NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0365-10T3

DAVID S. MATHIESEN and AIR MODS
AND REPAIR, INC.,

Plaintiffs-Appellants,

v.

DAVID MOLESKI, ROBERT COAKLEY,
SPIRIT FLIGHT AIRWAYS, INC.,
and ONE 1974 CESSNA 421B,
N317AM, S/N421B0565,

Defendants/Third-Party
Plaintiffs-Respondents,

v.

JAMES WALL,

Third-Party Defendant.

Argued: March 30, 2011 - Decided: August 12, 2011

Before Judges Axelrad and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-335-08.

John J. Novak argued the cause for appellants.

Scott W. Kenneally argued the cause for respondents (Starkey Kelly Bauer Kenneally &

Cunningham, attorneys; Mr. Kenneally, on the brief).

PER CURIAM

Plaintiffs David Mathiesen and Air Mods and Repair, Inc. (Air Mods), an airplane repair business and its owner, filed suit against defendants, David Moleski, Robert Coakley, Spirit Flight Airways, Inc., and One 1974 Cessna 421B, N317AM (Cessna) for collection of an outstanding repair bill. Both parties obtained verdicts in their favor from the jury. Plaintiffs appeal from the court's denial of their motion to dismiss defendants' counterclaim asserting violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and the resulting verdict in defendants' favor on their counterclaim. We affirm.

I.

On February 27, 2008, plaintiffs filed an amended complaint against defendants alleging breach of contract in failing to pay the outstanding debt of $19,516.36 for repairs and maintenance on the Cessna. Defendants Moleski and Coakley filed an answer and counterclaim disputing the amount sought to be collected and alleging violations of the CFA. Moleski and Coakley also filed a third-party complaint against James Wall, seeking damages for his alleged removal of certain items from the Cessna. Plaintiffs filed an answer to the counterclaim.

In April 2009, the parties entered into a consent order permitting plaintiffs and Wall to join Asset Recovery Services (ARS) as a fourth-party defendant. Plaintiffs' and Wall's amended answer included a fourth-party complaint against ARS for contribution and indemnification.[1]

Following arbitration, defendants filed a demand for a trial de novo. The matter was tried by a jury on the issues of the breach of contract and the counterclaim for violations of the CFA. After defendants rested, plaintiffs moved to dismiss defendants' counterclaim, which the court denied. The jury returned a verdict in favor of plaintiffs in the amount of $19,516.36 on their breach of contract claim and in favor of defendants in the amount of $20,785.13 on their counterclaim for violations of the CFA. By order of September 8, 2010, the court entered final judgment, trebling defendants' award in accordance with the CFA, N.J.S.A. 56:8-19,[2] and reducing it by plaintiffs'

---

[1] By order of November 19, 2009, ARS was permitted to be served by publication, and by order of December 1, 2009, ARS was dismissed from the litigation for lack of prosecution.

[2] N.J.S.A. 56:8-19 provides, in relevant part:

> In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section . . . the court shall also award reasonable

(continued)

award for a net award of $42,839.08. Additionally, the court awarded defendants reasonable attorneys' fees and costs of $34,603.95 pursuant to the CFA, N.J.S.A. 56:8-19, resulting in a final judgment in favor of defendants and against plaintiffs in the amount of $77,443.03. Plaintiffs appealed.

II.

The following facts were presented by testimony and evidence at trial. Mathiesen presented his case for collection of the bill. Moleski and Coakley took the position no payment was due, and presented their counterclaim for violations of the CFA alleging unconscionable commercial practices in connection with the repair and overcharges relating to the Cessna and the collection tactics for the outstanding bill and illegal conversion of the plane's radio and log books.

Mathiesen is an aircraft mechanic and owner of Air Mods, an aircraft maintenance shop located in Robbinsville, New Jersey. Coakley's Cessna was stored in Florida but was brought to Air Mods in New Jersey for mandated annual inspections beginning in 2004. According to Coakley, the annual inspection

---

(continued)

> attorneys' fees, filing fees and reasonable costs of suit.

costs on the Cessna were generally between five and eight thousand dollars.

Moleski, Coakley's pilot, delivered the plane to Mathiesen for the annual inspection in early 2007. According to Mathiesen, when Moleski dropped off the plane for the inspection, he asked whether there were any areas he should focus on and Moleski told him "'the auto pilot is flaky'" but it worked. Moleski testified that he was not aware of anything wrong with the plane and simply asked Mathiesen to perform an annual inspection. Mathiesen was aware the Cessna was being sold.

Moleski was never given a written estimate of the work and his expectation was that the cost would be "four, five, six, eight thousand, tops." Moleski explained that he stopped by about four times as Mathiesen was working on the plane and the last time he was there, it appeared Mathiesen was doing additional work so he asked what would be the amount of the bill. According to Moleski, the response was, "Well, it's up there. It's fifteen thousand. . . . But we're doing this, and this, and this."

A week later, Moleski picked up the plane and discovered the auto pilot was not functioning properly so he returned the plane for repair and picked it up a few weeks later. Moleski

received a bill by mail in the interim totaling $31,143.51 and was "shocked" by the amount. When Moleski picked up the plane around April 2007, Mathiesen handed him a bill for the additional work performed on the auto pilot in the amount of $3,372.85. According to Moleski, the auto pilot was still not working properly, and Mathiesen tried to fix it until Moleski said he had to leave for Florida and took the plane "as is."

Mathiesen testified he handed the initial bill to Moleski who he acknowledged was "shocked" by the amount. According to Mathiesen, Moleski said he would have Coakley write him a check; Moleski denied he made that promise. Coakley wired Mathiesen $15,000 in June 2007, and according to Mathiesen, said he "would have to get the balance out of [] Moleski." Coakley denied the statement; he testified he told Mathiesen he was under the impression the bill would not exceed $15,000, and he thought the bill was egregious because he had no quotes, no bids, was never informed "this amount of work was being done on the aircraft[,]" and certain parts of the aircraft were still not working properly. Coakley said he would not pay the balance and heard nothing for about five months.

Mathiesen testified he was then referred to ARS by Wall, an acquaintance in the construction demolition business. Mathiesen understood ARS "repossessed construction equipment"

and was "very effective at collecting money." In October 2007, he told someone at ARS[3] he was owed money on an invoice, provided information on the Cessna, and agreed to pay fifty percent of what was collected.

Moleski then received a call on his cell phone from someone who identified himself as "Vito"[4] who told him to check his plane because the caller had his radios and log books, which would be returned when he paid the money he owed. Moleski confirmed that the items were missing from the Cessna. Mathiesen phoned while Moleski was with the police and insurance adjuster and "started mentioning something about the bill," to which Moleski responded that someone had broken into the plane and he was busy. A few minutes later, "Vito" called Moleski and said, "this is not a theft. This is an asset recovery. And when you pay Mathiesen his money, you get your radios and log books back. I'll talk to the police, I'll talk to anyone, I'll talk to the insurance company."

Moleski then began working with the FBI. Moleski testified that he asked Mathiesen in a phone conversation when he "start[ed] stealing things out of airplanes as part of your

[3] ARS did not have an address and the phone number that Mathiesen called was an untraceable cell phone number.

[4] "Vito" was never identified; Coakley suggested at trial that "Vito" was Wall.

normal business[,]" to which Mathiesen responded, "I didn't steal anything. I paid someone to do it." Pursuant to instructions from the FBI, Moleski requested pictures of the equipment and log books from Mathiesen. According to Mathiesen, he, in turn, demanded proof from ARS that the collection company had the items, and received, in his mailbox, pictures depicting the radios and log books with identifying serial numbers, which he emailed to Moleski on December 4, 2007. Mathiesen testified that after he received the pictures, he was told by "Vito" that if the bill were paid, the property would be returned. On cross-examination, Mathiesen acknowledged that in November and December 2007, he continued to demand payment from defendants for the balance of the invoice in exchange for return of the stolen items.

Moleski explained that he and Mathiesen then planned a meeting in January 2008 to exchange the items for $19,000, which never occurred. Mathiesen eventually got possession of the radios and log books by purportedly paying ARS $7,500 pursuant to instructions from "Vito," which he claimed he paid by way of an envelope full of cash. Mathiesen's attorney delivered the stolen items to the prosecutor's office in July 2008. In August 2008, Mathiesen pled guilty to third-degree conspiracy and theft by failure to make required disposition of property received,

N.J.S.A. 2C:5-2a(1), N.J.S.A. 2C:20-9.[5] The jury was not informed that Wall was criminally charged with extortion and related offenses and entered pretrial intervention.

Coakley testified that he had a contract for sale of the Cessna in February 2007 for $235,000. According to Coakley, the sale could not close in July because the auto pilot was not working properly, it was then delayed until November, but could not be consummated because of the missing equipment, and the contract was ultimately revoked. The Cessna was sold to another purchaser in early 2010 for $150,000. Coakley testified that he incurred hangar storage charges of $798 per month from November 2007 through February 2008 ($3192) and then moved the Cessna outside and incurred reduced storage charges of $132 per month to the date of sale. He also testified to insurance premiums he paid on the Cessna from December 2007 through January 2010, annual inspection costs for 2008 and 2009 and additional costs

[5] Only the transcript of the allocution was presented on direct testimony of Mathiesen as his prior sworn statement, in which he acknowledged hiring services of an outside source to collect a debt but claimed he did not do anything wrong that he knew of. He acknowledged speaking with them on numerous occasions and they alerted him to their possession of radios and log books from the Cessna and he had calls from Moleski requesting the return of the items. However, even though Mathiesen did not actually possess those items, he admitted he conspired with the collection agency "to not have those items returned unless and until [his] bill was paid" and thus "for a period of time [he] conspired with another to not make proper disposition of the radios and log books because [he wasn't] paid [his] bill[.]"

for parts, and insurance proceeds he received. In summation, defense counsel calculated the approximate damages at $125,673.

At the close of defendants' case, plaintiffs moved to dismiss the CFA claims, arguing Mathiesen's conduct regarding collection of the debt was outside of the scope of the CFA.[6] The court denied the motion, finding payment of the bill was part of the initial transaction -- it was "not separate and apart" and "d[id]n't enjoy individual status." Rather, it was "all part and parcel of the . . . annual and any repair done on the plane." The court elaborated:

> [I]f [the jury] find[s] that [Mathiesen] used the situation to coerce [] Coakley into paying a bill, then I think it could definitely be considered an unconscionable practice at the very least, not to mention a host of other violations of the Statute, certainly a shar[p] practice. And again the [CFA] has to be read broadly.

In charging the jury on the CFA, the court framed defendants' CFA allegations as follows:

> The defendants here claim that plaintiffs committed what is commonly known as a consumer fraud when plaintiffs charged defendants in excess of $15,000 for the repair and inspection services on the airplane and with respect to plaintiffs' involvement in the theft of the log books and the radios from the defendants' personal airplane. The Consumer Fraud Act says that

[6] Plaintiffs' written motion to dismiss contained in our appendix solely addressed the collection of the debt.

anyone who engages in an unconscionable commercial practice is chargeable with consumer fraud. Specifically defendants charge that the plaintiffs allegedly used by means of affirmative []acts an unconscionable commercial practice and misrepresentation in connection with charging for the inspection and repair of defendants' airplane without an estimate and in the subsequent activity with respect to plaintiffs' involvement in the collection of the balance of the bill.

The court next gave the model jury charge on the CFA, 4.43, including the elements of a CFA claim, specifically an unconscionable commercial practice, causation, and damages. With respect to trebling of damages and attorneys' fees, the judge instructed the jury:

If you find that the [CFA] was violated and you award damages, you should understand that the law requires me to triple whatever amount of damages you award. This is because the [CFA] is punitive in nature and the tripling of your award is meant to punish the defendant. I'm sorry. The plaintiffs. It gets confusing when there's a counterclaim.

In addition, should you award damages to the defendants, the law also requires me to compel the plaintiffs to pay whatever reasonable attorneys' fees defendants incurred in bringing their counterclaim. I will determine at a later time the reasonable amount of attorneys' fees, should this be the case.

[Emphasis added.]

Neither party objected to the jury instructions.

The jury was provided the following verdict form pertinent to the issues on appeal:

> . . . .
>
> 5. Do you find by a preponderance of the evidence that [] Mathiesen committed any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation against defendants?
>
> Yes _____ No _____ Vote ___ - ___
>
> Proceed to Question #6
>
> 6. Do you find by a preponderance of the evidence that Air Mods and Repair, Inc., committed any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation against defendants?
>
> Yes _____ No _____ Vote ___ - ___
>
> If your answer to Question #5 and/or Question #6 is "Yes," go to Question #7. If your answer is "No" for both questions, cease your deliberations and return your verdict.
>
> 7. Did defendants suffer any damages as a result of the conduct in question 5 or 6?
>
> Yes _____ No _____ Vote ___ - ___
>
> If your answer to Question #7 is "Yes," go to Question #8. If your answer is "No," then cease your deliberations and return your verdict.
>
> 8. Please state the amount of monetary loss suffered by the defendant.
>
> $ ___________ Vote ___ - ___

Several hours into deliberations, the jury asked: "[d]oes a yes to question five and/or question six automatically require the plaintiff to pay the defendants['] attorneys' fees?" The following colloquy ensued:

> [Defense counsel]: The technical answer is no.
>
> The Court: Why not?
>
> [Defense counsel]: Because they have to answer yes to five or six and then seven.
>
> The Court: Seven, right.
>
> [Defense counsel]: And theoretically eight, if I'm looking at the questions right.
>
> The Court: What do you think?
>
> [Plaintiffs' counsel]: Judge, I think that if they answer five or six in the affirmative and there's no damages, then I don't that it triggers the CFA. If the Court is of like mind with me, then I agree with [defense counsel]. Not to split the hair too finely, but it could be almost like a Civil Rights case where one penny in damages award is awarded or one dollar in damages, as now is the custom, and enormous legal fees. There's the situation that is so delicate.
>
> The Court: So neither of you are aware of any cases which hold that if there's a CFA violation, that attorneys' fees are recoverable even in the absence of an ascertainable loss, I'll say.

[Plaintiffs' counsel]: Respectfully, maybe I could save us all time. If it's [defense counsel's] position on behalf of his respective clients that in the absence of damages he will not seek attorneys' fees, then all of this would be moot.

[Defense counsel]: Correct. In the absence of an award on number eight, that would be my position.

The Court: Ok. Good enough.

. . . .

So this is what I'll do. I'll instruct them that in the absence of an affirmative response - - is that how you want to put it - - or in the absence of an amount being entered - -

[Plaintiff's counsel]: How did they pose the question? Did they pose the question predicated on if they answer yes to five or six?

The Court: Well, the answer to their question is no, it doesn't automatically - -

[Defense counsel]: Technically the answer is no.

[Plaintiffs' counsel]: So why don't we just say that then? And I would rely upon [defense counsel's] representation - - and I think it's a fair one.

[Defense counsel]: Could you read the question again, Your Honor?

The Court: Sure. "Does a yes to question five or six automatically require the plaintiff to pay the defendants' attorneys' fees?"

[Defense counsel]: The answer is no.

> The Court: Okay. Because if they answered it yes - -
>
> [Plaintiff's counsel]: Yes, but no damages, then [no] attorneys' fees.
>
> The Court: Right.
>
> [Defense counsel]: There's a whole bunch of permutations as to why I wouldn't necessarily be awarded attorneys' fees.
>
> The Court: All right. Okay. So the answer to the question is no, and that's what I'll tell them.
>
> [Plaintiffs' counsel]: Thank you, Judge.

When the jury was brought in, the judge read the question and said "the answer is no." Fifteen minutes later, the jury reached its verdict, finding the parties entered into an agreement for an inspection and related repair services on the plane, defendants breached the agreement by failing to pay the remainder of the bill, and plaintiff suffered damages. The jury answered question #4 as to the amount of money which would fairly compensate plaintiffs for their damages as $19,516.36 with a handwritten notation in parentheses that "each party pays own attorney." The jury also found in favor of defendants on the CFA claims (questions #5-7), finding the amount of monetary loss suffered by defendant (question #8) to be $20,785.13 with a similar handwritten notation in parentheses that "each party

pays their own attorney." The jury was polled to confirm this was their intention, which was so confirmed.

Plaintiffs' attorney expressed a concern at sidebar. The court noted the jury did not decide the question pursuant to the instructions, which were that if it made an award under the CFA, the court would award the statutory attorneys' fees. The court offered to do one of two things:

> I can either explain to them that this is contrary to the instructions I gave them and send them back to deliberate and explain to them that the jury instruction is that if they find an award on seven, I must award attorneys' fees, if that would change their verdict at all. But I don't know if that's fair.

Plaintiffs' counsel commented, "It's not fair to me," and urged "if there was ever a jury verdict that begged for judicial intervention, this would have to be" it, especially since the judge was "the one that's going to be stuck with this."[7] Defense counsel argued it was inappropriate to send the jury back in to re-deliberate after it reached a verdict on an issue that was not a question of fact. Plaintiffs' counsel responded that the jury had "not reached a verdict on number eight because the

[7] The court retorted, "[n]o I'm not. The Appellate Division is going to be stuck with this. Not me." We understand that comments are sometimes made in the heat of trial; however, we expect trial judges to address issues that arise during trial to the best of their abilities and to refrain from such flip and injudicious comments.

answer" was not in accordance with the charge or interrogatories. The court disagreed and discharged the jury.

Plaintiffs then moved for judgment notwithstanding the verdict, "[a]nd/or to mold and shape the Judgment to conform with the verdict." The judge noted that both parties agreed to answer "no" to the jury's question, and observed that the award of attorneys' fees "really wasn't up to [the jury]. The fact that they might not have wanted the plaintiffs to pay the defendants' attorneys' fees is really of no moment." The judge explained that she did not "have the authority and power to mold the verdict" in this situation because "the law compels [her] to add attorneys' fees." Consequently, this was a situation where there was "no discretion" to "mold" the judgment. The judge thus left the verdict undisturbed. After defense counsel submitted a certification of services, final judgment was entered against plaintiffs in the amount of $77,443.03, and this appeal ensued.

III.

On appeal, plaintiffs argue: (1) the CFA does not apply to collection of a debt and, alternatively, (2) the court erred in failing to adequately clarify the jury charge when the jury demonstrated confusion about the charge and returned a verdict inconsistent with the charge. In their reply brief, plaintiffs

contend the court found the CFA did not apply to written estimates. They also argue, for the first time, that where a conflict exists between the Fair Debt Practices Act and the CFA, the CFA does not apply.

We first dispose of the issues raised in the reply brief. Plaintiffs accuse defendants of inaccurately representing to us "that the [c]ourt found that the [CFA] applies because the Plaintiffs did not provide Defendants with a written estimate." Plaintiffs, however, not defendants, misstate the court's holding and inaccurately cite to statements made by the court during the initial colloquy on the motion that were not the court's ultimate holding.

As aforestated, plaintiffs' written motion, which was filed on the eve of argument, only dealt with a challenge to the application of the CFA to Mathiesen's collection of the debt. The colloquy evolved into considerable discussion regarding both aspects of defendants' CFA claim. The judge then took an approximately forty-five minute recess, presumably to perform additional research and, upon further reflection, modified her prior ruling. This was well within the judge's discretion to do and she provided ample explanation for her ultimate ruling.

It is clear from a reading of the entire transcript of August 10, 2010, including the judge's ruling on the motion and

her subsequent jury charge, that directly contrary to plaintiffs' representations in their reply brief, the judge did, in fact, hold that the CFA applied in connection with plaintiffs' charging for the inspection and repair of defendants' airplane without an estimate and charging in excess of the $15,000 allegedly quoted to Moleski. As previously discussed, and challenged by plaintiffs, she also held it applied to plaintiffs' involvement in the collection of the balance of the bill.

The judge found Hyland v. Zuback, 146 N.J. Super. 407 (App. Div. 1976), to be on point. In Hyland, we found the failure to present a written estimate to the owner of a boat and the failure to inform of the labor charge overrun, coupled with an ultimate bill substantially higher than the initial verbal quote was a violation of the CFA. Id. at 414-15. In explaining her ruling, the trial judge stated, in pertinent part:

> The actual unconscionable practice which was identified in the Hyland opinion was the failure to inform the consumer of the repair cost overrun, which would be, I would say, precisely the allegation in this case.
>
> . . . .
>
> [Moleski] testified that he delivered the plane and had a conversation with [] Mathiesen to do the annual, it would be four, five, six, or eight thousand dollars tops. . . . he had been back to the repair shop on numerous occasions . . . there was

more and more work being done and it was $15,000 the last time he was there. A week or so later he picked up the plane . . . and he took it back because the auto pilot wasn't working properly. And eventually when he saw that the bill was [$]31,000, he was shocked.

So I would say that looking at the facts most favorable to the non-moving party on this motion, which would be the defendants . . . the allegation is that the failure to inform the consumer of the repair cost overrun is what would form the basis of the applicability of the consumer fraud claim.

. . . .

Well, in this case we did not have what I will say a preliminary estimate. The defendant, neither [] Coakley or [] Moleski was given an estimate that this is what it's going to cost. However, [] Moleski testified that he thought that it would be eight, tops when he dropped the plane off to do the annual. So while it wasn't in writing, he testified that he thought it was going to be - - and I'm using his words - - eight, tops to do the annual. And then he realized from stopping in and the plane not being returned, I guess, in a quick fashion that more work was being done. And at that time he says the last time he was there he was told it was going to be fifteen. So there's a factual basis, frankly, for why [] Coakley paid the fifteen, and it's based on [] Moleski's conversation with [] Mathiesen when he was there.

Now, what complicates this case is the fact that the parties did have a history of dealing with each other in a certain way and, frankly, that history was that generally [] Mathiesen did the work and [] Coakley paid the bill. What made this

> situation unique is that [] Coakley intended to sell the plane, and that's something [] Mathiesen knew. What is a factual difference that I certainly can't resolve is why it was that [] Mathiesen, knowing that [] Coakley wanted to sell the plane, did even more work beyond the fifteen. Did he do it because he wanted to get the plane up to every single standard that there could be? Did he do it because he felt that all the work had to be done because of safety standards? I don't know. But I never heard [] Mathiesen say that he ever gave [] Moleski a revised estimate of what it would cost. He only presents him later with a $30,000-odd bill.
>
> So looking at these facts in a light most favorable to the non-moving party, I find that the jury should be charged on the issue of the Consumer Fraud Act.

Plaintiffs did not challenge this ruling on appeal. We discern no legal error by the court in applying the CFA's broad policy against commercial deception expressed in the case law that includes, for example, failure to "give estimates in writing free of false promises designed to induce [customers] to authorize repairs" and "lulling" a customer "into a false sense of calm concerning what the job would actually cost." See id. at 410, 415.[8]

---

[8] We note that defendants relied on the case law interpreting N.J.S.A. 56:8-2, not on the administrative regulations contained in N.J.A.C. 13:45A-23.2 and -26C.2, pertaining to deceptive practices involving watercraft and automotive repairs, respectively. Both regulations enumerate deceptive practices but expressly provide they do not "limit[] the prosecution of (continued)

With regard to plaintiffs' Fair Debt Collection Practices Act argument, this issue was also addressed by the court in its ruling on the CFA motion, and was not challenged on appeal by plaintiffs. Plaintiffs cannot bring up a new issue or argument in a reply brief. See R. 2:6-5; Warren Twp. v. Suffness, 225 N.J. Super. 399, 412 (App. Div.), certif. denied, 113 N.J. 640 (1988). Accordingly, we will not address this issue.

We turn now to plaintiffs' argument that the court erred as a matter of law in applying the CFA to the theft of the log books and radios because of the purported inapplicability of the CFA to the collection of a debt. We recognize that we owe no "special deference" to a "trial court's interpretation of the law and the legal consequences that flow from established facts" and decide the issue de novo. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Nonetheless, based on our independent review of the record and applicable law, we find plaintiffs' arguments on this issue to be unpersuasive in view of the unique facts of this case and thus are not convinced the trial court committed a legal error warranting our intervention.

The CFA provides, in pertinent part:

(continued)
any other practices which may be unlawful under the [CFA]." The lack of a separate regulation for aircraft repairs does not remove that industry from regulation under the CFA.

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale . . . of any merchandise . . . or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [N.J.S.A. 56:8-2 (emphasis added).]

The CFA defines "merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c). It is clear defendants are consumers meant to be protected by the CFA even under the most basic definition because they are "individual purchasers." See Papergraphics Int'l, Inc. v. Correa, 389 N.J. Super. 8, 12 (App. Div. 2006).

Plaintiffs rely on Joe Hand Promotions, Inc. v. Mills, 567 F. Supp. 2d 719 (D.N.J. 2008), to support their contention that the CFA is inapplicable to the theft of the airplane equipment. In Joe Hand, the plaintiff mailed the defendant a letter threatening to file suit if the plaintiff was not paid for the defendant's use of a television program to which plaintiff had an exclusive license even though the defendant had purchased the program from the plaintiff's agent. Id. at 721. The District

Court found the CFA did not apply to the defendant's claim because the plaintiff's wrongful threat "did not induce [the defendant] to purchase anything. . . . Thus, the fraudulent conduct alleged was not done 'in connection with' the sale or advertisement of merchandise[.]" Id. at 723-24.

Plaintiffs' reliance on Joe Hand is misplaced for two reasons. First, "a federal court's decision on a question of New Jersey law is not binding on any court in this State." Pressler & Verniero, Current N.J. Court Rules, comment 3.5 on R. 1:36 (2011); see also Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 80 (1990), Shaw v. City of Jersey City, 346 N.J. Super. 219, 229 (App. Div.), rev'd on other grounds, 174 N.J. 567 (2002).

Secondly, Joe Hand is distinguishable from this case because plaintiffs here sold defendants services, i.e., the repair of the Cessna, and a jury could find the alleged CFA violations arose directly from the provision of those services - the failure to provide a written estimate, the verbal quoting of a price of $15,000, the lack of authorization for the express work performed, and the ultimate submission of a bill for about $35,000, all in the context of the knowledge that defendants were selling the Cessna. Taking the equipment from the Cessna was done to force defendants to pay for services they disputed.

Therefore, there is almost a circular relationship with the services and the theft or, as the judge said, "all part and parcel" of the inspection and repair done on the Cessna. By contrast, in Joe Hand there was no provision of services by the plaintiff to the defendant that triggered the alleged CFA violations.[9]

The conduct that occurred here is not a typical debt collection scenario where the debt collector acts independently of the seller. A review of the applicable law demonstrates the CFA is applicable to the facts of this case. It is axiomatic that the CFA "is remedial legislation[.]" Allen v. V & A Bros., Inc., ___ N.J. ___ (2011) (slip op. at 18). In enacting the CFA, it was intended "that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud." Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 264 (1997). "The history of the Act is one of

[9] Plaintiffs also continue to rely heavily on two unpublished federal District Court cases, Nicholls v. Portfolio Recovery Assocs., 2010 U.S. Dist. LEXIS 29639 (D.N.J. Mar. 24, 2010) and Boyko v. Am. Int'l Group, Inc., 2009 U.S. Dist. LEXIS 119339 (D.N.J. Dec. 23, 2009). Unpublished decisions are not precedential. See Rule 1:36-3; Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001) (Verniero, J., concurring) (stating that unpublished opinions "serve no precedential value, and cannot reliably be considered part of our common law"). Furthermore, both cases are inapposite as they involved debt collection agencies separate and distinct from the seller of any merchandise, whereas here the seller acted in concert with an unknown third party to force defendants to pay for services.

constant expansion of consumer protection." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997). This underscores the recognition that, given the vastness of fraudulent schemes, "the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud in its myriad, nefarious manifestations." Lemelledo, supra, 150 N.J. at 265. While read broadly, "the CFA does not cover every sale in the marketplace. Rather, CFA applicability hinges on the nature of a transaction, requiring a case by case analysis." Papergraphics, supra, 389 N.J. Super. at 13.

Construing the CFA broadly per Lemelledo, the theft of the log books and radios fall within the ambit of the CFA because it was "in connection with" the sale of inspection and repair services or "with the subsequent performance of such person." Viewing the specific facts of this transaction as required by Papergraphics, the CFA applies to this case because under Gennari an unconscionable act intended to "induce" the consumer to complete the transaction is unlawful, and here stealing the log books and radios was clearly effectuated to "induce" defendants to pay the disputed bill and complete the transaction. Furthermore, as recognized in Lemelledo, it is impossible to imagine every instance in which the CFA would

apply, and given the unique facts of this case, application of the CFA was appropriate.

Plaintiffs' claim that they did not engage in the conduct alleged, rather it was ARS, is wholly without merit. There was ample evidence upon which a jury could conclude defendants participated in the unlawful and unconscionable conduct, i.e. the theft and extortion. In his criminal plea allocution, Mathiesen admitted he retained ARS, it alerted him to its possession of radios and log books from the Cessna, he received calls from Moleski requesting the return of the items, and he conspired with the collection agency to withhold the stolen property until his bill was paid. In the present trial, Mathiesen testified he retained ARS, who he understood to "repossess construction equipment," to collect defendants' outstanding bill for work performed on the Cessna and he provided information on the Cessna. He also phoned Moleski contemporaneous with "Vito's" calls, emailed photographs of the stolen log books and radios to Moleski, and in November and December 2007, he continued to demand payment from defendants for the balance of the invoice in exchange for return of the stolen items. A jury could also believe Moleski's testimony that Mathiesen said he "didn't steal anything[; he] paid someone to do it."

Plaintiffs next submit the trial court erred by not answering the jury's question sufficiently and dismissing the jury after it demonstrated confusion by returning a verdict inconsistent with the instruction that if it found damages, the court would award attorneys' fees.

"It is firmly established that '[w]hen a jury requests a clarification,' the trial court 'is obligated to clear the confusion.'" State v. Savage, 172 N.J. 374, 394 (2002) (alteration in original) (quoting State v. Conway, 193 N.J. Super. 133, 157 (App. Div.), certif. denied, 97 N.J. 650 (1984)). "[T]he trial judge is obliged to answer jury questions posed during the course of deliberations clearly and accurately . . . ." Pressler & Verniero, Current N.J. Court Rules, comment 7 on R. 1:8-7 (2011). "An appropriate judicial response requires the judge to read the question with care to determine precisely what help is needed. Sometimes a question is direct and simple to answer." State v. Parsons, 270 N.J. Super. 213, 221 (App. Div. 1994). "[A] simple 'yes' or 'no' may suffice" where "the jury wants the judge to confirm its understanding that by making certain findings of fact," a certain verdict must follow. Ibid. However, if it is clear the import of the question needs more then a "yes" or "no" answer, the court is "obliged to do more than simply answer [the] question" in one

word. State v. Middleton, 299 N.J. Super. 22, 30 (App. Div. 1997).

In Middleton, the jury asked if it could "see" certain testimony; the trial had been recorded thus there was no transcript so the court answered "no" and sent the jury back to deliberate. Id. at 29-30. We found this was error because while the judge's answer was "literally correct," it was clear the jury was asking for a read-back of the testimony, which could have been accomplished by playing the recording. Id. at 30-31.

A simple reiteration of the jury charge may also be insufficient to answer the question. In Fayer v. Keene Corp., 311 N.J. Super. 200, 206 (App. Div. 1998), the jury was not instructed on the issue of whether the failure to warn was a proximate cause of the plaintiff's injuries, over the defendant's objection, because the court felt it was not a jury question. During deliberations the jury asked why the issue of damages from the failure to warn was not on the verdict sheet. Ibid. The court simply answered, "This question must be taken together with the [c]ourt's charge as it relates to proximate cause." Id. at 207. We found the jury's inquiry was whether the failure to warm was a proximate cause of the injuries "was [an issue] which it had to decide" and thus found the failure of

the court to adequately answer the question was prejudicial and warranted remand. Ibid.

"[C]ounsel must be consulted before the trial court responds to a question from the jury." State v. Whittaker, 326 N.J. Super. 252, 262 (App. Div. 1999); see also State v. Graham, 285 N.J. Super. 337, 341 (App. Div. 1995). Importantly, where counsel is properly consulted, and the court answers the question in the manner urged by both attorneys, the issue on appeal is resolved by the plain error doctrine. State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div.), certif. denied, 177 N.J. 512 (2003).

In the context of a jury charge, plain error "is '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Afanador, 151 N.J. 41, 54 (1997) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). In civil cases, "relief under the plain error rule . . . is discretionary and 'should be sparingly employed.'" Gaido v. Weiser, 115 N.J. 310, 311 (1989) (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957)).

The court here clearly had an obligation to dispel the jury's confusion as required by Savage. The question posed by the jury does not seem to belie a deeper confusion with the underlying issues, in contrast to Fayer. It would have been preferable for the court to explain that there would be no attorneys' fees unless damages were found, and, while the colloquy is choppy, it appears the court did offer to instruct the jury that "in the absence of an amount being entered" the answer would be no. After another brief discussion, defense counsel said the technical answer was no,[10] and plaintiffs' counsel said "why don't we just say that then?" It is therefore abundantly clear the court answered the jury's question in the manner urged by plaintiffs' counsel.

Thus, the inquiry under Morais is whether answering "no" was plain error. Plaintiffs fail to demonstrate how the court's one-word answer had a "clear capacity to bring about an unjust result" under Afanador. The jury was asked specific interrogatories regarding plaintiffs' conduct and the "monetary loss" suffered by defendants. Plaintiffs do not challenge the

---

[10] The answer is not legally correct, as attorneys' fees are recoverable in a CFA case even where there are "no damages attributable to th[e] practice . . . ." Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J. Super. 23, 33-34 (App. Div. 1993). However, the parties agreed on the record that if there were no damages found, defendants would not seek attorneys' fees.

adequacy of the jury interrogatories or the jury charge, or even argue the court's response to the jury question was incorrect. In fact, during argument on plaintiffs' post-verdict motion, the court's response to the jury question was not challenged. Plaintiffs requested the answer that was given, and cannot now attempt to undermine the answer, particularly as relief under the plain error rule should be "sparingly employed" under Gaido.

The gist of plaintiffs' argument is that the jurors did not want each party to pay the other's attorney's fees. However, the jury's desire on this point is irrelevant. While the jury is advised of the ultimate outcome, Wanetick v. Gateway Mitsubishi, 163 N.J. 484, 496 (2000), the trebling of damages and the award of attorneys' fees in a CFA case are solely within the role of the judge, not the jury. The jury's notation on the verdict sheet that it opposed attorneys' fees is no more valid than if the jury had indicated it opposed the trebling of damages on defendants' counterclaim.

The jury was clearly instructed that if it awarded damages on the CFA claim, attorneys' fees would be awarded. "[A]n award of treble damages and attorneys' fees is mandatory under N.J.S.A. 56:8-19 if a consumer-fraud plaintiff proves both an unlawful practice under the Act and an ascertainable loss. The use of the word 'shall' in the statute suggests as much." Cox

v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994). An award of attorneys' fees in a consumer fraud action is statutory, and thus a purely legal issue "not within the province of the jury." State v. Schneiderman, 20 N.J. 422, 426 (1956).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION