should enter summary judgment pursuant to Rule 4:46-2***.

Id. (emphasis added).

On remand, the trial court conducted a Rule 104 hearing on January 19, 2023 and January 20, 2023. See 6T and 7T.

On March 9, 2023 the trial court entered an order barring Dr. Powell's experts report and granted defendants summary judgment. Pa 1280.

Plaintiffs filed a Notice of Appeal on April 22, 2023. Pa 1297.

[3] The Supreme Court felt that, because it considered itself constrained by [Weiss v. Revenue Building & Loan Assn., 116 N.J.L. 208 (E. & A. 1936)], the trial court had no opportunity to conduct a fact-sensitive analysis of the evidence and decide whether plaintiffs can prove lost profits damages with reasonable certainty." Schwartz, 251 N.J. at 577.

STATEMENT OF FACTS

Defendant hereby incorporates the Statement of Facts articulated by the Appellate Division in its November 6, 2020 Opinion and the Supreme Court in its August 17, 2022 Decision. See, Schwartz, 251 N.J. at 578.

The property at issue is located in Monroe Township, Gloucester County, New Jersey, and is commonly referred to as Duncan Farms and in this litigation as the "Property." Pa 2. In December 2007, pursuant to a certain General Release, Plaintiffs acquired an interest in the Property for $250,000.00. Pa 4 at ¶ 15. In May 2009, Plaintiffs assigned their interest in the Property to an entity known as Monroe Township Development Company, LLC ("MTDC") for $2,000,000.00. Pa 7 at ¶ 36. The assignment between Plaintiffs and MTDC was terminated after MTDC had paid Plaintiffs a total of $630,000.00, which funds were retained by the Plaintiffs. Pa 1 at ¶36, 42. In May 2010, Plaintiffs assigned their interest in the Property to MBI Development Company for $480,000.00. Pa 8 at ¶45. In total, Plaintiffs received $1.1 million for selling their interest in the Property.

During his May 3, 2017 deposition, Schwartz confirmed that he made more money ($1.1 million) from the sale of his interest in the Property than Plaintiffs spent acquiring their interest in the Property and obtaining governmental approvals ($700,000-$900,000):

> Q: Mr. Schwartz, we have established that you received $480,000 from MBI in connection with the transfer of your interest in Duncan Farms, correct?
>
> A: Yes.
>
> Q: And then another 630,000 from MTDC, correct?
>
> A: Yes.
>
> Q: Do you know how much money you invested in the Duncan Farms project?
>
> A: In upwards, I would say, of $800,000, $700,000. Something like that. Very close—it was a wash. It could have been $900,000. It was a wash. I had to pay the assignee, the legal fees, the architectural fees, my partner, the extensions, all those fees. It was a wash. It was very minimal profit. Maybe $100,000 or $200,000.
>
> Pa 438 line 19 - 439 line 10.

Mr. Schwartz could not testify to any prior relevant developmental experience. Originally, NJ 322 had two members, Schwartz and Sal Surace. Schwartz testified that when he first heard the term affordable housing in early 2007, he and Mr. Surace went to the New Jersey Housing Mortgage and Finance Agency (NJHMFA) to find out what affordable housing was. Pa 384. Schwartz had no experience with or knowledge of the requirements imposed on developers of affordable housing by the Fair Housing Act, N.J.S.A. 52:27D-301 to -329.

In Plaintiffs' response to the Pulte Defendants' Interrogatory 16, dated June 27, 2013 and signed by Schwartz, they admit that as of January 2007 Schwartz "did

not even know… what COAH (Counsel on Affordable Housing) meant." Pa 271.

In response to Interrogatory 64, the Plaintiffs state:

> I have no experience with Low Income Housing Credits nor did I ever know anything about it. I never applied for same, never been awarded credits, never reviewed the allocation plan, worked on no projects, and I only came to understand what a tax credit compliance analyst is after being informed of COAH.

Pa 272.

Schwartz testified that while Mr. Surace, the only other member of the NJ 322, had developed residential projects, he was not an affordable housing developer and that he did not know anything about COAH. Pa 380 at 21:17-22. Schwartz also testified, in no uncertain terms, that Mr. Surace lost interest in participating in the COAH Project and that he "wasn't feeling this project anymore" and that Mr. Surace did not want to be involved with COAH. Pa 379. Schwartz bought out Mr. Surace's interest in NJ 322 in 2007.

Schwartz testified that from late 2007 onward he was the sole member of NJ 322 and that he wanted to develop the COAH Project himself. Pa 379-380. Mr. Surace had sold his interest to Schwartz in 2007 because, Schwartz acknowledges, he had no experience with, or interest in, developing a COAH Project. Pa 379. Because of Mr. Surace's death it was not possible for Plaintiffs to change any of that.

Nevertheless, the Plaintiffs sued to recover the lost profits they claim they would have received by developing 132 affordable housing units on the Property as approved by the Township (the "COAH Project"), along with other damages, attorney's fees and possible disgorgement of the fees they paid to Cooper.

The Plaintiffs retained Dr. Robert S. Powell to testify as an expert witness at trial to establish the amount of lost profits damages the Plaintiffs suffered because they were allegedly not allowed to develop the COAH Project. Pa 274. Powell issued a report in which he calculated the Plaintiffs' estimated lost profits allegedly suffered as a result of their inability to complete the COAH Project. Pa 274.

In his report, Powell did not cite to any prior projects completed by either Plaintiffs in calculating the amount of profits the Plaintiffs would have made in connection with the COAH Project, because there are no such projects. Pa 274. Schwartz admitted the Plaintiffs had never developed a project that was similar to the COAH Project which Powell could use as a basis for computing the Plaintiffs' alleged lost profits relating to the COAH Project. Pa 272 (Plaintiff's Interrogatory Answers at 16). Had the Plaintiffs chosen to develop the COAH Project rather than sell their interest in the Property they would have been engaged in a new business venture unlike anything they had done before.

The Plaintiffs' development of the COAH Project would have been the first time that the Plaintiffs had engaged in any real estate development and, specifically, in the development of a COAH Project. Pa 271-72 at 16.

The Rule 104 Hearing

Following the Supreme Court remand, a Rule 104 hearing was conducted on January 19-20, 2023 to explore and consider Powell's report and opinions.

Powell's report began by conceding he presents a "range of values (depending upon ***certain assumptions*** as more fully discussed herein)…." Pa 276. (emphasis added). After summarizing the allegations in Plaintiffs' Amended Complaint, Powell described the scope and purpose of his report as follows:

> You have asked me to assess the profits that would have likely been earned by Plaintiffs in the event that their development goals and objectives in connection with the development of the Project has not been frustrated by the alleged negligence and breach of fiduciary duty of Defendants to Plaintiffs as set forth in the Amended Complaint.
>
> Therefore, I have prepared an analysis of the profits that would likely have been earned ***by a development team which would have included Plaintiffs as principals***, in connection with two alternative projects on the Property."

Powell then presented his opinions on the range of lost profits damages associated with two completely different development projects for Duncan Farms:

(1) a mixed use market rate development;[4] and (2) a 100% affordable housing development.

With respect to the market rate development, Powell's model first "***assumes*** construction of 100 residential townhomes for sale along with 20,000 square feet of commercial space" and "***assumed*** the commercial space would be built and leased by the developer, and then upon completion and stabilization, would be sold as an investment property based upon its cash flow." Pa 276. Powell then summarizes "the financial results that could reasonable have been achieved ***by a development group led by Plaintiff***," but bases the $5,135,804 profit margin on a comparison to a project developed in Washington Township by Ryan Homes, which (unlike Plaintiffs) is a large national homebuilder. Pa 276-279.

With respect to the alternative affordable housing project, Powell's model first "***assumes*** a team led by Plaintiff Schwartz." Pa 279. Powell then concedes that his financial model "***assumes*** sources of funds, costs, income and expenses for the development that are identical to those used by the actual developer…" (*i.e.*, MBI Development Company ("MBI") -- a highly experienced and accomplished affordable housing developer). Powell obtained financial data for MBI's development project from the HMFA. Powell noted that "HMFA provided [MBI] a

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[4] Plaintiffs abandoned and did not present any proofs or arguments as to a mixed use market rate development.

$3,612,994 long-term loan to the development, and also authorized a 9% Low Income Housing Tax Credit investment into the project." Pa 274. Powell also confirmed that the HMFA tax credits ultimately awarded to MBI for this project provided $122 million dollars of public financing to the developer and postulates that Schwartz could have availed himself of the same benefit, although seemingly he possessed no funding and no known ability to obtain such funds privately. 6T at 65. Any assumption that Schwartz would have obtained the same extraordinary award of more than $122 million dollars in public, taxpayer financing as an inexperienced developer simply because it was provided to the most highly experienced entity in the field (MBI) is illogical.

Powell then opines that profits on the affordable housing project would come in two stages:

> (1) initially, profits of $3,643,285 consisting of a portion of the fees permitted for development overhead and construction management, along with a "developer's fee of 15% of development costs; and
>
> (2) profits of $4,524,132 from the sale of the project at the end of the fifteen years of operation of the project, when initial tax credit "investors" seek to exit the project through a sale of the asset, thereby allowing the "development team" to achieve a gain on the sale of the project to a new investor.

With respect to the affordable housing project, Dr. Powell projected "a range of profit sharing ***possibilities***" that Schwartz could have received. The low range is "**up to 60%** of the development fees and profits **if** Schwartz elected to form a joint

venture with another developer experienced in such projects.[5] The high range of profit sharing is 100% ***if*** Schwartz undertook that project on his own. (Id.) (emphasis added). According to Dr. Powell, "this would have resulted in a gain for Plaintiff Schwartz of between **$4,900,450** and **$8,167,416**." Pa 274 [emphasis in original]. Thus, the difference between the high range and the low range of profits is ***at least*** **$3,266,966** (assuming a low range of 60%), with that delta increasing if Dr. Powell's negotiated share in an "development team" is less than 60%.

During this Rule 104 hearing, Dr. Powell agreed that the Ingerman Company (*i.e.*, MBI)[6] was one of the most experienced, well-known companies in connection with affordable housing in New Jersey. Pa 6T, 43:19-24.

Dr. Powell confirmed that, in his report, the word "possibilities" was used in connection with the range of profit-sharing. Pa 6T, 49:17-22. Also, Dr. Powell confirmed that when he wrote his report of August 15, 2017, with regard to the Affordable Housing Project, that this would have been a new business for Mr. Schwartz. (6T, 49:25; 50:1-3; and 51:6-14). Dr. Powell recognized that Mr.

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[5] Dr. Powell relied on the deposition testimony of a fact witness, Martin Bershtein, for the "possibility" that Schwartz could have joint ventured with an experienced developer. Pa 274. But Mr. Bershtein's testimony related to a single occasion when, as a consultant, he helped a church partner with an experienced affordable housing developer where the church retained 60% of the development fees. (Pa 1003; 18:13-19:10).

[6] The Ingerman Company was previously known as "MBI" for its founder (M. Brad Ingerman).

Schwartz was not "specifically in the business of developing affordable housing …" (6T, 51:10-12).

When questioned about Mr. Bershtein, Dr. Powell did not know whether Mr. Bershtein ever entered into a Retainer Agreement with Mr. Schwartz to provide professional services. (6T, 52:6-10). Dr. Powell did not know if Mr. Schwartz ever provided Mr. Bershtein with any documents pertinent to the Monroe project. (6T, 52:8).

Dr. Powell also did not know whether Mr. Bershtein ever looked at whether there were any project plans for the development. (6T, 53:12). Dr. Powell confirmed that there was nothing in the Bershtein deposition where Bershtein looked at any of Mr. Schwartz's financial statements. (6T, 53:24-25; and 54:1-2). Likewise, Dr. Powell did not see in the Bershtein deposition that he [Bershtein] reviewed tax returns for Mr. Schwartz. (6T, 54:2-6).

Dr. Powell did not see anything in the Bershstein deposition where Mr. Bershtein reviewed any of Mr. Schwartz's bank statements. (6T, 54:7-10). Dr. Powell was questioned at length about Mr. Berschtein's lack of involvement in this project and acknowledged Mr. Bershstein's deposition testimony, wherein he testified: "I had run some very preliminary models in terms of, you know, how to possibly make it work, **but we never really went very far, because it was terminated fairly quickly**." (6T, 56:20-25; and 57:1-5)(emphasis added).

Dr. Powell recalled reading from the Bershtein deposition that Bershtein could not tell us off the top, in connection with tax credits, what they would be, because his analysis was preliminary. It was not something that would even be relevant. (6T, 57:22-25; and 58: 1-3).

Dr. Powell confirmed that he did not look at any financial data of Mr. Schwartz. (6T, 63:2-5). In fact, Dr. Powell did not see any information, did not see any data, did not see loan applications, did not see commitments, did not see conditional commitments by any bank lender or otherwise given to Schwartz for the project. (6T, 63:16-22). Dr. Powell never saw any correspondence between Mr. Schwartz and MBI's principal, Brad Ingerman, referring or relating to the fact that Schwartz wanted to partner up with him or joint venture with MBI/Ingerman for this particular Monroe project. (6T, 68:18-23).

When asked if he read any of Schwartz's deposition transcripts for purposes of his opinion, Dr. Powell conceded that there were no depositions cited in the report. (6T, 69:13-19).

Dr. Powell did not know that Mr. Schwartz was the owner of a dry cleaning business in Staten Island. (6T, 69:22-25; and 70:1). He had no knowledge whether Mr. Schwartz ever created the infrastructure, water, electric, roadways, parking lots, and signage for a new development. (6T, 71:6-10). He did not know that Schwartz never owned construction equipment, and did not have a workforce on hand to

develop the Duncan Farms project. (6T, 71:11-15). Nor was Dr. Powell aware that Schwartz admitted that he had no experience constructing, planning, or financing an affordable housing project. (6T, 71:16-19).

When asked about his opinion regarding Schwartz's share of profits if he joint ventured with an experienced developer, Dr. Powell conceded his share could vary greatly. Specifically:

> Q. In your report you indicate, on the bottom of page 6 -- you read it into the record -- that Mr. Schwartz would have been able to share ***up to 60 percent*** if he partnered with another developer. Correct?
>
> A. Correct.
>
> Q. ***Now, when you say up to, I assume that also means it might be something less. Correct?***
>
> A. ***That's correct.***
>
> Q. **Depending upon the negotiations, depending upon what the leverage was with a partner, he might have 20 percent, 30 percent, or anything in between; correct?**
>
> A. **Of course**. It would have still been a very positive number.
>
> Q. A very positive number, but you can't say with certainty what that number would have been.
>
> A. Well, of course not, because Mr. Schwartz – at the risk of repeating myself -- was never permitted to get to that point in the process, he was cut out of the process for reasons that are fundamental to the matter here.
>
> (6T, 81:2-22) (emphasis added).

TRIAL COURT OPINION DISMISSING PLAINTIFFS' COMPLAINT

On March 9, 2023, the trial court entered an order barring Dr. Powell's expert report and granted summary judgment in favor of Defendants. That order included a detailed Statement of Reasons.

Citing to the Supreme Court Opinion, the Trial Court noted:

> Importantly, as the Court observed, "[i]t is undisputed that neither Schwartz nor NJ 322 had ever financed or built a residential development before they sought to construct the housing at issue." Schwartz, 251 at 560. Rather, the facts demonstrate that Schwartz owned and operated a dry-cleaning business prior to these projects. He was never certified in any professional discipline, nor had he ever taken any courses on real estate, land development, or finance. His real estate experience was limited to purchasing his own home, rehabilitating a small number of homes in Newark, and inheriting and selling of a small commercial building. He admitted to never acting "as a developer."

Pa 1283.

The Trial Court also observed that although the Supreme Court:

> abandoned the per se ban on new business profits, the Court did not throw overboard the rationale for the prior, bright line rule. More specifically, Justice Patterson, writing for the unanimous Court, expressly stated: "it is substantially more difficult for a new business to establish lost profits damages with reasonable certainty than it is for an established business to do so." Schwartz, 251 N.J. at 561. In recognition of that heightened standard, the Court directed trial courts to "carefully scrutinize a new business's claim that a defendant's tortious conduct or breach of contract prevented it from profiting from an enterprise in which it has no experience and should bar that claim unless it can be proven with reasonable certainty." Ibid. The Court made patent that the "reasonable certainty" standard "creates a higher level of proof needed to achieve reasonable certainty as to the amount of damages." Id. at 574-75 (citing Int'l Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 86 (2d Cir. 1996)).

Pa 1284-1285.

In Schwartz, the Supreme Court repeatedly emphasized not only the fact-sensitive nature of the inquiry, but also that "a new business's inexperience is an important factor in the reasonable certainty standard." Id. at 575. Thus, a "business's inexperience `enters into judicial consideration of the damages claim not as a rule but as a factor in applying the standard.' Id. at 574 (quoting Mindgames, Inc. v. W. Publ'g Co., 218 F.3d 652, 657 (7th Cir. 2000)).

Applying Dr. Powell's opinions to the known facts, the Trial Court concluded that:

> Dr. Powell's reports and opinions do not account for Schwartz's lack of experience in development. Rather, they ignore it. In the context of developing large tracts of more than 100 units (and in the case of the 2013 Litigation more than 200 units), with both projects having estimated costs substantially exceeding $20 million, in a heavily regulated industry, Dr. Powell's failure to account for Schwartz's inexperience is fatal. Dr. Powell's failure to account for Schwartz's lack of experience is glaring considering his acknowledgement during cross examination that the low-income housing industry is: "highly regulated"; "very complex"; and "competitive." Those adjectives to which he agreed are appropriate descriptors of the industry demonstrate, beyond peradventure, that experience in such a highly regulated, very complex, competitive industry is important. To not account for such is pivotal.
>
> But such is not the case here. Again, these developments were sizeable — anticipated costs exceeding $24 million; the number of units were 132 and 208 respectively; both involved heavily regulated, labyrinthian business and building requirements, including affordable housing.

Pa 1286.

The Trial Court's Opinion rejected the argument that simply because the project was ultimately developed by MBI/Ingerman, leaders in the industry, *ipso facto*, Schwartz could have done the same relying exclusively or primarily on MBI/Ingerman's results.

As the Court noted, Dr. Powell did not cite to any market data, treatises, articles, or any other independent, third-party information that discussed the circumstances of new businesses generally nor specifically in the context of low-income housing.

In substantially — if not entirely — relying on MBI/Ingerman's results to form the basis of his expert opinion, Dr. Powell implicitly acknowledged that he did not consider Schwartz's inexperience in development in formulating his expert opinion. Dr. Powell conceded during cross examination Ingerman and MBI are "experienced and well known." He also acknowledged that MBI and Ingerman were "prime" developers in New Jersey and would be on any short list of competitive firms. The Trial Court summarily rejected Plaintiffs' attempts to equate Schwartz with MBI/Ingerman:

> Comparing Schwartz — a novice — on one hand to MBI and Ingerman — industry leaders — on the other ignores that sharp distinction identified by Justice Patterson and the Court and is a false comparison. Put simply, it is comparing chalk to cheese.

Pa 1289.

The Court also noted that Schwartz could not solve his inexperience by suggesting that Schwartz could partner with an experienced entity or entities in the development as Dr. Powell's testimony was speculative and contradictory on that issue. Pa 1290.

The Trial Court also noted nothing in the record indicating that Schwartz ever had even one conversation with any experienced partner and any reliance on the involvement of Martin Bershtein was misplaced, as any conversations or communications in that regard were in their infancy, such that any partnership remained speculative. Pa 1291.

The Court concluded that Dr. Powell's expert reports and testimony were silent regarding his consideration or contemplation of Schwartz's novice developer status and lack of experience as nowhere does Dr. Powell compare his projected lost profits with projects done by inexperienced developers, nor does he offer any indication whether a novice developer could undertake — let alone complete — multi-unit housing developments of 132 units. Pa 1296.

Ultimately, the Trial Court concluded that Dr. Powell's expert opinions did not satisfy the "reasonable certainty" standard and, accordingly, are too speculative for introduction and presentation to a jury. Accordingly, the Trial Court granted the defendants' respective motions to bar Dr. Powell's report and testimony, and granted the defendants' respective motions for summary judgment. Pa 1296.

ARGUMENT

I. STANDARD OF REVIEW

On March 6, 2023, the Court provided an Opinion and Order barring Dr. Powell's testimony and dismissing plaintiffs' Complaint. The scope of appellate review is limited if an appeal concerns alleged errors in findings of facts. State v. Locurto, 157 N.J. 463, 470-71 (1999); In re Taylor, 158 N.J. 644 (1999); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). The Appellate Court will not set aside a finding of fact, but can decide whether the findings that were made, were properly reached on the sufficient or credible evidence before the Trial Court. Id. The Appellate Court must give due regard to the ability of the factfinder to judge credibility. Id.

The standard of review on appeal of the findings of fact of a judge sitting without a jury is "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering the 'proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Close v. Kordulak Bros., supra, quoting State v. Johnson, 42 N.J. 146, 162 (1964). The Appellate Division will not generally conduct its own examination of the evidence as if it were sitting as a Trial Court. State v. Locurto, 157 N.J. 463, 471 (1999). Accordingly, the trial court's determination under the rule warrants substantial deference, and should not be reversed unless it results in a clear

abuse of discretion. See DEG, LLC v. Twp. Of Fairfield, 198 N.J. 242, 261, 966 A. 2d 1036 (2009); Hous. Auth. Of Morristown v. Little, 135 N.J. 274, 283, 639 A.2d 286 (1994). The Court may find an abuse of discretion when a decision is "'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."' Illiadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123, 922 A. 2d 710 (2007) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002)). The trial court' s factual findings should not be disturbed unless those are "wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-484 (1974).

Moreover, "the admission or exclusion of expert testimony is committed to the sound discretion of the Trial Court." Townsend v. Pierre, 221 N.J. 36, 52-53 (2015).

II. THE TRIAL COURT PROPERLY ASSESSED THE HEIGHTENED REASONABLE CERTAINTY STANDARD APPLICABLE TO PLAINTIFFS' NEW BUSINESS AND CORRECTLY BARRED POWELL'S TESTIMONY.

The Supreme Court has now clarified that, although the "reasonable certainty test applies" to lost profits damages claims by new businesses, it is *"**substantially more difficult for a new business than for an experienced business to prove lost profits damages with reasonable certainty**."* Id. at 577 (emphasis added). In this regard, the Court agreed with the courts of other jurisdictions (namely, New York and Illinois) that impose a high standard on new business claims for lost profits

damages. Schwartz, 251 N.J. at 574-75 (citing Blinds to Go, Inc. v. Times Plaza Dev., L.P., 931 N.Y.S.2d 105, 108 (App. Div. 2011); Kenford Co. v. County of Erie, 67 N.Y.2d 257 (1986); Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill. 2d 218 (2006)). See also Schonfeld v. Hilliard, 218 F.3d 164 (2d Cir. 2000) ("Therefore, evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate.")

In Mindgames, Inc. W. Publ'g Co., 218 F. 3d 652, 657 (7th Cir. 2000) (cited by the New Jersey Supreme Court), Judge Posner noted:

> [s]tates that have rejected the "new business" rule are content to control the award of damages for lost profits by means of a standard -- ***damages may not be awarded on the basis of wild conjecture, they must be proved to a reasonable certainty***.

Id. at 657 (emphasis added).

The Seventh Circuit further noted:

> Nonetheless, "[a]brogation of the 'new business' rule does not produce a free-for-all"; ***the business's inexperience "enters into judicial consideration of the damages claim*** not as a rule but ***as a factor in applying the standard***."

Id. at 658 (emphasis added).

The Supreme Court also found the "recognition that it is difficult for a new business to prove lost profits claims is consistent with the approach of the Restatement (Second) of Contracts § 352," which expressly acknowledges the "sharp distinction between an established business and a new business with respect

to such claims." Schwartz, 251 N.J. at 575; Restatement § 352, cmt. b ("***However, if the business is a new one or if it is a speculative one*** that is subject to great fluctuations in volume, costs or prices, ***proof will be more difficult***.").

Here, the Supreme Court has already determined that Plaintiffs' development project at Duncan Farms constitutes a "new business." Schwartz, 251 N.J. Super. at 577. In its role as gatekeeper, the Trial Court "carefully scrutinized" Plaintiffs' claim that, but for the conduct of Defendants, it would have gained substantial profit in a venture in which it had no experience, ***treating Plaintiffs' "inexperience as an important factor***." Schwartz, 251 N.J. at 576-77 (emphasis added). After a full Rule 104 hearing the Trial Court concluded that the Plaintiffs did not present evidence sufficient to overcome their inexperience in affordable housing. Dr. Powell's opinion on Plaintiffs' alleged lost profits were deemed too remote, uncertain, and speculative. Thus, the Trial Court barred the evidence supporting that claim and enter summary judgment in favor of the Defendants.

Plaintiffs argue that the Trial Court "made numerous errors of facts in its statement of reasons, impermissibly and inappropriately acting as a rebuttal expert to Dr. Powell". Plaintiffs assertion is misplaced. Dr. Powell was not presented as a fact witness. Dr. Powell did not possess any "facts" relevant to the case. Dr. Powell was presented as an expert witness who issued a report and testified to his "opinions". The Trial Court analyzed Dr. Powell's opinions and testimony and

found the conclusions to be not reliable and not meeting the standard of establishing damages for a new business with "reasonable certainty", all for the detailed reasons expressed in the Trial Courts "Statement of Reasons".

Plaintiffs also assert that the Trial Court "erroneously barred Dr. Powell's expert report and granted Defendant's summary judgment by impermissibly creating its own standard and failing to apply the standard set forth by the Supreme Court". However, Plaintiffs fail to explain what alleged erroneous standard the Trial Court applied in assessing Dr. Powell's opinions related to the ability of Plaintiffs' new business to develop the proposed project successfully and establish damages with reasonable certainty. Stated simply, Dr. Powell offered testimony as to what profit would be realized by "a" developer which undertook and completed the subject project, but offered no opinions as to whether these "Plaintiffs" could have successfully undertaken and completed the project. Essentially Plaintiff assert that it only needs to prove with reasonable certainty what the profit would be realized if the project was built successfully. That misses the mark and is not the standard set by the Supreme Court. The focus is not on the theoretical profit numbers, but on these Plaintiffs and its abilities, or lack thereof, to undertake and complete the proposed project. On that critical issue Dr. Powell could not offer any testimony.

At the Rule 104 hearing, Dr. Powell acknowledged that the low-income housing tax credit ("LIHTC") program in the United States is "highly regulated" and "very complex." (6T, 76:11-21). He also confirmed that, in New Jersey, the sole agency administering the LIHTC program is the HMFA, which does so through a highly competitive process. (6T, 78:1-23). To be sure, even if all applicants meet the threshold requirements for such tax credits, the HMFA ultimately has to make discretionary decisions on which applicants to award credits each year. "Not all applicants are approved." (Id., 78:24-79:9).

The HMFA's competitive process is reflected in the language of the governing regulations themselves. For example, pursuant to N.J.A.C. 5:80-33.1:

> (a) Section 42 of the Internal Revenue Code of 1986 (Code), 26 U.S.C. § 42, establishes a low income housing tax credit that may be applied against the Federal income tax of persons or associations who or which have invested in certain buildings providing housing for families of low-income. ***As the housing credit agency for the State of New Jersey, the New Jersey Housing and Mortgage Finance Agency (NJHMFA) allocates these credits to qualified taxpayers and thereafter monitors their compliance with Section 42 of the Code***. The rules in this subchapter set forth the standards and procedures used by NJHMFA to perform its allocation and monitoring responsibilities and this subchapter represents the qualified allocation plan for New Jersey required by Section 42 of the Code.
>
> (b) In each calendar year, the total dollar value of the credits that can be allocated under these rules, except for the credits issued in connection with buildings financed with the proceeds of certain tax-exempt bonds, is limited by the State housing credit ceiling provided in Section 42 of the Code. ***NJHMFA, therefore, has determined to award these limited credits on a competitive basis***. Applicants seeking an allocation of these credits must apply under one of the cycles set forth

> in N.J.A.C. 5:80–33.4, 33.5, 33.6 or 33.7. NJHMFA ranks the applications received in each cycle according to the respective point scales provided in N.J.A.C. 5:80–33.15, 33.16, 33.17 and 33.18. ***The credits assigned to each cycle are then reserved for the highest ranking applications that meet the eligibility requirements set forth in N.J.A.C. 5:80–33.12.***
>
> [emphasis added].

As explained in N.J.A.C. 5:80-33.14, only a small percentage of applicants receive tax credits:

> (a) ***Because of the limited amount of credits and the high volume of applications to NJHMFA, only a fraction of the projects that apply typically receive credits.*** In addition to meeting the eligibility criteria described at N.J.A.C. 5:80-33.12, applications that fail to satisfy a minimum of 65 percent of the maximum score under the ranking criteria established under N.J.A.C. 5:80-33.15 through 33.18 shall be declared ineligible to obtain a reservation of tax credits. NJHMFA will rank projects according to the score sheet submitted in the project's application.... Based on this ranking, NJHMFA will then examine the applications of only those projects that rank sufficiently high to receive credits. Once it is determined that an application meets all eligibility requirements, it is admitted into the cycle and underwritten.
>
> [emphasis added].

Finally, from the pool of applicants, the HMFA presents its recommendations to a quorum of the Tax Credit Committee (consisting of the Commissioner of the Department of Community Affairs, the Executive Director, and three (3) members of the HMFA staff), which reviews the rankings and awards the tax credits. N.J.A.C. 5:80-33.22.

Dr. Powell offered no testimony on Plaintiffs qualification and abilities to obtain such an award with "reasonable certainty".

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN BARRING DR. POWELL'S EXPERT REPORT AND DISMISSING PLAINTIFFS' AMENDED COMPLAINT

As the Court summarized following the Rule 104 hearing, "the analysis here comes down to whether Dr. Powell's analysis meets the newly articulated standard based on the inputs that he had at the time…." (6T, 183:10-15). The trial Court had the opportunity to conduct a "fact-sensitive analysis" of Dr. Powell's report and the bases for his opinion. Dr. Powell failed to establish Plaintiffs' alleged lost profits to a (heightened) reasonable degree of certainty precisely because there is no evidence to support his serial ***assumptions*** that: (1) Plaintiffs could have developed the project either alone or as part of a "joint venture"; and (2) during the highly competitive LIHTC review process, the HMFA would have awarded the same tax credit funding to the inexperienced Plaintiffs as it ultimately awarded to MBI – a preeminent affordable housing developer in New Jersey.

Even assuming that Dr. Powell's *methodology* for calculating lost profits is sound, he (the Plaintiffs) skipped over the critical first step of establishing (within a reasonable degree of certainty) that these Plaintiffs – given their lack of experience -- could have successfully developed the affordable housing project in the first place. This is not particularly surprising given it was beyond the stated scope and purpose of Dr. Powell's report: to provide "an analysis of the profits that would likely have

been earned by a development team which would have included Plaintiffs as principals." As Dr. Powell further conceded on direct examination:

> A. ***The scope and purpose of the report was to determine damages incurred by plaintiff in the 11 case***, so – and the report, therefore described an analytical process that I undertook to examine a series of potential projects that could have been developed, including the main project which the report focuses on, to determine more precisely, ***had that project been developed with participation of Mr. Schwartz and the plaintiffs***, what were the potential profits that the project would likely have been generated as a result of that participation.
>
> (6T, 22:18-23:3) (emphasis added).

In other words, Dr. Powell was tasked with quantifying lost profits while ***assuming*** Plaintiffs developed the same project as MBI on the same terms as MBI. Dr. Powell did not account for Plaintiffs' inexperience as an affordable housing developer or otherwise address the impact of Plaintiffs' inexperience on the ultimate viability of the project – a deficiency expressly noted by the Supreme Court ("Powell did not acknowledge in his report that Schwartz had never been involved with a residential development or built housing of any kind."). Rather, Dr. Powell simply ***assumed*** that the inexperienced Plaintiffs – either with the help of some unidentified professionals or as part of some unidentified "joint venture" – would have completed the project using the same sources of funds, costs, income and expenses as the ultimate developer, MBI -- one of the most experienced affordable housing developers in New Jersey. That is a bridge too far.

As reflected in Footnote 1 to his report, Dr. Powell based his assumptions on the limited testimony of a fact witness, Martin Bershtein. Pa 274. Mr. Bershtein is a consultant who assists developers in applying for and obtaining low-income tax credits for affordable housing projects from the HMFA. However, in the present case, Mr. Bershtein testified that he had only preliminary discussions with Schwartz regarding the Duncan Farms project, never reviewed any project documentation or evaluated Schwartz's financials (Pa 1003, 26:4-27:4), and, thus, made no determination of whether Schwartz would be qualified to pursue an affordable housing deal (Id., 35:18-36:13). Nor did Mr. Bershtein explore partnering Plaintiffs with an experienced affordable housing developer, as he had done for others. (Id.).

Dr. Powell's blind acceptance of Bershtein's speculative testimony was reflected in his testimony at the Rule 104 hearing, where he conceded he ***did not know*** the following basic information:

- Whether Mr. Bershtein ever entered into a Retainer Agreement with Mr. Schwartz to provide professional services;
- If Mr. Schwartz ever provided Mr. Bershtein with any documents pertinent to the Monroe project;
- Whether Mr. Bershtein ever looked at whether there were any project plans for the development;
- Whether Bershtein looked at any of Mr. Schwartz's financial statements, tax returns or bank statements;

- Whether Mr. Schwartz ever created the infrastructure, water, electric, roadways, parking lots, and signage for a new development;
- Whether Schwartz ever owned construction equipment' or
- Whether Schwartz had the workforce on hand to develop the Duncan Farms project.

(6T, 71:11-15). However, Dr. Powell did acknowledge Bershstein's testimony that: "I had run some very preliminary models in terms of, you know, how to possibly make it work, ***but we never really went very far, because it was terminated fairly quickly***." (6T, 56:20-25; 57:1-5)(emphasis added). This is precisely why the Appellate Division previously rejected Schwartz arguments that he could have partnered with other individuals with more experience and completed the projects. Because nothing was consummated, the potential for such a partnership is only conjecture. (Id. at 24).

Accordingly, any suggestion that the HMFA would have awarded low-income tax credits (millions of dollars of public funding the award of which is highly competitive and available only on a limited basis) to a "development team led by Plaintiff Schwartz" for an affordable housing project on Duncan Farms is pure speculation.

Even accepting the foregoing assumption, Dr. Powell could only project "a range of profit sharing ***possibilities***" that Schwartz could have received as part of a joint venture. Indeed, Dr. Powell's report identified Plaintiffs' profit share as "***up to***

60%." Pa 274, p.6. But again, in support of this profit range, Dr. Powell cites to Bershtein's testimony regarding a single occasion when, as a consultant, he helped a church partner with an experienced affordable housing developer and retain 60% of the development fees. Pa 274, 18:13-19:10. Mr. Bershtein's testimony regarding work he did for a past client is wholly irrelevant to the present matter – especially given he was never even retained by Schwartz (Id., 24:25-25:13) and performed only preliminary services for him.

Dr. Powell effectively conceded the insufficiency of his opinion on the "range of profits" when he acknowledged that the ultimate percentage earned by Plaintiff would be subject to negotiations between the "partners" – meaning Plaintiffs' share could range anywhere between 0% and 60%.

> Q. In your report you indicate, on the bottom of page 6 -- you read it into the record -- that Mr. Schwartz would have been able to share ***up to 60 percent*** if he partnered with another developer. Correct?
>
> A. Correct.
>
> Q. ***Now, when you say up to, I assume that also means it might be something less. Correct?***
>
> A. ***That's correct.***
>
> Q. **Depending upon the negotiations, depending upon what the leverage was with a partner, he might have 20 percent, 30 percent, or anything in between; correct?**
>
> A. **Of course**. It would have still been a very positive number.
>
> Q. A very positive number, but you can't say with certainty what that number would have been.

> A. Well, of course not, because Mr. Schwartz – at the risk of repeating myself -- was never permitted to get to that point in the process, he was cut out of the process for reasons that are fundamental to the matter here.
>
> (6T, 81:2-22) (emphasis added).

Thus, the low range is "***up to 60%*** of the development fees and profits ***if*** Schwartz elected to form a joint venture with another developer experienced in such projects. The high range of profit sharing is 100% ***if*** Schwartz undertook that project on his own. (Pa 274, p. 6). (emphasis added). According to Dr. Powell, "this would have resulted in a gain for Plaintiff Schwartz of between **$4,900,450** and **$8,167,416**." [Id.] [emphasis in original]. Thus, the difference between the high range and the low range of profits is ***at least*** **$3,266,966** (assuming a low range of 60%), with that delta increasing if Dr. Powell's negotiated share in an "development team" is less than 60%. Such a wide range of possible profits falls far short of "reasonable certainty."

At base, Dr. Powell's blind assumptions based on Mr. Bershtein's speculative testimony to support a range of profits "up to 60%" is objectively insufficient. Mr. Bershtein's testimony (and thus Dr. Powell's opinion based on Bershtein's testimony) that the HMFA would have awarded low-income tax credits to an unidentified "development team led by Plaintiff Schwartz" is rank speculation.

Courts applying the heightened reasonable certainty standard applicable to new business have routinely rejected lost profits claims based on assumptions and

speculation. *See, e.g.,* Schonfeld, 218 F.3d at 172 (quoting Kenford, 67 N.Y.2d at 67) ("Projections of future profits based on a '***multitude of assumptions***' that require '***speculation and conjecture***' and few known factors do not provide the requisite certainty.") (emphasis added); Kidder, Peabody & Co., Inc. v. IAG Intern. Acceptance Group. N.V., 28 F. Supp. 2d 126, 134 (S.D.N.Y. 1998) ("The theme that emerges from these cases is clear: a claimant ***cannot establish lost profits*** with the law's requisite certainty where its calculation is dependent upon a ***host of assumptions*** concerning uncertain ***contingencies***, and applies numerous variables ***about which an expert can only surmise***.") (emphasis added). Indeed, Plaintiffs' lost profits claims suffer the same fate as the claimant in Kidder:

> Similar to those in *Kenford* and its progeny, IAG's expert calculations are premised upon a variety of assumptions about hypothetical deals continuing successively (and successfully) for several years by an entity that had no historical experience in the particular business for which it seeks lost profits. These cases make evident that IAG, a fledgling, unproved business, cannot prove damages with reasonable certainty in the face of such extensive assumptions.
>
> Kidder, 28 F. Supp. 2d at 134-35.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN NOT PERMITTING MARTIN BERSHTEIN TO TESTIFY FINDING PLAINTIFF CANNOT CIRCUMVENT HIS LACK OF EXPERIENCE BY SPECULATING THAT HE COULD PARTNER WITH AN EXPERIENCED DEVELOPER

It would flip the "reasonable certainty" standard on its head if an inexperienced plaintiff were allowed to satisfy a heightened standard by simply

asserting that it planned to team with an experienced professional/developer to complete its project and earn a profit. This is plainly at odds with the heightened reasonable certainty standard employed by Courts of New York and Illinois, as adopted by the New Jersey Supreme Court.

The Appellate Division recognized this falsehood. Specifically, the Appellate Division rejected Schwartz arguments that he could have partnered with others to develop the affordable housing project at Duncan Farms:

> ***We also reject Schwartz's argument that he could have partnered with other individuals with more experience and completed the projects***. Surace lost interest in the Monroe Township project after it was converted to an affordable housing development and he sold his interest to Schwartz. ***Although Schwartz contacted someone who had experience in this area, he never consummated a partnership with this individual*** [*i.e.*, Bershtein].

(Id. at 24)(emphasis added).

Any speculation that plaintiff "could possibly have" partnered with an experienced developer to make up for its lack of ability is therefore misplaced.

CONCLUSION

It is indisputable that the Plaintiffs' attempt to develop the COAH Project would have been a new business venture for them. Accordingly, the Plaintiffs are not permitted to recover their alleged lost profits arising from their proposed new business venture and their expert was properly precluded from testifying at trial in support of the Plaintiffs' pursuit of those prohibited damages. Based upon the foregoing it is respectfully submitted that the Plaintiffs' Appeal should be denied.

Respectfully submitted,

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Dated: March 11, 2024

LARRY SCHWARTZ; NJ 322, LLC, Plaintiffs-Appellants, v. NICHOLAS MENAS, ESQ.; COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.C, ERIC FORD; PULTE HOMES; BRAD INGERMAN; MBI DEVELOPMENT COMPANY, INC.; and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants-Respondents.	::	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002481-22 Docket No. Below: MON-L-3904-11 Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

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INTRODUCTORY STATEMENT

In this thirteen-year-old tortious interference/legal malpractice case, the Law Division made four serious legal errors. Each of those errors independently calls for reversal of the summary judgment granted to Defendants below.

First, the Law Division made numerous clear errors of fact in their Statement of Reasons, at times even impermissibly and inappropriately acting as a rebuttal expert to Dr. Robert S. Powell, Jr. ("Dr. Powell"), and contesting the facts established by Martin Bershtein, Esq. ("Bershtein") Point I, infra.

Second, the Law Division barred Dr. Powell's expert report and granted Defendants summary judgment, by impermissibly creating its own standard rather than correctly applying the standard set forth by the Supreme Court of New Jersey on August 17, 2022, in the matter of Schwartz v. Menas, 251 N.J. 556, (2022). Point II, infra.

Third, the Law Division erred by not permitting Bershtein to testify at the Rule 104 Hearing. Point III, infra.

STATEMENT OF PROCEDURAL HISTORY

A. The Parties and the Pleadings

On March 8, 2011, Plaintiffs Larry Schwartz and NJ 322, LLC filed a Complaint in the Superior Court of New Jersey, Law Division, Monmouth County, alleging legal malpractice against Defendants Nicholas T. Menas and Cooper,

Levenson, April, Niedelman & Wagenheim, PA ("Cooper Levenson"), and on December 21, 2012, Plaintiffs filed an Amended Complaint adding Eric Ford, Pulte Homes, Brad Ingerman, and MBI Development Company ("MBI") as Defendants. 1a.[1] Plaintiffs' Amended Complaint alleged that, in addition to the legal malpractice of Defendants Menas and Cooper Levenson, all Defendants had conspired to commit fraud, conversion, and tortious interference with a contract and business advantage. 1a-17a.

In summary, Plaintiffs' case centered on Defendants' wrongful conduct in blocking Plaintiffs' efforts to develop a mixed-use rental townhome/commercial development, and later, an affordable housing development, on property located in Monroe Township, New Jersey, known as "Duncan Farms." 1a-17a. Plaintiffs alleged that after agreeing that Plaintiffs would pursue such a development, Defendants connived to have Duncan Farms rezoned for affordable housing so that Defendant Pulte Homes could build a mixed-use market rate development on a different property that Pulte Homes sought to develop in Monroe Township,

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[1] "Pa" denotes the accompanying appendix. Transcript references are as follows:

1T= October 12, 2018 Transcript of Motion to Bar Hearing
2T= November 30, 2018 Transcript of Motion for Reconsideration Hearing
3T= February 15, 2019 Transcript of Summary Judgment Motion Hearing
4T= January 19, 2023 Transcript of <u>Rule</u> 104 Hearing
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known as "Pork Chop Hill." 1a-17a. The rezoning of Duncan Farms to 100% affordable housing would allow Defendant Pulte Homes to develop Pork Chop Hill with little or no affordable housing obligation. 1a-17a. Defendants then prevented Plaintiffs from acting as the affordable housing developer at Duncan Farms, instead causing Defendant MBI to get that project. 1a-17a.

Defendants Menas and Cooper Levenson filed an Answer to the Amended Complaint on January 31, 2013. 18a. Defendants Ford and Pulte Homes filed their Answer on February 4, 2013.

B. The Report of Plaintiffs' Damages Expert, Dr. Powell

On or about August 15, 2017, Plaintiffs' damages expert, Dr. Powell, issued an expert report. 275a. Dr. Powell's report assessed the profits that Plaintiffs would have earned had Defendants not derailed their attempts to develop the Duncan Farms property. 275a-286a.

The report calculated damages on two models. 275a-286a. The first model was based on Plaintiffs constructing a mixed-use market rate development as originally agreed among the parties. 276a-279a. The second model was based on Plaintiffs instead having developed 132 affordable housing units after the rezoning of Duncan Farms, as MBI eventually did after Defendants displaced Plaintiffs from a role at Duncan Farms. 279a-280a. Dr. Powell valued Plaintiffs' profits at up to

$5,135,804.00 under the first scenario, and up to $8,167,416.00 under the second scenario. 280a-281a.

C. Defendants' Repeated Efforts to Bar Dr. Powell's Report

As detailed infra, Defendants repeatedly tried to bar Dr. Powell's expert report by arguing that the report was a net opinion and that Plaintiffs could not prove damages because of the "new business rule." 218a-221a; 243a-258a. The Hon. Daniel L. Weiss, J.S.C., denied in its entirety a motion for summary judgment by Defendants Menas and Cooper Levenson on those bases. 229a. Those Defendants filed a motion for reconsideration of that denial, as did Defendants Pulte Homes and Ford, both of which Judge Weiss denied. 243a; 241a; 298a-299a; 300a-301a. Each time, Judge Weiss offered detailed reasons for those decisions, which rejected Defendants' net opinion argument and held the "new business rule" inapplicable. 237a-238a; 306a-307a; 2T 32:13-33:14.

Defendants' final attempt was the motion filed by Defendants Ford and Pulte Homes that sought to bar Dr. Powell's report. 259a-260a. A different judge, who had no previous involvement in the case, granted that motion (see Point II, infra). 308a-309a.

1. **The Summary Judgment Motion of Defendants Menas and Cooper Levenson**

Defendants Menas and Cooper Levenson filed their motion for summary judgment regarding Dr. Powell's report and the "new business rule" on May 28, 2018. 199a-200a. Point IX of that brief specifically argued that Plaintiffs' damages claim should be dismissed pursuant to the "new business rule." 218a-221a. On August 21, 2018, Judge Weiss rendered a written opinion denying that motion for summary judgment. 231a-240a. Judge Weiss explicitly ruled on the admissibility of Dr. Powell's expert report. 237a-238a. After analyzing the "new business rule" and the relevant case law, he held, in relevant part, that the "new business rule" did not apply because Dr. Powell's expert report calculated Plaintiffs' lost profits with a degree of reasonable certainty. 237a-238a. Judge Weiss found that:

> In the instant matter, the court is satisfied that Mr. Powell uses sound fact when compiling his report as such calculations take into account the various changes in development e.g. affordable housing and age restricted requirements along with objective factors e.g. estimates of cost, capital structure, sales process and rental rates. For these reasons, the court is satisfied that such opinion does not constitute a net opinion.

[238a].

This ruling by Judge Weiss established the law of the case on the admissibility of Dr. Powell's expert report, and that Dr. Powell's report calculated Plaintiffs' damages with reasonable certainty. 237a-238a.

2. The Motions for Reconsideration by All Defendants

Dissatisfied with Judge Weiss's ruling, Defendants Menas and Cooper Levenson filed a motion for reconsideration on September 4, 2018. 243a-244a. Defendants Ford and Pulte Homes filed their own motion for reconsideration on August 29, 2018. 241a-242a. In support of their motion for reconsideration, Defendants Menas and Cooper Levenson argued that Plaintiff NJ 322, LLC was a new business, that the "new business rule" applied, and that Plaintiffs' claim for lost profits were too remote and speculative. 254a-258a. Despite Judge Weiss's unambiguous August 21, 2018 opinion, Defendants Menas and Cooper Levenson argued that the Law Division had "overlooked" the question of whether Plaintiff NJ 322, LLC was a new business. 250a.

The Law Division heard oral argument on reconsideration on September 28, 2018. 306a-307a. After hearing argument from both sets of Defendants, Judge Weiss denied reconsideration, finding, for the second time, that Dr. Powell's report calculated damages with reasonable certainty, and stating expressly that he had not overlooked this issue in denying summary judgment. 306a-307a. Judge Weiss issued a written opinion on September 28, 2018, reiterating the ruling that he had made on the record at oral argument. 306a-307a.

3. The Improper Motion to bar of Pulte Homes and Ford

After Defendants' summary judgment motions were denied on August 21, 2018 (222a-223a), Defendants Pulte Homes and Ford filed a motion to exclude Dr. Powell's report and his testimony at trial. 259a-260a. Oral argument was heard on October 12, 2018. See 1T. Judge Weiss was unavailable that day. Instead, the motion to bar Dr. Powell was heard by The Hon. Lourdes Lucas, J.S.C., who had not heard or decided any previous motions in this matter. See 1T.

The motion to bar Dr. Powell was predicated entirely on the "new business rule," despite Judge Weiss's emphatic rulings on August 21 and September 28, 2018, that the "new business rule" did not apply and that Dr. Powell's report met the reasonable certainty test. 261a-266a. Indeed, the supporting brief of Defendants Pulte Homes and Ford argued that the new business rule applied as a per se bar to Plaintiffs' damages claim, and that the damages claimed by Plaintiffs, were too remote or speculative to meet the legal standard of reasonable certainty – the same arguments that Judge Weiss had rejected not once but twice. Compare 261a-266a brief on motion to bar, with 237a-238a, 306a-307a, August 21, 2018 and September 28, 2018 Judge Weiss opinions.

At oral argument, the new Law Division judge held that Plaintiffs were engaged in a "new venture," and because Plaintiffs' enterprise was a new business, Dr. Powell's calculations of lost profits were remote and speculative. 1T, 31:20-35. The judge entered an Order embodying the ruling barring Dr. Powell on

October 15, 2018. 308a-309a. On October 22, 2018, Plaintiffs filed a motion for reconsideration. 310a-311a. Oral argument occurred on November 30, 2018. See 2T. The judge adhered to her previous ruling granting the motion to bar.

4. Defendants' final summary judgment motion

Since the Law Division had crippled Plaintiffs' case by excluding Dr. Powell, Defendants all moved for summary judgment yet again on January 30, 2019, on the grounds that Plaintiffs could not establish damages. 1094a-1095a. Plaintiffs' opposition had to candidly acknowledge that because Dr. Powell's report had erroneously been barred, Plaintiffs could not establish lost profits damages. The Law Division thus entered two Orders on February 15, 2019, granting summary judgment and dismissing Plaintiffs' Amended Complaint with prejudice. 1176a-1178a.

Plaintiffs timely filed a notice of appeal on March 28, 2019. 1180a. Oral argument was held on the appeal on October 14, 2020, and the appeal was decided on November 6, 2020. 1221a. The Appellate Division affirmed the Law Division's decision. The Supreme Court of New Jersey granted certiorari and held oral argument on April 26, 2022. 1252a. On August 17, 2022, the Supreme Court reversed the decision of the Law Division, ended the new business rule in the State of New Jersey, and remanded the matter to the Law Division to be decided on the new standard. 1252a. Under the new standard, the Supreme Court reiterated the

general rule under New Jersey law that lost profits may be recoverable if they can be established with a reasonable degree of certainty, but anticipated profits that are remote, uncertain, or speculative are not recoverable. 1252a. The Supreme Court in Schwartz v. Menas, 251 N.J. 556, (2022), stated:

> If the trial court determines that Plaintiffs' lost profits evidence is sufficient to establish their claim for damages with reasonable certainty despite Plaintiffs' inexperience in developing housing, it should deny Defendants' motions to bar the evidence and for summary judgment.

[1279a].

On remand, the Law Division conducted a Rule 104 Hearing on January 19, 2023, and January 20, 2023. See 4T and 5T. On March 9, 2023, the Law Division erroneously barred Dr. Powell's expert report and granted Defendants summary judgment. 1280a. Plaintiffs filed a notice of appeal on April 22, 2023. 1297a.

STATEMENT OF FACTS

At all relevant times, Defendant Nicholas T. Menas was a partner at Cooper Levenson in the commercial real estate, land use and zoning practice group. 480a(24:1-20). Defendant Eric Ford was Vice President of Land Acquisition for the Delaware Valley region encompassing parts of New Jersey and Pennsylvania for Pulte Homes, one of the nation's largest real estate developers. 330a(13:19-22).

Plaintiff Larry Schwartz had experience building two family homes and rehabilitating residential properties, and was always interested in real estate opportunities. 272a (Interrogatory #65); 988a (40:2-14); 407a (90:4-9). Salvatore

Surace was Plaintiff Schwartz's business partner and was like a father to Plaintiff Schwartz. 407a (90:4-9). Mr. Surace was a very wealthy real estate developer and manager of rental units who had built properties throughout New York City for over fifty-five years. 402a (85:11-16); 407a (90:23-91:3). Mr. Surace built in excess of 4,500 homes during his career as a real estate developer. 402a (85:11-16); 407a (90:21-91:3). Mr. Surace was also interested in developing real estate opportunities in South Jersey. 332a (15:16-22).

In 2006, Defendants Menas and Ford proposed a real estate opportunity to Messrs. Schwartz and Surace. 987a (34:22-36:16). The deal involved developing 100 rental units and 20,000 square feet of commercial real estate on the "Duncan Farms" property in Monroe. 986a (32:17-33:13); 324a (7:4-17). Duncan Farms was then owned by an entity called Washington Development Company ("WDC"). 781a.

Defendant Menas had known Mr. Surace his entire life because Mr. Surace was a friend of Defendant Menas's father since the 1950's or 1960's. 495a (80:2-14). Defendant Menas and his father, Teddy Menas, introduced Mr. Surace and Plaintiff Schwartz to Defendant Ford of Pulte Homes. 495a (80:17-22).

At a May 2006 meeting attended by Plaintiff Schwartz, Mr. Surace, and Defendant Ford, Defendant Ford, on behalf of Pulte Homes, made the following offer: if Plaintiff Schwartz and Mr. Surace purchased Duncan Farms, obtained the

necessary approvals to build 100 market rate townhomes and improved the property, Pulte Homes would then purchase the development for more than $5.5 million and allow Plaintiff Schwartz and Mr. Surace to retain ownership of the 20,000 square feet of commercial space. 323a-324a (6:24-7:17); 330a-331a (13:23-14:16); 361a (44:1-44:22); 538a (48:16-49:16).

On May 24, 2006, Defendant Menas memorialized Defendant Ford's offer in a letter to Mr. Surace. 287a-288a. Plaintiff Schwartz and Mr. Surace accepted the proposal and agreed to proceed with the transaction. 675a. They also agreed to retain Defendant Menas and Cooper Levenson to handle all land use, zoning, and regulatory matters related to the transaction. 675a.

Defendant Menas formed an entity, Plaintiff NJ 322, LLC, through which Plaintiff Schwartz and Mr. Surace would purchase Duncan Farms. 677a; 333a-334a (16:24-17:3). Pursuant to the Operating Agreement prepared by Defendant Menas, Plaintiff Schwartz, and Mr. Surace were the only members of NJ 322, LLC. 677a.

Thereafter, on or about June 13, 2006, Defendant Menas sent a Memorandum of Understanding to Mr. Surace reconfirming the terms of the transaction proposed by Defendant Ford on behalf of Pulte Homes and confirmed in Defendant Menas's May 24, 2006 letter to Mr. Surace. 289a-293a. Mr. Surace

signed the Memorandum of Understanding on behalf of NJ 322, LLC and it was delivered to Defendant Menas at Cooper Levenson's office. 394a (77:22-78:1).

At the same time that Defendant Menas was representing Plaintiffs' entity, NJ 322, LLC, in connection with Duncan Farms, he also represented 322 West Associates, LLC, an entity whose managing member was Defendant Menas's longtime friend, Michael Borini. 627a-628a (14:18-19:4); 629a-630a (23:11-25:13); 675a. On May 22, 2006 – the same day 322 West Associates, LLC's Certificate of Formation was filed – WDC, who owned Duncan Farms, entered into an agreement selling Duncan Farms to 322 West Associates, LLC. 90a. Thereafter, on June 29, 2006, based upon the advice and counsel of Defendant Menas, NJ 322, LLC executed an Assignment and Assumption Agreement assigning that Agreement of Sale of Duncan Farms to NJ 322, LLC for $2,140,000.00. 107a. Neither Mr. Surace nor Plaintiff Schwartz negotiated the terms or consideration for the Assignment and Assumption Agreement. 380a (63:18-24).

In early 2007, Plaintiff Schwartz attended a Mayor's Workshop at the behest of Defendant Menas where Defendant Ford presented two proposed development projects in Monroe Township, one for Duncan Farms, and another for a project at "Pork Chop Hill." 326a-328a (9:9-11:22). For the first time, Plaintiff Schwartz learned that Defendant Pulte Homes intended to develop Duncan Farms as a 100%

affordable housing development. 326a-328a (9:9-11:22). That was a completely different project than the market rate rental/commercial development that Defendant Ford had proposed, and that Pulte Homes, NJ 322, LLC, and Plaintiff Schwartz and Mr. Surace had agreed to in May and June 2006. 326a-328a (9:9-11:22). Instead of pursuing that sort of project on Duncan Farms, Pulte Homes proposed to build a 400-unit market rate development at Pork Chop Hill. 563a (147:3-21).

Even as Defendants Menas and Ford were proposing the Duncan Farms project to Plaintiff Schwartz and Mr. Surace as a market rate rental/commercial development, Defendants Menas and Ford were aggressively trying to persuade Monroe Township to re-zone Duncan Farms for affordable housing. 123a-125a (36:19-42:21); 129a (59:22-60:3); 130a (62:13-23). Neither Mr. Surace nor Plaintiff Schwartz were aware of this when they decided to purchase Duncan Farms. 327a (10:17-20); 358a (41:2-13). Pulte Homes needed the rezoning of Duncan Farms to cover the Township's affordable housing obligation so that Defendant Pulte Homes could build the market rate development at Pork Chop Hill instead. 324a (7:22-8-1); 327a-328a (10:15-11:12); 336a (19:13-17); 747a-749a (145:5-149:18).

Plaintiff Schwartz demanded an explanation from Defendant Ford. 326a-328a (9:9-11:22). In response, Defendant Ford argued that he had improved their

Duncan Farms deal because the change from market units to affordable housing units would make Plaintiff Schwartz and Mr. Surace $6 million without having to improve the property as required in the original deal. 340a-342a (23:22-25:1).

Ultimately, in April 2007, Monroe Township approved a Reexamination of the Monroe Township Master Plan that rezoned Duncan Farms for 100% affordable housing. 747a (142:14-144:25). Plaintiffs did not learn about the rezoning until later in 2007 and were not advised by Defendant Ford or Defendant Menas that this rezoning had taken place, thereby denying Mr. Surace and Plaintiff Schwartz the ability to seek to overturn the rezoning. 340a-341a (23:12-24:11).

Despite the bad faith by Defendant Menas and Defendant Pulte Homes, Plaintiff Schwartz and Mr. Surace decided to pursue the affordable housing development on Duncan Farms. a340-341a (23:22-24:11); 337a (20:10-20:21). They intended to build the affordable housing units as the Council on Affordable Housing ("COAH") developer. 337a (20:10-20:21); 340a-341a (23:22-24:11); 343a-345a (26:3-28:5).

In October 2007, Defendant Menas told Plaintiff Schwartz that he had filed a Complaint in Lieu of Prerogative Writ against Monroe Township on behalf of NJ 322, LLC. 335a (18:3-15). Defendant Menas filed that lawsuit without Plaintiff Schwartz or Mr. Surace's knowledge. 335a (18:3-15). Defendant Menas and

Defendant Ford advised Plaintiff Schwartz that this lawsuit was a friendly lawsuit, filed to provide political coverage and to improve their deal. 421a(104:4-9).

Plaintiffs had informed Defendants Menas and Ford that Plaintiffs wished to serve as the COAH developer at Duncan Farms. 337a (20:10-20:21); 340a-341a (23:22-24:11); 343a-345s (26:3-28:5). But Defendants Menas and Ford stonewalled their efforts. 343a-344a (26:19-27:5). Plaintiffs only later learned why: Defendant Ford had secured for MBI (a Defendant in the Amended Complaint whom Plaintiffs later voluntarily dismissed) as early as January 2007 the deal to develop the affordable housing project at Duncan Farms. 915a (22:20-33:19); 938a.

After learning about (a) the change in the nature of the Duncan Farms project, (b) the betrayal of NJ 322, LLC, to MBI, and (c) the unauthorized lawsuit Defendant Menas filed, Mr. Surace wanted nothing further to do with Defendant Menas, Defendant Ford, or the Duncan Farms project. 337a-338a (20:10-21:16). Plaintiff Schwartz, based on the advice, representations, and assurances of Defendants Menas and Ford, continued pursuing the project and bought out Mr. Surace's interest in NJ 322, LLC. 339a-342a (22:21-25:1). Mr. Surace assured Plaintiff Schwartz that he would continue to support him with the project in any way Plaintiff Schwartz needed. 402a (85:7-20); 407a (90:4-20).

Plaintiff Schwartz continued to try to become the COAH developer. 346a-347a (29:5-30:1). In fact, at Plaintiff Schwartz's request, Defendants Ford and Menas arranged a meeting with MBI to discuss the possibility of Plaintiff Schwartz entering into a joint venture with them. 339a (22:6-16); 343a (26:11-16). But nothing came of that meeting. 346a (29:8-13).

Consequently, Plaintiff Schwartz used his own real estate business network to find someone one to help him become the COAH developer. 346a-347a (29:8-30:1). Through this network, Plaintiff Schwartz met Martin Bershtein. 346a-347a (29:8-30:1). Mr. Bershtein is the former Director of the Low Income Housing Tax Credit Division for the State of New Jersey where he oversaw the selection, financing and building of low income housing, primarily COAH housing. 1005a-1006a (9:25-10:11). He subsequently opened a consulting firm that assists developers with obtaining financing and developing COAH projects. 1005a-1006a (9:25-10:11).

Mr. Bershtein met with Plaintiff Schwartz a number of times and testified at his deposition that he could have successfully helped Plaintiff Schwartz obtain the necessary funding to develop Duncan Farms on his own, or that he could have partnered Plaintiff Schwartz with a COAH developer to facilitate the development of Duncan Farms. 346a (29:14-22); 971a-974a (39:3-51:6). Plaintiff Schwartz told Defendants Menas and Ford that he intended to move forward with Mr.

Bershtein and become the COAH developer at Duncan Farms. 346a-347a (29:14-30:2).

But Defendants Menas and Ford refused to play fair with Plaintiff Schwartz. Instead, they persuaded him to forego his involvement with Mr. Bershtein. 347a-a350 (30:6-33:16). They told Plaintiff Schwartz that if he would continue to trust them, they would improve his deal and also provide him with additional real estate opportunities through Defendant Pulte Homes. a347-350a (30:6-33:16).

To convince Plaintiff Schwartz to remain under their sway, Defendants Menas and Ford promised Plaintiff Schwartz that he would receive double the purchase price of Duncan Farms and either retain one-hundred percent ownership of the COAH project after certain restrictions were lifted or, alternatively, own fifty-percent of the development with an individual named John Fendt or MBI. 350a-351a (33:9-34:14). On or about July 30, 2008, Defendants Menas and Ford provided Plaintiff Schwartz with a memorandum confirming those representations. 866a; 434a (119:7-17); 464a-465a (147:22-148:3)

To further entice Plaintiff Schwartz, Defendants Menas and Ford presented Plaintiff Schwartz with an executed Letter of Intent from Pulte Homes pertaining to the Pork Chop Hill market rate development. 311a; 347a (30:6-15); 359a (42:8-11); 463a (146:19-25). According to Defendants Menas and Ford, the Letter of Intent confirmed that Defendant Pulte Homes was going to develop Pork Chop Hill

and that the affordable housing development at Duncan Farms needed to happen in order for the Pork Chop Hill project to move forward. 311a; 347a (30:6-15); 359a (42:8-11); 463a (146:19-25). Plaintiff Schwartz was convinced, and instead of allowing Mr. Bershtein to help him become the COAH developer at Duncan Farms, he continued to follow Defendants Menas and Ford's lead. 464a-465a (147:22-148:3).

Unbeknownst to Plaintiff Schwartz, despite the representations, assurances, and promises from Defendants Menas and Ford, another entity, Monroe Township Development Company ("MTDC"), owned by an individual named John Fendt, had on June 13, 2007 entered into an agreement with MBI to sell them Duncan Farms in 2007. 845a-861a. That agreement was signed without Plaintiff Schwartz's knowledge and while NJ 322, LLC was the contractual buyer of Duncan Farms. 445a-449a (128:12-132:14.) Indeed, the record demonstrates that MTDC did not have any ownership interest in Duncan Farms on June 13, 2007. 445a-449a (128:12-132:14).

Notably, John Fendt and MTDC were represented by Defendant Menas. 564a (149:2-6). Defendant Menas never advised Plaintiff Schwartz that he represented Mr. Fendt or MTDC or that the June 13, 2007 Purchase and Sale Agreement existed. 445a-449a (128:12-132:14).

At different times, Defendant Menas represented MBI, Plaintiff Schwartz and NJ 322, LLC, 322 West Associates, and Mr. Fendt and MTDC. 529a-530a (10:10-13:2); 564a (149:2-10); 567a 164:8-15. On or about March 10, 2009, when MBI still had no interest in Duncan Farms, Defendant Menas filed an application with the Monroe Township Planning Board for the Duncan Farms development on behalf of MBI. 581a (217:17-219:22). Shortly thereafter, Defendants Menas and Ford induced Plaintiff Schwartz into assigning his interest in Duncan Farms to MTDC in order to secure the deal that Defendants Menas and Ford had memorialized in their 2008 memorandum to Plaintiff Schwartz and Mr. Surace. Pa182-Pa188. Plaintiff Schwartz, trusting in his attorney, Defendant Menas, and Defendant Ford, entered into an Assignment and Assumption Agreement with MTDC for $2,000,000.00 on May 7, 2009. 363a-364a (46:23-47:25); 382a-383a (65:19-66:8); 458a (141:8-17).

In 2010, after certain payments were made in accordance with the May 7, 2009 Assignment and Assumption Agreement, MTDC defaulted and ultimately terminated that agreement with NJ 322, LLC. 356a-357s (39:18-4014). Even though the Assignment and Assumption Agreement set forth that Defendant Menas would no longer represent Plaintiff Schwartz or NJ 322, LLC, Defendant Menas continued to advise Plaintiff Schwartz on the Duncan Farms transaction. 449a-452a (132:21-135:19). Indeed, Defendant Menas advised Plaintiff Schwartz that

WDC had provided him with a Notice of Termination if NJ 322, LLC did not consummate the sale with WDC. 449a-452a (132:21-135:19). Plaintiff Schwartz was left "upside down": because of MTDC's default he no longer had a buyer for his interest in Duncan Farms, he could no longer qualify as a COAH developer and had lost his opportunity to develop the project, and WDC was now threatening to hold NJ 322, LLC in default unless it closed on the 2006 Assignment and Assumption Agreement. 353a-354a (36:15-:37:9).

Fearing financial ruin and mentally distraught, Plaintiff Schwartz again relied on Defendant Menas's advice and was forced to negotiate a deal with WDC, under which he conveyed NJ 322, LLC's interest in the property in exchange for $480,000.00. 353a-354a (36:15-:37:9); Pa370-Pa371 (53:20-54:19). The conveyance was made after Plaintiff Schwartz had expended approximately $800,000.00-$900,000.00 in pursuing the Duncan Farms development. 397a-398a (80:1-81:9).

Ultimately, with Defendant Menas serving as counsel, WDC conveyed Duncan Farms to MBI in 2010, completing the transaction that, without Plaintiffs' knowledge, Defendants Menas and Ford had structured years before MBI ever had an interest in Duncan Farms. MBI subsequently developed 132 low and moderate income rental apartments on Duncan Farms. 119a (20:17-20).

POINT I

THE TRIAL COURT MADE NUMEROUS ERRORS OF FACT IN ITS STATEMENT OF REASONS, IMPERMISSIBLY AND INAPPROPRIATELY ACTING AS A REBUTTAL EXPERT TO DR. POWELL AND CONTESTING THE FACTS ESTABLISHED BY BERSHTEIN (1282a-1296a)

The Trial Court made numerous clear errors of fact that require reversal of its decision predicated on those errors of fact. The Trial Court repeatedly acted as though it were the rebuttal expert to Dr. Powell and contested facts established by the deposition testimony of Bershtein, without any expert opinion in the record rebutting Dr. Powell or any facts in the record that contested the testimony of Bershtein. It was neither the role nor in the expertise of the Trial Court to dispute whether Dr. Powell's or Bershtein's factual statements and/or unrebutted expert opinions were correct. Yet, that is precisely what the Trial Court erroneously and repeatedly did.

The following are the Trial Court's errors of fact: "Schwartz's project never materialized..." (1283a); "Dr. Powell's reports and opinions do not account for Schwartz's lack of experience in development. Rather, they ignore it." (1286a); "Those adjectives to which he agreed are appropriate descriptors of the industry demonstrate, beyond peradventure, that experience in such a highly regulated, very complex, competitive industry is important." (1286a); "[A] failure to provide comparisons to other novice businesses may not be fatal to an expert analysis, if

buttressed by other sources of information. But such is not the case here." (1286a); "According to Dr. Powell, Schwartz's lost profit was approximately $4.9 to $8 million – a broad range by any assessment." (1288a); "[I]s a 108-unit project an appropriately scaled project for a novice developer with no experience developing affordable housing? That question was not answered by Dr. Powell, let alone posed. In short, silence." (1288a); "Dr. Powell did not cite to any market data, treatises, articles, or any other independent, third-party information that discussed the circumstances of new businesses generally nor specifically in the context of low-income housing." (1289a); "Dr. Powell implicitly acknowledged he did not consider Schwartz inexperience in development…" (1289a); "Nowhere does Dr. Powell discuss unique problems a novice developer may face." (1289a); "[T]here is nothing in the record indicating that Schwartz ever had a lone conversation with an experienced partner" (1290a); "Any reliance on the involvement of Martin Bershtein was misplaced, as any conversations or communications in that regard were in their infancy, such that any partnerships remained speculative, at best, illusory at worst." (1290a); "[A]t no point does Dr. Powell cite to any facts he relied on to indicate that partnering with an experienced developer was anything more than a makeweight, pipe dream to salvage his speculative opinion." (1291a); "[A]ny conversations between Schwartz and Bershtein were very preliminary…" (1291a); "Dr. Powell's analysis and conclusions fall short of that elevated bar for

new entries into a market – such as Schwartz here seeking to make a first foray into the complex world of affordable housing development." (1292a).

In reality, all of the above statements by the Court were completely erroneous. The Trial Court was effectively "contesting" facts, acting as a rebuttal expert without any authority or expertise to do so, rather than accepting the uncontroverted facts in the record and set forth by Dr. Powell and Bershtein.

From 1993 to 2002, Bershtein worked for the New Jersey Housing Mortgage Finance Agency ("NJHMFA"). 1005a, 8:6-9:8. At first, Bershtein worked in the NJHMFA's Multi-Family Development and Tax Division. 1005a, 8:6-14. Eventually, Bershtein became the Director of the Low-Income Housing Tax Credit Division and the Legal Division. 1005a, 9:9-13. In said capacity, Bershtein recommended the projects to the Commissioner for approval. 1006a, 11:3-5. Thus, Bershtein selected the projects that would go forward, and assisted in getting said projects financed and developed. 1005a-1006a, 9:25-10:6.

Bershtein left the NJHMFA and from 2003 to 2004 worked for Wachovia Bank, in its Affordable Housing Department which financed affordable housing developments. 1006a, 12:11-18. At Wachovia Bank, Bershtein oversaw the financing of all affordable housing developments in which Wachovia Bank decided to participate, through Wachovia Bank's participation in the tax credit scheme in accordance with the IRS code. 1006a, 12:17-3:4. In 2005, Bershtein

went into private practice as an affordable housing development financial advisor, starting the firm of MGB Housing & Tax Consultants, LLC. 1007a, 14:1-4; 14:20. In 2006, Bershtein commenced simultaneously working also for CAPREIT, Inc., starting, and overseeing its national affordable housing division. 1007a, 14:4-19. Bershtein's expertise and reputation as an affordable housing development financial advisor is widely revered by all in the affordable housing industry, both in the public and private sector. 4T, 150:15-23.

During the spring of 2008, Plaintiff Schwartz and Bershtein had several meetings. 4T, 144:12-19; 145:14-16. Bershtein confirmed that since Duncan Farms was rezoned for 100% affordable housing, its development would be a 9% tax credit project. 4T, 146:4-13. Bershtein commenced putting different models together for pursuing the 100% affordable housing project from the application process with NJHMFA, getting the funds awarded, assembling the 9% tax credits investors, and if necessary, finding an affordable housing developer partner. 4T, 146:21-147:10. This is not "lone conversation", nor is this a "makeweight, pipe dream".

Shortly after his meetings with Bershtein, Plaintiff Schwartz informed Defendant Menas of said meetings with Bershtein. Further, Plaintiff Schwartz told Defendant Menas that Bershtein was going to advise and assist Plaintiff Schwartz in obtaining the financing for the development of the affordable housing project on

Duncan Farms. Defendant Menas deterred Plaintiff Schwartz by promising Plaintiff Schwartz multiple lucrative options pertaining to the affordable housing development which Defendant Menas never brought to fruition, yet memorialized same in a Memorandum dated July 30, 2008. Relying on said misrepresentations, Plaintiff Schwartz did not continue with Bershtein.

Just as Bershtein's qualifications and testimony could not be refuted, Dr. Powell's qualifications as damages expert was not and could not be challenged by opposing counsel. Indeed, no rebuttal expert report was ever even provided by Defendants. It was not the Trial Court's role to act as a rebuttal expert. Dr. Powell's experience and reputation as advisor and expert in the development and financing of residential and commercial real estate, including affordable housing, is highly acclaimed and revered. Dr. Powell's work experience spans over 40 years in New Jersey and numerous other states in the region. Dr. Powell was the first Executive Director of the New Jersey Economic Development Authority. 4T, 18:21-22:5. Dr. Powell was and is an entrepreneur in residential and commercial real estate. Also, Dr. Powell for over 10 years, was a partner of DKM Properties, a company involved in real estate development and investments in residential and commercial real estate. 4T, 19:6-14. For over the last 15 years, Dr. Powell is a partner of Nassau Capital Advisors, which advises public and private entities in real estate developments and financing for market rate and affordable housing

developments and provides litigation support as an expert in said fields of expertise. 4T, 19:7-24. To date, Dr. Powell has provided such advisory services to approximately 100 municipalities in New Jersey and other important public entities such as the Port Authority of New York/New Jersey and the New Jersey Department of Community Affairs on Affordable Housing. 4T, 19:25-20:14.

Dr. Powell testified, confirming Bershtein's deposition testimony, which opposing counsel did not and could not contest, that 100% affordable housing developments, such as the subject affordable housing development in this matter, are completely different than residential market rate developments 4T, 24:5-9. The State of New Jersey, as states throughout the country, and the federal government created a regulatory scheme to foster and facilitate the development of affordable housing for low and medium income residents. 4T, 23:23-24:4. Since such developments do not and cannot generate the level of rental income necessary to incentivize the market to invest in the development of affordable housing, the aforesaid federal and state regulatory scheme, including the IRS code, provides a lucrative subsidy incentivizing the development of affordable housing. 4T, 24:5-14.

In New Jersey, such 100% affordable housing developments, at all times relevant to this matter and still now, are financed by the NJHMFA through assigning said developments as 9% tax credit projects and providing both the

construction loan and subsequent permanent loan. 4T, 23:16-24:5. Thus, developers are not required to put any equity, that is money, into the development of a 100% affordable housing project. 4T, 24:5-14.

As Dr. Powell testified, and opposing counsel did not and could not contest, the affordable housing development on Duncan Farms, at the conclusion of the first 15 years of said development, will generate profits, discounted to present value, of $8.2 million. 274a; 4T, 30:8-32:7. Dr. Powell simply calculated the two types of profits generated within said first 15 years of the development. 274a. That is, (1) the developer fee of 15% of the total development costs, and (2) the sale of the project or refinancing of the mortgage after the fifteen-year hold period, as required by the federal and state regulations. 4T, 88:17-92:1.

Dr. Powell, testified that said profits, discounted to present value, would be the profits earned by *whoever* was the developer or developers, whether MBI, Plaintiff Schwartz, or anyone else, novice or not. 4T, 131:4-16. Further, Dr. Powell testified that Plaintiff Schwartz could have developed the affordable housing project on his own or entered into a partnership with an affordable housing developer. 4T, 105:24-106:5. If Plaintiff Schwartz developed the affordable housing project on his own, obviously Plaintiff Schwartz would have received 100% of the profits. 4T, 116:14-21. However, if Plaintiff Schwartz entered into a

partnership with an affordable housing developer, he would have received 60% of the profits 4T, 125:21-125:3.

Further, Dr. Powell testified that the aforesaid range of the percentage of profits Plaintiff Schwartz would have received from the affordable housing development, but for the actions of Defendants Menas and Ford, is also consistent with his many years of experience as an affordable housing development financial advisor to clients undertaking similar affordable housing developments. 4T, 125:7-17. Dr. Powell testified that said range of profits is also consistent with the testimony of Bershtein in this matter. Bershtein testified during his deposition that partnerships between persons and affordable housing developers are not unusual, but rather are often the case. 4T, 141:20-142:24; 146:21-148:7. Moreover, Bershtein testified that in the course of his private practice as an affordable housing development financial advisor, he puts together and structures such partnerships if desired by the first-time "novice" developer who either owns or is the equitable owner of the 100% affordable housing site, or if such a partnership is deemed warranted. 4T,149:25-150:8.

Bershtein testified that upon being informed by Plaintiff Schwartz that Duncan Farms was rezoned for a 100% affordable housing development, he knew it would be a 9% tax credit affordable housing project. 4T, 146:9-14. In fact, the affordable housing project developed on the Duncan Farms was a 9% tax credit

affordable housing project. Bershtein testified that if given the opportunity to serve as affordable housing development financial advisor to Plaintiff Schwartz, Bershtein would have successfully assisted Plaintiff Schwartz through the application process with the NJHMFA and obtained the financing for the affordable housing development. 4T, 146:21-147:10.

Also, Bershtein testified that serving as advisor to Plaintiff Schwartz, if Plaintiff Schwartz desired, he could develop the 100% affordable housing project as sole developer, thus retaining 100% of the ownership of the development and receive 100% of the profits. 4T, 139:3-140:9. On the other hand, if Plaintiff Schwartz desired or deemed it warranted, Bershtein would have put together and structured a partnership for Plaintiff Schwartz with an affordable housing developer. 4T, 140:21-142:22. Bershtein testified that in that instance, he would have structured a partnership, as he had done in other occasions and continues to do so, whereby Plaintiff Schwartz would have retained 60% of the ownership interest of the affordable housing development and received 60% of the profits. 4T, 146:21-148:7; 149:25-150:8.

Again, as Dr. Powell testified, the range of profits Plaintiff Schwartz or anyone else would earn from the affordable housing development on Duncan Farms, whether developing the affordable housing project as sole developer or in a partnership with an affordable housing developer, is consistent not only with Dr.

Powell's many years of experience as an affordable housing development financial advisor to clients undertaking similar affordable housing developments, but is also consistent with the deposition testimony of Bershtein in this matter. 4T, 150:11-16.

As for a partnership, Dr. Powell testified, confirming Bershtein's deposition testimony, that if Plaintiff Schwartz desired or deemed it warranted to enter into a partnership with an affordable housing developer, Plaintiff Schwartz had what was required to attract such a partner. 4T, 146:21-148:7; 149:25-150:8. Having control of the land, said land being rezoned for a 100% affordable housing development, said affordable housing project being a 9% tax credit project, and having the 15% developer fee to be paid on the total development cost, provided both the leverage to Plaintiff Schwartz and a very attractive incentive to any affordable housing developer to form a 60%-40% partnership. 4T, 35:9-36:24.

The Trial Court's misplaced preoccupation with the arguments that Plaintiff Schwartz was not an affordable housing developer, allegedly had no construction or real estate development experience, had no experience in managing affordable housing developments, and allegedly did not have the money to develop the affordable housing project, was nothing more than a disguised "new business rule" ignoring the above-stated realities of 100% affordable housing developments as expertly and irrefutably set forth by Dr. Powell and Bershtein. The Trial Court's erroneous analysis is based on the Court's invention of "facts", inexpert

disagreement with unrebutted experts, imaginary non-issues, and new business rule categorizations which are no longer relevant following termination of the new business rule.

The record is clear that Plaintiff Schwartz paid the required consideration as set forth in the 322 West-NJ 322 Assignment and General Release, thus becoming the equitable owner of Duncan Farms. 274a. The record is clear that Plaintiff Schwartz paid legal fees, other professional fees, property taxes, and governmental fees in pursuit of the real estate transaction and development of the affordable housing project. 274a; 4T, 107:5-7. Also, the record is clear that Plaintiff Schwartz, though a successful entrepreneur in the dry-cleaning business, was also a real estate investor, having among other things, purchased and rehabbed various real estate in Newark, New Jersey. 4T, 70:70-13. However, all these alleged issues of the need of investment capital to develop 100% affordable housing projects, prior construction or affordable housing development experience, management experience of affordable housing developments, are all imaginary issues which have absolutely no application in this matter. The Trial Court erroneously failed to accept these uncontroverted facts established in the record and by Dr. Powell and Bershtein.

The facts are that MBI did not expend $1.00 ultimately to purchase Duncan Farms. 4T, 65:17-22. MBI did not expend $1.00 to construct the affordable

housing development on Duncan Farms. 4T, 65:17-22. The facts are that whatever money MBI expended in pursuing the affordable housing development project – land cost, property taxes, governmental fees, legal fees, other professional fees, and whatever costs expended in reference to the application process for the financing of the affordable housing project and its development – were all covered by the financing provided by the NJHMFA and through the 9% tax credit scheme. This would have been the case irrespective of whoever was the developer, whether MBI, Plaintiff Schwartz, or anyone else, and whether a first-time "novice" developer or an experienced developer. 4T, 65:23-66:18.

The facts are that Dr. Powell's expert report and Bershtein's deposition testimony were never refuted in the record or at the Rule 104 Hearing. Only the Trial Court chose to refute them, without any authority to act as a rebuttal expert and contester of uncontested facts. First, but for the actions of Defendants Menas and Ford, Plaintiff Schwartz could have commenced the application process with the NJHMFA in April/May 2007 upon Monroe Township's rezoning of the Duncan Farms to 100% affordable housing. 4T, 116:4-23. Plaintiff Schwartz, pursuant to the 322 West-NJ 322 Assignment, already had control of Duncan Farms since June 29, 2006. 274a. Second, if Plaintiff Schwartz was not subjected to the actions of Defendants Menas and Ford, and adequately, properly, and timely advised, Plaintiff Schwartz could have commenced, as did MBI, the NJHMFA

application process in mid-2007 with the assistance of an affordable housing development financial advisor such a Bershtein, Dr. Powell, or any other reputable affordable housing development financial advisor, completed the process in 2008 or 2009, and obtained the financing for the affordable housing project, as did MBI. 4T,102:8-104:17; 116:14-23;139:16-143:3. Upon obtaining approval of said financing, Plaintiff Schwartz would have proceeded and obtained the preliminary site approval from Monroe Township. Obviously, said preliminary site plan would have been, as it was for MBI or any other developer, a pro forma exercise, because Monroe Township, which had been terribly incompliant with the State's affordable housing obligation, sua sponte changed the zoning of Duncan Farms to 100% affordable housing in April/May 2007. 4T, 116:14-23.

Third, even if Plaintiff Schwartz in 2007 desired or deemed it warranted to enter into a partnership with an affordable housing developer or for whatever reasons waited until after the aforesaid NJHMFA rule change actually became effective and then entered into partnership with an affordable housing developer having already participated in two prior affordable housing projects, it would still have no effect on Dr. Powell's expert report. 4T, 139:16-142:24. As Dr. Powell opined, also confirming Bershtein's deposition testimony, whether before or after the rule change became effective, Plaintiff Schwartz could have easily entered into a 60%-40% partnership with an affordable housing developer. 4T, 139:16-142:24.

Dr. Powell's opinion as set forth in his expert report on Plaintiff Schwartz' lost profits, is not only within a reasonable degree of certainty, but is, as Dr. Powell affirmed in response to opposing counsel's question, an absolute economic certainty. 4T, 47:19-48:25. Dr. Powell's analysis, as he testified, and as opposing counsel did not and could not contest, was done on the real, certain, actual data and information of the actual affordable housing development. 4T, 33:24-34:22. Therefore, as Dr. Powell testified because Dr. Powell's report is solely based on the analysis of the real, certain, actual data and information of the developed affordable housing project, Dr. Powell's expert report on lost profits damages is not only an opinion of said damages within a reasonable degree of certainty, but is an absolute economic certainty. 4T, 33:24-34:24; 47:19-48:25.

Moreover, Dr. Powell testified that his opinion of lost profits damages is not and cannot be remote, speculative, or uncertain, because it is based on an analysis of the real, certain, actual data and information of the developed affordable housing development and on profit projections utilizing commonly accepted industry and capital market methodology for making such projections of profits, as developers, investors, and the NJHMFA do to determine the value and profits of any 100% affordable housing project. 4T, 24:15-25:22; 33:24-34:22; 47:19-48:25.

Likewise, Dr. Powell testified that based on the irrefutable facts of the peculiarities of the financing of 100% affordable housing developments through

the NJHMFA, Plaintiff Schwartz having control of land and said land having been rezoned by Monroe Township for a 100% affordable housing development, was evidence that Plaintiff Schwartz, if he desired or deemed it warranted, was more than capable of entering into a 60%-40% partnership with an affordable housing developer. 4T, 32:17-33:20; 139:16-142:24.

Further, Dr. Powell testified, confirming Bershtein's deposition testimony, that prior to NJHMFA voting the aforesaid rule change in January 2009, which became effective later in time, Plaintiff Schwartz could have developed the affordable housing project on his own without the necessity of entering into a partnership with an affordable housing developer. 4T, 139:24-140:13. Dr. Powell testified that MBI did not have to expend a dime in developing the 100% affordable housing development on Duncan Farms. 4T, 65:17-22. As Dr. Powell and Bershtein explained, in 100% affordable housing projects, developers, whether MBI, Schwartz, or anyone else, do not need and do not put any money in the development of the affordable housing project. 4T, 61:12-63:1, 64:16-66:24, 79:10-81:1, 81:23-84:25, 124:2-125:20; 1008a-1009a, 18:8-23:2; 1013a, 39:11-40:2; 1013a-1014a, 40:18-43:13; 1015a, 48:11-20; 1015a-1016a, 49:15-50:13. Dr. Powell further explained that developers actually take money out by way of the 15% developer fee as part of the lucrative incentive provided in the development of 100% affordable housing projects. 4T, 66:1-18.

Dr. Powell testified that the lost profits include the 15% developer's fee, paid in two parts. Approximately half is paid at intervals over the construction phase of the development of the affordable housing project, and the other half is paid over the remainder of the mandatory 15-year hold period. 4T, 91:18-92:20. Also, Dr. Powell explained that in addition to said 15% developer fee, Plaintiff Schwartz's lost profits also include, after the mandatory 15-year hold period, profits generated by the sale of the affordable housing development or refinancing of the balance of the NJHMFA mortgage. 274a; 4T, 66:1-18; 91:18-92:20.

Based on the analysis of the real, certain, actual data and information of the affordable housing project submitted by MBI to the NJHMFA to obtain the financing for the affordable housing development, and utilizing commonly used analytic standards and methodology in the industry of affordable housing developments and capital markets by developers, investors, advisors, and the NJHMFA, to determine the value and profits of a 100% affordable housing project, Plaintiff Schwartz's lost profits discounted to present value is $8.2 million. 274a; 4T, 4:15-25:22. Dr. Powell's expert opinion is not only an expert opinion within a reasonable degree of certainty, but based on the uniquely distinct peculiarities of federal and state laws and regulatory schemes regarding affordable housing developments and the unique realities of financing 100% affordable housing developments by and through the NJHMFA, which are diametrically opposite to

market rate real estate developments, Dr. Powell's lost profits damages report is far more than just within a reasonable degree of certainty – it is an absolute economic certainty. 4T, 47:18-48:25.

Dr. Powell did not "ignore" Plaintiff Schwartz's novice status. Instead, Dr. Powell repeatedly explained, with the support of Bershtein's testimony, that Plaintiff Schwartz's novice status simply did not matter. The Trial Court does not have the expertise in low income housing developments to refute this fact, and Defendants did not submit any rebuttal expert report to refute this fact. As such, this fact should have been accepted by the Court and Plaintiff Schwartz's novice status should have been deemed irrelevant. In this unique case, the "newness" of Plaintiff Schwartz's business was irrelevant, as expert testimony and the uncontroverted record established that low income housing developments are routinely developed by first time developers. In this unique case, the factor of the "newness" of the business in determining reasonable certainty whether "preeminent" or just one of the factors to be considered equally, is met on its face, because the expert testimony explained that the newness of the business in this unique context is irrelevant. Dr. Powell's testimony did not "fail" to take into account the newness of Plaintiff Schwartz's business; rather, Dr. Powell explained that the newness of Plaintiff Schwartz's business in this particular enterprise, was immaterial, since any person or entity who owns the land, new business or

otherwise, could have developed the land precisely as Dr. Powell and Bershtein expertly explained. The Trial Court's errors of fact, and the Trial Court's impermissible contesting and rebutting of the uncontroverted facts in the record and established by Dr. Powell and Bershtein, require that the Trial Court's Order barring Dr. Powell's expert report be reversed and the matter be remanded to Law Division for trial.

POINT II

THE TRIAL COURT ERRONEOUSLY BARRED DR. POWELL'S EXPERT REPORT AND GRANTED DEFENDANTS SUMMARY JUDGMENT BY IMPERMISSIBLY CREATING ITS OWN STANDARD AND FAILING TO CORRECTLY APPLY THE STANDARD SET FORTH BY THE SUPREME COURT OF NEW JERSEY (1282a-1296a)

The Supreme Court of New Jersey in Schwartz v. Menas, 251 N.J. 556, 577 (2022), overturned the terribly aged New Business Rule, and reiterated "the general rule under New Jersey law that lost profits may be recoverable if they can be established with a reasonable degree of certainty . . . ." Dr. Powell's expert report on Plaintiff Schwartz' lost profits damages, absolutely establishes lost profits above and beyond a reasonable degree of certainty, because the data and information reviewed and analyzed by Dr. Powell to arrive at his conclusions was not hypothetical data or information from some hypothetical affordable housing development imagined to be constructed on Duncan Farms or a comparison to some other similar parcel of land somewhere else. 4T, 23:13-25:9. Instead, Dr.

Powell reviewed and analyzed the real, certain, actual data and information required by NJHMFA for the processing of the application for financing of the 100% affordable housing development, which was approved. 4T, 33:21-34:9). Thus, said real, certain, actual data and information was not only the data and information upon which the NJHMFA approved the financing of the affordable housing project, but was the same real, certain, actual data and information from which the affordable housing project was soon thereafter actually developed on the Duncan Farms. 4T, 24:10-35:7.

As Dr. Powell testified, in providing his lost profits damages expert report in this matter, he reviewed the real, certain, actual data and information MBI was required to submit in applying to the NJHMFA for the financing of the affordable housing project developed on Duncan Farms. 274a; 4T, 25:10-23. Said data and information, in the record (and which is public information), is data and information that opposing counsel could not refute because it is the actual, certain, real data and information provided by MBI and reviewed by the NJHMFA, in processing MBI's application submitted for financing the affordable housing development, which was approved and permitted MBI to develop the affordable housing development on Duncan Farms. 4T, 23:13-25:9; 33:21-35:7.

Dr. Powell made no assumptions, because none were necessary; he simply analyzed the real, certain, actual data and information provided by MBI, as

required, in its application to the NJHMFA. 4T, 23:13-25:9; 33:21-35:7. This was the same data and information created by MBI and the NJHMFA and utilized by the NJHMFA for its financial analysis and determination of the value and profit of the affordable housing project, evidenced in the NJHMFA's public records. 4T, 33:21-34:9. Dr. Powell analyzed said real, certain, actual data and information, utilizing customary industry analytical standards, and performed customary industry standard projections done for affordable housing projects, in essence verifying the value and profit as projected by MBI and determined by NJHMFA for the 100% affordable housing project developed on Duncan Farms. 4T, 25:4-22.

Yet, the Trial Court erroneously invented a standard that the Supreme Court did not establish. As the Trial Court stated:

> Although the Court did not establish a per se requirement that an expert analysis include an assessment that accounts for the novice status of a new business, patent in the Court's analysis was that consideration of a Plaintiff's novice status was preeminient among the constellation of factors to be determined.

[1285a-1286a].

The Trial Court acknowledged that the Supreme Court did *not* establish a per se requirement that an expert include an assessment that accounts for the novice status of a new business, yet in the same breath impermissibly created a standard that the Plaintiff's novice status is the "preeminent" factor in the Court's analysis. According to the Trial Court, the underlying facts demonstrating that the

novice nature of the new business was irrelevant were not preeminent, expert testimony establishing that the novice nature of the new business was irrelevant was not preeminent, and the circumstances and factual reality were not preeminent. However, the Trial Court did not have authority to invent this standard where the "novice" status of a business is so "preeminent" as to overlook expert testimony explaining that in this particular set of facts the newness of the business was in fact irrelevant. This invented standard effectively acted as the new business rule, erroneously barring Plaintiffs' expert report simply because the business was new, and the Trial Court erroneously ignored the surrounding facts and testimony establishing that the newness of this business in this context was irrelevant.

The Trial Court goes on to acknowledge that "the Court did not require expert comparisons and modeling to similarly situated new businesses in adopting the reasonable certainty standard." 1286a. Yet, in the same breath, the Trial Court held that the absence of comparisons to other novice businesses was fatal here. The Trial Court again acknowledged the lack of a requirement established by the Supreme Court, but then immediately created a requirement. The Trial Court did not have authority to create this standard. Moreover, even if such a standard existed, the Trial Court should have recognized that the facts and expert testimony in the record established that comparisons to other novice businesses were especially unnecessary in this case. As Dr. Powell and Bershtein repeatedly

explained, the newness of the business in these particular circumstances was irrelevant. 4T, 34:17-39:20, 91:23-95:6, 105:5-106:6, 131:4-25, 137:10-138:22, 138:23-143:5, 149:2-151:7; 1008a, 18:8-20:21; 1008a, 20:25-22:9; 1013a, 39:5-20; 1013a, 40:18-42:18; 1014a, 43:7-13; 1014a, 44:23-45:12; 1015a, 48:12-20; 1015a, 49:15-50:13; 1016a, 53:10-54:17. Any person or entity owning the land could have developed the property. That is the uncontroverted testimony of Dr. Powell and Bershtein.

Under the correct standard of reasonable certainty, a Plaintiff's inability to fix its lost profits with precision will not preclude recovery of damages. Tessmar v. Grosner, 23 N.J. 193, 203 (1957). So long as a plaintiff is able to provide reasonably accurate and fair calculations of lost profits, damages are recoverable. V.A.L. Floors, Inc. v. Westminister Communities, Inc., 355 N.J. Super. 416, 424 (App. Div. 2002). Failing to calculate damages with precision does not bar recovery of lost profits, and it would be a "travesty to deny a Plaintiff essential justice because the absence of means for precision precludes perfect justice." Id. at 427 (quoting Am. Sanitary Sales Co. v. State, Dep't of Treasury, Div. of Purchase & Prop., 178 N.J. Super. 429, 435 (App. Div. 1981)). Indeed, where there is uncertainty as to lost profits, fairness dictates that the uncertainty be laid "at the door of the wrongdoer who altered the proper course of events instead of at the door of the injured party." See id.

Here, Plaintiffs' lost profits are far beyond merely "reasonably certain" because the development they were prevented from developing exists in the same way it would have, had they been allowed to develop the project. Thus, Dr. Powell's expert report calculates Plaintiffs' lost damages with reasonable certainty, and more. Indeed, Judge Weiss had specifically held so not once, but twice. In his August 21, 2018 ruling denying summary judgment, Judge Weiss concluded that Dr. Powell "uses sound fact when compiling his report as such calculations take into account the various changes in development e.g. affordable housing and age restricted requirements along with objective factors e.g. estimates of cost, capital structure, sales prices and rental rates." 238a. Judge Weiss then reaffirmed that ruling in denying reconsideration. 306a-307a.

Indeed, Judge Weiss held that:

> Loss of profits, where based on sound fact and not on mere opinion evidence without factual support, is recognized as a proper measure of damages if capable of being estimated with a reasonable degree of certainty. Id. In the instant matter, the court is satisfied that Mr. Powell uses sound fact when compiling his report as such calculations take into account the various changes in development e.g. affordable housing and age restricted requirements along with objective factors e.g. estimates of cost, capital structure, sales prices and rental rates. For these reasons, the court is satisfied that such opinion does not constitute a net opinion.

Judge Weiss analyzed the expert report and made a decision on the merits that it satisfied the reasonable certainty test. Absent Defendants' wrongful conduct,

Plaintiffs would have constructed and developed the market rate development originally proposed by Defendants Pulte Homes and Ford. Plaintiff Schwartz would have been in a construction business, focusing on residential construction, with Mr. Surace and/or for the affordable housing development with the assistance of Bershtein[2] supplementing Plaintiff Schwartz's own experience and expertise in real estate development.

Plaintiff Schwartz had rehabilitated a number of residential real estate properties and had successfully sold them. 272a (Interrogatory #65); 988a (40:2-14); 407a (90:4-9). In fact, Plaintiff Schwartz had built a number of two-family homes and developed eight other rehabilitated properties. 272a (Interrogatory #65); 988a (40:2-14); 407a (90:4-9). It was a natural segue for him to incorporate into his existing business the construction and sale of the proposed low and moderate income housing development on the Duncan Farms.

At bottom, residential development and construction is residential development and construction. The notion that because low and moderate income housing development and construction is subject to different regulations, such as those of COAH it is a different business than other residential development and

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[2] Mr. Bershtein testified that he had successfully counseled and assisted developers who had less experience than Plaintiff Schwartz in developing affordable housing projects, and that he would have helped Plaintiff Schwartz develop the affordable housing project at Duncan Farms. 1010a (29:14-22); 1013a-1016a (39:3-51:6).

construction is without merit. Every municipality has its own zoning code, design specifications, and engineering review process, but that does not make a project in a new municipality into a new business for an experienced developer.

Nor does the fact that Plaintiff Schwartz acted through a new entity, NJ 322, LLC, created by Mr. Means, through which to perform this project, have any relevance in the reasonable certainty analysis. It is routine for even the largest, most experienced developers to create a new entity for each job, for liability or other reasons. The presence of a new development entity does not diminish the reasonable certainty of lost profit damages.

The Law Division's decision slices and dices businesses, especially in the construction and real estate development fields, too finely, and will lead to irrational and unrealistic results. In addition, the Law Division's decision has serious public policy ramifications – it may shield parties who engage in unscrupulous business practices by stripping victims of their right to recover damages. Parties will be encouraged to contrive immaterial "differences" between a prior business and a "new" one in order to label a business "new" and thereby defeat an otherwise meritorious damage claim, despite the fact that newness of a business in this particular context is irrelevant. The Trial Court's error essentially resurrects the buried new business rule disguised as a reasonable certainty test. The Trial Court erroneously obsessed on the novice nature of Plaintiffs' business

despite uncontroverted facts in the record and the expert testimony of Dr. Powell and Bershtein establishing that the novice nature of Plaintiffs' business was irrelevant in this context. There is no doubt that the Trial Court barred Dr. Powell's expert report for no other reason than the Trial Court's belief that Plaintiff Schwartz was engaged in a new business, while completely ignoring the testimonies of Dr. Powell and Bershtein establishing that the newness of a business in low income housing development is completely irrelevant.

In addition, in failing to determine that Plaintiffs' lost profits could be calculated with reasonable certainty, the Law Division did not recognize that the calculation of damages is a question for the jury and that courts permit considerable speculation by the trier of fact as to damages. V.A.L. Floors, 355 N.J. Super. at 424. This legal error calls for reversal of the decision below. Above all, the Trial Court's invention of a standard, its invention that the novice status of a business is the "preeminent" factor, its failure to apply the uncontroverted facts in the record and in the testimony of Dr. Powell and Bershtein establishing that the novice status of the business in this context was irrelevant, and its failure to apply the standard as simply set forth by the Supreme Court of New Jersey, was fatal and reversible error.

The Supreme Court in Schwartz v. Menas, 251 N.J. 556 (2022) stated:

> If the trial court determines that Plaintiffs' lost profits evidence is sufficient to establish their claim for damages with reasonable certainty

> despite Plaintiffs' inexperience in developing housing, it should deny Defendants' motions to bar the evidence and for summary judgment.

[1279a].

Here, since the uncontested testimonies of Dr. Powell and Bershtein established that Plaintiffs' alleged inexperience in developing housing was irrelevant in the particular context of low income housing development, Plaintiffs' lost profits evidence should have been deemed sufficient to establish their claim for damages with reasonable certainty. In other words, the factor of "Plaintiffs' inexperience in developing housing", whether "preeminent" or not, was met on its face when Dr. Powell and Bershtein repeatedly established that such inexperience was totally irrelevant in this particular context. As such, the Trial Court's error should be reversed and the case should be remanded to the Law Division for trial.

POINT III

THE TRIAL COURT ERRED BY NOT PERMITTING MARTIN BERSHTEIN TO TESTIFY AT THE RULE 104 HEARING (4T, 14:7-8)

The Trial Court completely ignored the deposition testimony of Bershtein which was placed on the record during the Rule 104 Hearing and with which Dr. Powell appropriately and permissibly supported certain conclusions in his expert opinion. The Trial Court erred by not permitting Bershtein to testify at the Rule 104 Hearing to answer questions and clarify issues which the Trial Court's decision evidently missed or misunderstood, and its error was exacerbated when

the Trial Court sua sponte rejected the facts set forth in Bershtein's deposition testimony. The Trial Court made layers of error with respect to Bershtein. The Trial Court erroneously barred Bershtein from testifying, then erroneously ignored Bershtein's deposition testimony, and at times outright rebutted the facts set forth in Bershtein's deposition testimony as if the Trial Court were a rebuttal witness equipped with the expertise to even attempt to rebut Bershtein's deposition testimony. Respectfully, the Trial Court had neither the legal authority nor the expertise in the field of affordable housing development to effectively rebut the deposition testimony of Bershtein. These actions and decisions by the Trial Court are erroneous and should be reversed.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that this Court should reverse the decision of the Law Division excluding the testimony of Dr. Powell and granting summary judgment to Defendants, and remand the matter for trial.

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