SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1064-15T1
A-1093-15T1

OLEG SHTUTMAN,

Plaintiff-Appellant,

v.

BRIAN PATRICK CARR, Individually and as a Member of Capital Markets Advisory Limited Liability Company f/k/a Carr Miller Capital Investments, LLC,

Defendant-Respondent,

and

EVERETT CHARLES FORD MILLER, Individually and as President of Carr Miller Capital, LLC, and as Chief Operating Officer and Member of Board of Directors for INDIGO-ENERGY INC.; RYAN JUDE CARR, Individually and as a Member of Capital Markets Advisory Limited Liability Company f/k/a Carr Miller Capital Investments, LLC; HERCULES PAPPAS, Individually and as an agent of Carr Miller Capital, LLC, and as Member of Board of Directors for INDIGO-ENERGY INC., and as a principal in ICA Investment Advisors, LLC; PAPPAS &

RICHARDSON, LLC, a New Jersey limited liability company; PAPPAS & WOLF, LLC, a New Jersey limited liability company; CAPITAL MARKETS ADVISORY LIMITED LIABILITY COMPANY, f/k/a CARR MILLER CAPITAL INVESTMENTS, LLC, a New Jersey limited liability company; INDIGO-ENERGY INC.; STEVE DURBIN; STANLEY L. TEEPLE; BRAD HOFFMAN; and JOHN FISH,

Defendants.

OLEG SHTUTMAN,

Plaintiff-Respondent,

v.

BRIAN PATRICK CARR, Individually and as a Member of Capital Markets Advisory Limited Liability Company f/k/a Carr Miller Capital Investments, LLC;

Defendant-Appellant,

and

EVERETT CHARLES FORD MILLER, Individually and as President of Carr Miller Capital, LLC, and as Chief Operating Officer and Member of Board of Directors for INDIGO-ENERGY INC.; RYAN JUDE CARR, Individually and as a Member of Capital Markets Advisory Limited Liability Company f/k/a Carr Miller Capital Investments, LLC; HERCULES PAPPAS, Individually and as an agent of Carr Miller Capital, LLC, and as Member of

Board of Directors for
INDIGO-ENERGY INC., and as a
principal in ICA Investment
Advisors, LLC; PAPPAS &
RICHARDSON, LLC, a New Jersey
limited liability company;
PAPPAS & WOLF, LLC, a New Jersey
limited liability company; CAPITAL
MARKETS ADVISORY LIMITED LIABILITY
COMPANY, f/k/a CARR MILLER
CAPITAL INVESTMENTS, LLC, a New
Jersey limited liability company;
INDIGO-ENERGY INC.; STEVE DURBIN;
STANLEY L. TEEPLE; BRAD HOFFMAN; and
JOHN FISH,

Defendants.

Submitted May 23, 2017 – Decided October 4, 2017

Before Judges Leone and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0638-12.

Law Offices of Thomas T. Booth, Jr., LLC attorneys for Oleg Shtutman, appellant in Docket No. A-1064-15 and respondent in Docket No. A-1093-15 (Matthew J. Gindele, of counsel and on the briefs).

Brian Patrick Carr, respondent pro se in Docket No. A-1064-15 and appellant pro se in A-1093-15 (Ernest Edward Badway and Lauren J. Talan, on the briefs).

PER CURIAM

These appeals arise from a Ponzi scheme involving defendant Everett Charles Ford Miller.[1] Plaintiff Oleg Shtutman claimed he invested over a million dollars in promissory notes (CM notes) issued by Carr Miller Capital, LLC (CMC) based on representations about one of CMC's investments, defendant Indigo-Energy, Inc. Plaintiff sued numerous defendants, claiming common law fraud, aiding and abetting fraud, negligence, negligent misrepresentation, and unjust enrichment.

Prior to trial, all defendants were dismissed except defendant Brian Patrick Carr.[2] On summary judgment, the motion court dismissed plaintiff's claims of common law fraud, aiding and abetting fraud, and unjust enrichment but did not dismiss the negligence and negligent misrepresentation claims.[3] The jury found defendant was negligent and awarded damages.

Plaintiff and defendant appealed. We listed the appeals back-to-back and now consolidate them for the purpose of this opinion. In plaintiff's appeal, Docket No. A-1064-15, we affirm the motion court's grant of summary judgment on his fraud claim

[1] See United States v. Miller, 833 F.3d 274, 277 (3d Cir. 2016).

[2] Because Brian Patrick Carr was the only defendant remaining during the trial and on appeal, we will refer to him as "defendant."

[3] Plaintiff does not challenge the dismissal of the unjust enrichment claim.

and its imposition of sanctions against him. We reverse the court's grant of summary judgment on his aiding and abetting fraud claim. In defendant's appeal, Docket No. A-1093-15, we vacate the court's denial of summary judgment on plaintiff's negligent misrepresentation claim, and reverse the denial of summary judgment on his negligence claim. We reject defendant's challenges to the trial court's evidentiary rulings except the ruling allowing testimony regarding a consent order, which was prejudicial error. We remand for further proceedings on plaintiff's aiding and abetting fraud claim and his negligent misrepresentation claim regarding an alleged non-disclosure by defendant.

I.

We summarize the facts set forth in the trial testimony. Plaintiff testified as follows.

Plaintiff and his wife met Miller when they moved next door to him in 2006. Miller invited plaintiff and his wife to the CMC holiday party in 2006. Then and later, plaintiff was told defendant was "Miller's partner." Defendant told plaintiff "he was a certified advisor, he was fully licensed in securities." Plaintiff was impressed with defendant's abilities regarding "investing and consulting and understanding these investments."

Plaintiff again met defendant at the 2007 CMC holiday party at Miller's house. Defendant told plaintiff "how great" Indigo-

Energy was, "how they invested a lot of their own money," and how "they were going to make the value of it go up, but they needed initial capital." Defendant "said there was zero risk."

Miller invited plaintiff to a CMC event at the 2007 Heisman Trophy dinner. Plaintiff drove there with Miller and defendant, who discussed how he and Miller were partners. Plaintiff was told Indigo-Energy was "guaranteed, it's risk free" and "it's ready to take off." Around eight weeks later, plaintiff made an initial investment of $100,000 with CMC, and received CM notes as a client of Miller.

Miller invited plaintiff and his wife to the 2008 U.S. Open, where plaintiff next saw defendant. "[A]gain they were just really high on this Indigo Energy. [Defendant] just couldn't stop talking about it." Defendant told plaintiff not to "worry about [investing in] it, we have our own money in it. We have $8 million of Carr Miller's money into it. . . . [W]e're so well diversified that you'll never have to worry about losing your investment here." Plaintiff subsequently invested another $10,000 with CMC.

Plaintiff next met defendant at the Indigo-Energy shareholders meeting, at which Miller was chosen as CEO. That night, at the 2008 Heisman Trophy dinner, Miller and defendant were talking about "how great this [Indigo-Energy] is going to be, how the stock is going to skyrocket." Defendant told plaintiff

"there was absolutely no risk." In April 2009, plaintiff made another investment of $1,000,000 with CMC.

Plaintiff again saw defendant when he attended the 2009 U.S. Open at Miller's invitation. "[T]hey always had a reason why the stock wasn't doing what they said it would be doing" but said "everything was still going great." Later, plaintiff invested another $274,900 with CMC.

Plaintiff testified defendant influenced him the most in investing with CMC, because defendant "was the brains. He got the license. He had the education. He had the experience. He had the look, he had the talk, he had everything you could possibly ask for." He said he relied "[a] hundred percent" on defendant's advice in investing.

Defendant testified as follows. He was licensed as a certified financial planner until 2010, allowing him "to do financial planning for individuals, businesses, [and] organizations." He also had a Series 65 license, allowing him "to give advice with respect to individual securities."

Defendant was Chairman of CMC from 2008 to the summer of 2009. There, he served mostly as a figurehead and was not involved in the day-to-day operations. Defendant never represented to anyone that he was an owner of CMC. In April 2008, Miller created a registered investment advisory business, defendant Capital

Markets Advisory Limited Liability Company, originally known as Carr Miller Capital Investments, LLC (collectively "CMA"). After the fact, defendant was informed he was given ninety-five percent ownership of CMA.[4]

Defendant has no recollection of meeting plaintiff at the CMC holiday parties. Defendant did not recall any business being discussed at the 2007 and 2008 Heisman Trophy Dinner. He only recalled simply meeting plaintiff at the 2008 Heisman Trophy dinner. Defendant did not recall seeing plaintiff at the 2008 U.S. Open, remembered plaintiff being present at the 2009 U.S. Open, but did not recall discussing investments at either event. Defendant denied any knowledge of plaintiff's investments with CMC, discussing Indigo-Energy with plaintiff, or selling CMC notes to plaintiff.

Miller's deposition testimony was read at trial. In it, he testified as follows. Miller was the sole owner of CMC; defendant was never a member. CMC was a separate and distinct entity from CMA. There was no discussion at the sporting events of plaintiff investing with CMC. Miller did not believe he ever talked about investments with plaintiff in defendant's presence, and was

[4] Plaintiff testified no one explained that there was a distinction between CMC and CMA, and that he believed the entities to be "[o]ne in the same."

unclear about whether he recalled defendant soliciting plaintiff to invest with CMC.

The jury found defendant negligently gave investment advice to plaintiff, causing him $591,492.00 in damages. On September 30, 2015, the trial court entered a total judgment against defendant in the amount of $639,814.40, including interest.

II.

We first address plaintiff's claims in his appeal (Docket No. A-1064-15). Plaintiff argues the motion court erred in imposing sanctions against him and in granting summary judgment on his common law fraud claim and aiding and abetting fraud claim.

A.

The following facts concerning sanctions are taken from the certification of defendant's counsel, Lauren J. Talan, which the motion court credited. Defense counsel served a notice to take plaintiff's deposition on April 15, 2014. Before the deposition could take place, plaintiff's first counsel withdrew. The motion court ordered plaintiff to serve his responses to requests for admissions and his answers to interrogatories by September 22, 2014, and to be deposed by October 31, 2014. However, plaintiff served his written discovery late.

As a result, defense counsel initially attempted to schedule plaintiff's deposition for the beginning of November. Plaintiff's

second counsel responded he was unavailable during the beginning of November and suggested a December deposition. On October 8, 2014, defense counsel offered to take the deposition on October 29, 30, or 31, 2014. Plaintiff's second counsel did not respond. Defendant filed a motion for sanctions against plaintiff. After plaintiff's second counsel filed a response, he was disqualified and replaced by a third counsel. On March 20, 2015, the motion court announced it would award a reasonable fee to defendant. On July 30, 2015, the trial court ordered plaintiff to pay defendant $5070 in counsel fees plus $89.20 in costs.

Rule 4:23-2(b) permits various sanctions if "a party fails to obey an order to provide or permit discovery." In addition, "the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure," "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Ibid.; see Kolczycki v. City of East Orange, 317 N.J. Super. 505, 520 (App. Div. 1999). Plaintiff did not advance a substantial justification for failing to obey the order that he submit to deposition before October 31, or failing to respond to defense counsel's October 8 letter or to make other arrangements.

We reject plaintiff's arguments that the sanctions were unjust. First, he alleges defense counsel made oral representations which contradicted her certification, but the court did not appear to rely on those oral representations. Second, plaintiff notes the sanctions motion was heard four months after briefing, but he fails to show harm from this delay, caused by the disqualification of his second counsel. Third, plaintiff complains his second counsel was not present at the motion hearing due to his disqualification, but plaintiff's third counsel reiterated the points made in his second counsel's written opposition. Fourth, plaintiff claims the court failed to consider that written opposition, but the record shows the court was aware of it.

Plaintiff argues the fees were improperly imposed against plaintiff directly, not his counsel. However, Rule 4:23-2(b) authorizes requiring "the party" to pay the fees. We cannot say the motion court abused its discretion in sanctioning plaintiff. Thus, the imposition of counsel fees was appropriate under Rule 4:23-2(b).

B.

Plaintiff appeals the motion court's August 10, 2015 order granting summary judgment on the common law fraud claim and the aiding and abetting fraud claim against defendant.

Summary judgment must be granted if the court determines "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). An appellate court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). We must hew to that standard of review, and must "confine ourselves to the original summary judgment record." Lombardi v. Masso, 207 N.J. 517, 542 (2011).

1.

To prove common law fraud, five elements must be satisfied: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

Plaintiff did not present evidence that there was "a material misrepresentation of a presently existing or past fact." See ibid. The "plaintiff must show the misrepresentation of a fact that exists at or before the time the representation is made." Suarez v. E. Int'l Coll., 428 N.J. Super. 10, 29 (App. Div. 2012). Fraud claims "cannot ordinarily be predicated on representations which involve things to be done in the future." Anderson v. Modica, 4 N.J. 383, 391-92 (1950). "Statements as to future or contingent events, to expectations or probabilities, or as to what will or will not be done in the future, do not constitute misrepresentations, even though they may turn out to be wrong." Alexander v. CIGNA Corp. 991 F. Supp. 427, 435 (D.N.J. 1997), aff'd, 172 F.3d 859 (3d Cir. 1998); accord Middlesex Cty. Sewer Auth. v. Borough of Middlesex, 74 N.J. Super. 591, 605 (Law. Div. 1962), aff'd o.b., 79 N.J. Super. 24-25 (App. Div.), certif. denied, 40 N.J. 501 (1963)).

Further, "neither expressions of opinion, nor 'puffery,' will satisfy this element of fraud." Suarez, supra, 428 N.J. Super. at 29 (citations omitted). A statement is a matter of fact if it is "'susceptible of exact knowledge when the statement was made'"; it is a matter of opinion if "'it is unsusceptible of proof'" at that time. Joseph J. Murphy Realty, Inc. v. Shervan, 159 N.J. Super. 546, 551 (App. Div. 1978) (citation omitted). "However

persuasive," an opinion that the customer is "in good hands' . . . is nothing more than puffery," "is not a statement of fact, and therefore cannot rise to the level of common law fraud." Rodio v. Smith, 123 N.J. 345, 352 (1991)(citing Joseph J. Murphy Realty, supra, 159 N.J. Super. at 551). Saying a product is "'the best' . . . is only a statement of the seller's opinion." Jakubowski v. Minn. Mining & Mfg., 80 N.J. Super. 184, 195 (App. Div. 1963). Statements that a house is "'very saleable'" were merely "opinions" rather than "a material representation of a presently existing or past fact." Joseph J. Murphy Realty, supra, 159 N.J. Super. at 550-51. Similarly, "fraud cannot be predicated on representations as to value." Daibo v. Kirsch, 316 N.J. Super. 580, 589 (App. Div. 1998)(finding the defendan'ts grossly inflated equity estimate . . . . was not an expression of fact based on [his] assessment of value").

Defendant's alleged statements to plaintiff did not speak to a present or past fact. Plaintiff testified at his deposition defendant told him the Indigo-Energy "stock is going to increase," it was "going to rise," and "it's going to go huge," and how "terrific everything was going to be." Plaintiff also said he was told the stocks "c[ould]n't do anything but go up." These statements all constituted predictions about the future. Defendant also stated "how great [Indigo-Energy] is currently and

how much greater it's going to be moving forward," and that it was "undervalued." Those were not statements of fact but related defendant's opinions, and thus were not actionable. See, e.g., Argabright v. Rheem Mfg. Co., 201 F. Supp. 3d 578, 608 (D.N.J. 2016) (Simandle, J.) (finding such statements, including that products have "'great warranties," are "opinion rather than fact," "are neither measurable nor concrete, and are simply too imprecise to be considered material" under New Jersey law); Amorim Holding Financeria v. C.P. Baker & Co., 53 F. Supp. 3d 279, 305 (D. Mass. 2014) (finding an assurance that a company is a "'great investment' . . . is not the type of statement relied upon by reasonable investors"); Longo v. Butler Equities II, L.P., 718 N.Y.S.2d 30, 31 (App. Div. 2000) (ruling that "the alleged misrepresentations that the target company was seriously undervalued . . . can only be understood as nonactionable expressions of opinion, mere puffing").[5]

In his complaint, plaintiff alleged Miller said it was a "zero risk" investment. In his deposition, he did not claim either Miller or defendant said it was without risk. However, after

[5] Plaintiff alleged defendant knew Indigo-Energy was not profitable at the time defendant supposedly encouraged him to invest in it. However, defendant never told him it was profitable. Rather, plaintiff testified at his deposition defendant said "that the stock price is going to increase, and that's where the real profit and wealth is going to come from."

defendant moved for summary judgment, plaintiff filed a supplemental certification claiming "I was told by Brian Carr that investing in CMC was risk free." The motion court discounted plaintiff's belated "epiphany" in a certification prepared by counsel.

Under "the sham affidavit doctrine," trial courts may "disregard[] an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." Shelcusky v. Garjulio, 172 N.J. 185, 193-94 (2002). "[A] trial court may reject an affidavit as a sham when it 'contradict[s] patently and sharply' earlier deposition testimony, there is no reasonable explanation offered for the contradiction, and at the time the deposition testimony was elicited, there was no confusion or lack of clarity evident from the record." Hinton v. Meyers, 416 N.J. Super. 141, 150 (App. Div. 2010) (quoting Shelcusky, supra, 172 N.J. at 201-02).

We need not decide whether plaintiff's "risk free" statement in his supplemental certification could be disregarded as a sham affidavit, because the claimed statement was not actionable. Generally, asserting that an investment has low or no risk is "a non-actionable vague expression of corporate optimism and puffery upon which no reasonable investor would rely." Kelly v. Elec.

Arts, Inc., 71 F. Supp. 3d 1061, 1070 (N.D. Cal. 2014); see First Presbyterian Church v. John G. Kinnard & Co., 881 F. Supp. 441, 444 (D. Minn. 1995); Hasso v. Hapke, 173 Cal. Rptr. 3d 356, 382-83 (Ct. App. 2014); Paull v. Capital Res. Mgmt., Inc., 987 S.W.2d 214, 218-19 (Tex. App. 1999); Loula v. Snap-On Tools Corp., 498 N.W.2d 866, 868-69 (Wis. Ct. App. 1993).[6]

Here, even drawing all inferences in favor of plaintiff, defendant's alleged statement that the investment was risk free was not actionable. According to plaintiff, defendant was urging him to invest because Indigo-Energy, a gas-drilling company which had not yet struck gas, would be successful in the future. In that context, if defendant claimed the investment was risk free, "no rational person would accept such a claim." See Suarez, supra, 428 N.J. Super. at 35 (quoting Trs. of Columbia Univ. v. Jacobsen, 53 N.J. Super. 574, 579 (App. Div.), appeal dismissed, 31 N.J. 221-22 (1959), cert. denied, 363 U.S. 808, 80 S. Ct. 1243, 4 L. Ed. 2d 1150 (1960)). Such opinions about the risk of future loss

[6] Cf. Cohen v. Prudential-Bache Secur., Inc., 713 F. Supp. 653, 658 (S.D.N.Y. 1989) (finding a statement an investment was "without risk" "approaches the puffery line" but finding it actionable when combined with an assurance of a precise rate of return); Webb v. First of Mich. Corp., 491 N.W.2d 851, 853-54 (Mich. Ct. App. 1992) (finding a statement that an investment was "risk-free" "has the appearance of a mere expression of professional opinion or of 'puffing,' neither of which would be actionable," but denying summary judgment by "[g]iving the benefit of doubt to plaintiffs").

"are merely expressions in the nature of puffery and thus are not actionable." See N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 13-14 (App. Div.)(finding non-actionable a statement that a customer "'can lead a normal nearly symptom-free life again'"), certif. denied, 178 N.J. 249 (2003).

Plaintiff also argues defendant committed a negligent misrepresentation by failing to tell him that the CMC notes he was purchasing were unregistered, non-exempt securities, which he claims could not be sold under New Jersey law. See N.J.S.A. 49:3-60. This claim requires different treatment.

In his complaint, plaintiff's negligent misrepresentation count alleged that "[d]efendants . . . omitted material facts to Plaintiff in connection with the offer and sale of securities," but did not list among the omitted facts that the securities were unregistered and non-exempt.[7] When asked at his deposition if he had "any communications with Brian Carr or anyone at CMA regarding your [CMC] notes," plaintiff answered that defendant "was aware" that plaintiff "had an investment there," and that they discussed

[7] Plaintiff's complaint did not allege that defendant committed fraud by non-disclosure. However, "our rules demand [fraud] be pleaded with specificity." Nostrame v. Santiago, 213 N.J. 109, 129 (2013) (citing R. 4:5-8(a)); see Miller v. Bank of America Home Loan Servicing, L.P., 439 N.J. Super. 540, 552 (App. Div. 2015) (a plaintiff must plead that the defendant knowingly concealed a material fact). Therefore, we decline to read such an allegation into plaintiff's fraud count.

"how it was doing and how it was progressing and how it was to progress moving forward." Plaintiff gave no deposition testimony that he was deceived concerning the unregistered and non-exempt nature of the securities.

However, in his supplemental certification filed in opposition to summary judgment, plaintiff averred:

> I was never advised by Brian Carr that the CMC Notes were considered non-exempt unregistered securities and violated . . . New Jersey law. Brian Carr never advised me that he was not authorized to sell those securities. I would not have invested in CMC had I known that the Notes were essential[ly] illegal securities.

Although the court found plaintiff's supplemental certification was a sham affidavit insofar as it asserted defendant said investing in CMC was "risk free," the court did not rule on whether it was a sham regarding the non-disclosure averment.

Plaintiff argued to the motion court this non-disclosure was a misrepresentation. The court correctly noted it was not defendant but CMC which sold the CMC notes to plaintiff. But the court did not address the averment defendant failed to disclose the CMC notes were unregistered and non-exempt.

The sham affidavit issue should be resolved by the trial court in the first instance, applying the standards set forth in Shelcusky and Hinton. If the court finds plaintiff's non-disclosure averment was a sham, the court shall dismiss the

negligent misrepresentation claim. Otherwise, the court should address whether summary judgment is otherwise appropriate on the non-disclosure averment. We vacate the denial of summary judgment on the non-disclosure issue, and remand for further proceedings. Because plaintiff failed to advance sufficient evidence of a "material misrepresentation of a presently existing or past fact," Gennari, supra, 148 N.J. at 610, we affirm the dismissal of the fraud claim against defendant.[8]

2.

Plaintiff also appeals the dismissal of his claim for aiding and abetting fraud. To prove such a claim,

> a plaintiff must show that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation."
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> [State, Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l, Inc., 387 N.J. Super. 469, 484-85 (App. Div. 2006) (quoting Tarr v. Ciasulli, 181 N.J. 70, 84 (2004)).]

"A claim for aiding and abetting fraud [thus] requires proof of the underlying tort, that is, the fraud committed by [the

[8] Accordingly, we need not consider whether the evidence supported a reasonable inference defendant knew his statements were false.

principal]." Id. at 485. Accordingly, plaintiff had to present proof Miller defrauded plaintiff.

The motion court granted summary judgment on the sole ground that Miller was no longer a party to the case.[9] The court viewed Miller's dismissal as meaning "the issue of Mr. Miller's fraud is never going to go to the jury in this case." The court ruled that "without the finding of Miller's fraud," a jury could not find defendant aided and abetted Miller's fraud.

However, the jury could have been instructed to determine if Miller defrauded plaintiff even if Miller was longer a party. Even in a criminal case, a defendant can be convicted of aiding and abetting a principal even if the principal was not prosecuted or was acquitted. N.J.S.A. 2C:2-6(f); State v. Parris, 175 N.J. Super. 603, 606-08 (App. Div. 1980) (applying the common law). We see no reason why the same could not occur in this civil case where the principal was not sued, has settled, or was dismissed. If the jury found Miller defrauded plaintiff, and that defendant aided and abetted Miller it would be appropriate to hold defendant liable for his aiding and abetting even if the case could not be pursued against Miller.

[9] A stipulation of dismissal had been filed as to Miller and CMC, allegedly because a receiver had been appointed.

As the only ground offered by the motion court was invalid, we reverse its order granting summary judgment on the aiding and abetting claim, and remand for further proceedings on that claim. If the claim proceeds to trial, the court shall instruct the jury to make findings about whether Miller defrauded plaintiff, and the other elements of aiding and abetting against defendant.

III.

We now address defendant's claims in his appeal (Docket No. A-1093-15). He appeals the motion court's August 10, 2015 order denying summary judgment on plaintiff's negligence claim and negligent misrepresentation claim. He also claims the trial court made several erroneous evidentiary rulings.

A.

Regarding the negligence-based claims, defendant first argues the motion court erred in finding he had a duty to plaintiff. "A prerequisite to recovery on a negligence theory is a duty owed by defendant to plaintiff. . . . [T]he question of whether a duty exists is a matter of law properly decided by the court, not the jury." Strachan v. John F. Kennedy Memorial Hosp., 109 N.J. 523, 529 (1988) (citations omitted).

"In New Jersey, professionals are held to the standards of their industry," and "investment advisors are professionals who hold themselves out to the public as having special knowledge,

labor or skill." Lucier v. Williams, 366 N.J. Super. 485, 496 (App. Div. 2004) (citing Erlich v. First Nat'l Bank, 208 N.J. Super. 264, 287-88 (Law Div. 1984)). A professional investment advisor has a duty "to give prudent advice." Erlich, supra, 208 N.J. at 291; see also Harvey E. Bines & Steve Thel, Investment Management Law and Regulation § 6.01 at 289 (2004) ("Investment managers owe their clients professional competence in the handling of client affairs.").

As the account representative for plaintiff at CMC, Miller had a duty to act as a reasonable investment advisor. Defendant, an investment advisor himself, served as Chairman of CMC from 2008 to the summer of 2009. Plaintiff certified he was "always introduced to Brian Carr as Everett Miller's partner and . . . heard Brian Carr introduced to others in that capacity." Thus, as the motion court found, there was sufficient evidence, viewed in the light most favorable to plaintiff, for a jury to find defendant held himself out as a representative of CMC.

Under those circumstances, the motion court properly ruled that Miller had an obligation "not to provide erroneous, misleading information," and that if defendant was acting "on behalf of CMC then he had the same obligation to [plaintiff]."

> Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding

> sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.
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> [Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).]

Our Supreme Court has applied those principles to analogous situations. See, e.g., Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc., 135 N.J. 182, 194 (1994); see also Banco Popular N. Am. v. Gandi, 184 N.J. 161, 179 (2005) (discussing Petrillo v. Bachenberg, 139 N.J. 472 (1995)). "One who holds himself out to the public as [a professional] is required to have the degree of skill and knowledge requisite to the calling," and to exercise it. Carter Lincoln-Mercury, supra, 135 N.J. at 189 (quoting Rider v. Lynch, 42 N.J. 465, 476 (1964)) (both holding an insurance broker is liable to a non-client). The professional's "duty is defined not by the contractual relationship between the parties but by considerations of foreseeability and fairness." Id. at 196.

Moreover, our Supreme Court has relied on the Restatement's negligent misrepresentation section, Restatement (Second) of Torts, §522 (1977). Banco Popular, supra, 184 N.J. at 180; Petrillo, supra, 139 N.J. at 484. Section 552 imposes on

professionals and other business people a duty to avoid negligently providing false information, including to non-clients:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> [Restatement, supra, § 552.]

Applying § 552, our Supreme Court in H. Rosenblum, Inc. v. Adler, 93 N.J. 324 (1983), determined that non-client investors "could maintain a negligence action against a certified public accountant who negligently had prepared financial statements" on which "investors foreseeably may rely." Petrillo, supra, 139 N.J.

at 484; see H. Rosenblum, supra, 93 N.J. at 352.[10] In Petrillo, supra, the Court ruled that, "like certified public accountants or other professionals involved in commercial transactions, a lawyer's duty may run to [non-client] third parties who foreseeably rely on the lawyer's opinion[.]" 139 N.J. at 484.

We see no reason why the same duty could not be imposed on defendant, an investment advisor, if he was holding himself out to plaintiff as a representative of CMC. See Singer v. Beach Trading Co., 379 N.J. Super. 63, 76-77 (App. Div. 2005) (applying § 552 to a company responding to an employment inquiry). If defendant was holding himself out to plaintiff as a representative of CMC, he was holding himself out as acting "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest." Restatement, supra, § 552(1); see id. § 552 cmt. d ("[O]fficers of a corporation, although they receive no personal consideration for giving information concerning its affairs, may have a pecuniary interest

[10] Subsequent legislation modified the standard for accountants, N.J.S.A. 2A:53A-25, but did "not affect the application of section 552 to other professionals." Petrillo, supra, 139 N.J. at 485.

in its transactions, since they stand to profit indirectly from them").[11]

If a jury found that defendant held himself out to plaintiff as a representative of CMC, imposing a duty on defendant toward plaintiff "satisfies an abiding sense of basic fairness." Hopkins, supra, 132 N.J. at 439. It also conforms to the interpretation of § 552 in H. Rosenblum, Petrillo, and Singer. Therefore, the motion court did not err in finding there was evidence supporting plaintiff's claim that defendant owed him a duty sufficient to support his negligence claims.[12]

Second, defendant argues that even if the motion court properly found a duty, it erred in denying summary judgment on plaintiff's negligence and negligent misrepresentation claims. We are constrained to agree concerning the alleged

[11] By contrast, if defendant was not holding himself out to plaintiff as a representative of CMC, he would not have a duty to plaintiff, as there is no claim plaintiff otherwise engaged him as an investment advisor. If a professional or business person "gives a casual and offhand opinion . . . to a friend whom he meets on the street, or what is commonly called a 'curbstone opinion,' it is not to be regarded as given in the course of his business or profession." Restatement, supra, § 552 cmt. d.

[12] We note the trial court's instructions and the jury verdict sheet did not require the jury to resolve the disputed factual issue of whether defendant held himself out to plaintiff as a representative of CMC.

misrepresentations, because they are puffery, prediction, or opinion.

Negligence has four elements: "'(1) [a] duty of care, (2) [a] breach of [that] duty, (3) proximate cause, and (4) actual damages[.]'" Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008) (citations omitted) (alterations in original). Where the negligence involves misrepresentation, "[a]n incorrect statement, negligently made and justifiably relied upon, may be the basis for recovery of damages for economic loss or injury sustained as a consequence of that reliance." H. Rosenblum, supra, 93 N.J. at 334; accord Green v. Morgan Props., 215 N.J. 431, 457 (2013); see Restatement, supra, § 552.

"The element of reliance is the same for fraud and negligent misrepresentation." Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (2000) (citing H. Rosenblum, supra, 93 N.J. at 334; Gennari, supra, 148 N.J. at 610). Such reliance must be justifiable. Ibid. Similarly, "[i]ncorrect statement and misstatement of fact are elements of both common law fraud and negligent misrepresentation." Union Ink Co. v. AT&T Corp., 352 N.J. Super. 617, 645 (App. Div. 2002). If a defendant cannot be held liable for a statement made with an intent to defraud that is puffery, opinion, or prediction, there is no reason he should be liable for the same statement if made honestly but negligently.

Thus, "[i]n order to sustain a cause of action based on negligent misrepresentation, the plaintiff must establish that the defendant negligently made an incorrect statement of a past or existing fact." Masone v. Levine, 382 N.J. Super. 181, 187 (App. Div. 2005).[13] "Reliance is ordinarily not justifiable if the misrepresentation . . . is mere puffing, or states an opinion or judgment of one without specialized knowledge and that does not imply assertions of fact; [or] predicts some future course of events over which the defendant has little or no control[.]" D. Dobbs et al., 3 The Law of Torts, § 672 at 669, §676 at 682 (2d ed. 2011); see W. Keeton et al., Prosser and Keeton on the Law of Torts, § 109 (5th ed. 1984).

As set forth in our discussion of the fraud claim, plaintiff presented no evidence that defendant made an incorrect statement of a past or existing fact. Instead, defendant's alleged

[13] Courts have similarly held under § 552 of the Restatement that "[a] claim for negligent misrepresentation cannot be based on future promises; it must be premised on statements about past or present facts." In re Allstate Life Ins. Co. Litig., 971 F. Supp. 2d 930, 945 (D. Ariz. 2013); see Morrow v. Bank of Am., N.A., 324 P.3d 1167, 1180 (Mont. 2014); Wilkinson v. Shoney's, Inc., 4 P.3d 1149, 1165 (Kan. 2000) (rejecting a negligent misrepresentation claim based on "a personal opinion {rather] than a representation of past or present fact"); see also Alpine Bank v. Hubbell, 555 F.3d 1097, 1106 (10th Cir. 2009) (finding a statement "cannot trigger liability because it amounts to mere puffery").

statements were mere puffery, predictions, or opinions, which generally are not actionable. See id. §§ 676-78.

Our Supreme Court has held that in certain circumstances, "'[t]he statement need not be a factual report, but may consist of an expert opinion.'" H. Rosenblum, supra, 93 N.J. at 334 (citation omitted). Thus, the Court in H. Rosenblum held accountants issuing an audit report "should be responsible for their careless misrepresentations to [third] parties who justifiably relied upon their expert opinions" that a company's "financials had been prepared in accordance with generally accepted accounting principles and fairly presented [its] financial condition." Id. at 355-56. In Petrillo, supra, the Court held an attorney could be liable for misrepresentations in an opinion letter to "third parties who foreseeably rely on the attorney's opinion." 139 N.J. at 485. "The purpose of a legal opinion letter is to induce reliance by others." Banco Popular, supra, 184 N.J. at 183 (quoting Petrillo, supra, 139 N.J. at 482).

Defendant's vague oral opinions offered at sporting and social events did not fall within the special duties created by H. Rosenblum and Petrillo for written audit reports and opinion letters expressing formal expert opinions. See The Law of Torts, supra, § 667 at 653 & n.7 (distinguishing experts such as lawyers and accountants retained to provide accurate information); see

also id. § 725 at 40 & n.19 (citing Petrillo, supra, 139 N.J. at 655). Instead, they fall within the general rule that "statements that are merely opinion . . . or predictions of the future, do not qualify as representations of fact" and are inadequate to justify reliance. The Law of Torts, supra, § 675 at 682. "The securities dealer who tells a client that a stock is bound to rise in the next year is not asserting a fact but predicting the future." Id. at 683. Such statements about stocks are "a classic case of puffing by predicting the future, for which, subject to exceptions, liability should be rejected." The Law of Torts, supra, § 678 at 689. Accordingly, we reverse the motion court's denial of summary judgment on plaintiff's negligence claim, and on his negligent misrepresentation claim to the extent it is based on the same alleged misrepresentations. Because the court should have granted summary judgment on the only counts on which plaintiff prevailed at trial, we must reverse the jury's verdict as well.

B.

Defendant argues the trial court committed four evidentiary errors. "Considerable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Feaster, 156 N.J. 1, 82 (1998). "Under that standard, an appellate court should not substitute its own judgment for that

of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" State v. Kuropchak, 221 N.J. 368, 385 (2015) (citations omitted).

1.

First, defendant argues the trial court erred in allowing the jury to hear evidence regarding the "Consent Order and Final Judgment" entered against defendant and CMA in a separate civil action by the Attorney General on behalf of the Chief of the Bureau of Securities. Chiesa ex rel. Tiger v. Miller, et al., Docket No. ESX-C-288-10 (May 7, 2012). The Consent Order reported the Chief's "findings of fact and conclusions of law," and stated defendant and CMA would "neither admit nor deny" them.

While the Consent Order was not admitted into evidence, plaintiff's counsel questioned defendant about it. Counsel read aloud before the jury several paragraphs of the consent order, including that defendant "misrepresented and omitted material information regarding . . . how investors' funds would be used, the true nature and risk of investing in the Carr Miller Notes, the financial condition of Carr Miller Capital, [and] the nature and outcome of past investments made by Carr Miller Capital"; defendant "presented certain investors with false information regarding certain purported Carr Miller Capital investments, including Indigo Energy Inc."; and defendant "told certain

investors . . . that their investments were risk-free." Defendant answered that under the Consent Order, he neither "admitted or denied" those statements, and that he denied them all as to plaintiff, who was not a party to the Consent Order. Plaintiff's counsel stressed to defendant "this was a consent order that your attorney signed and you entered into."

Defendant moved in limine to bar evidence concerning the Consent Order as irrelevant and inadmissible under N.J.R.E. 403 and 404(b). The trial court stated it permitted the discussion of the Consent Order before the jury because "what [defendant] neither admitted or denied are allegations that are somewhat consistent with what [plaintiff] said he was told by" defendant, plaintiff was entitled to admit that "context," and "a jury can infer that [defendant's] sales technique [was] going to be the same for every potential customer," including plaintiff. The court's ruling was an abuse of discretion.

First, the testimony regarding the Consent Order was not relevant under N.J.R.E. 402. The premise of the Consent Order was that "Brian Carr and CMA neither admit nor deny" the Chief's findings and conclusions. Thus, the "findings" in the Consent Order were simply allegations by the Chief, neither admitted by defendant nor established in an adversarial judicial or administrative hearing. Such allegations are not themselves

relevant facts. See, e.g., State v. K.S., 220 N.J. 190, 193 (2015) (holding that, absent an admission or proof of guilt, prior dismissed charges cannot be used to create "an impermissible inference of guilt").

Settlements of suits are "'not factually relevant [if] they do not imply a belief (and, consequently, an admission by implication) on the part of the offeror that the adversary's claim is well founded, but rather that the further prosecution of the claim is preferably avoided by a purchase of the offeror's peace.'" Wyatt v. Wyatt, 217 N.J. Super. 580, 586 (App. Div. 1987) (citation omitted); see 4 Wigmore on Evidence § 1061 at 36 (Chadbourn rev. 1972). Indeed, as defendant argues on appeal, settlements are inadmissible to prove liability, in part because they are irrelevant. N.J.R.E. 408; see Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 408 (2017).

Moreover, the "findings" in defendant's Consent Order with the State focused on defendant's dealings with the clients of CMA, and did not purport to address defendant's dealings with plaintiff, who was unmentioned. "A settlement of compromise made by the defendant with other parties having similar claims would seem to be inadmissible [and irrelevant] on the additional ground that the reasons for admitting another person's claim might not be the same

as those affecting the present claim[.]" 4 Wigmore, supra, § 1061 at 47.

Because the Chief's "findings" related to defendant's actions regarding other persons, they constituted "evidence of other crimes, wrongs, or acts," which generally "is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith." N.J.R.E. 404(b). Plaintiff argues N.J.R.E. 404 is irrelevant because the "findings" were "inextricably related" to his complaint. However, they did not "'directly prove[] the charged [torts]'" or "'facilitate the commission of the charged [torts]'" against plaintiff, and so they "'must be analyzed under Rule 404(b).'" State v. Rose, 206 N.J. 141, 179-81 (2011) (citation omitted).

Under N.J.R.E. 404(b), the evidence had to meet "the standards for admissibility articulated by our Supreme Court in State v. Cofield, 127 N.J. 328, 338 (1992), which are also applicable in civil cases." N.J. Div. of Youth & Family Servs. v. H.B., 375 N.J. Super. 148, 181 (App. Div. 2005).

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and

> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [State v. Skinner, 218 N.J. 496, 514-15 (2014) (quoting Cofield, supra, 127 N.J. at 338).]

The "findings" in the Consent Order were not supported by clear and convincing evidence because they were only allegations defendant did not admit. For the same reason, they were not relevant to a material issue. They were not shown to be "admissible to prove something other than an individual's propensity to commit wrongful acts." State v. Weaver, 219 N.J. 131, 150 (2014).

The trial court stated the "findings" provided "context." However, a party seeking to admit background evidence generally must "'identify the specific, non-propensity purpose for which he seeks to introduce it.'" Rose, supra, 206 N.J. at 181 (citation omitted). The court stated the "findings" showed defendant's "sales technique," but neither the court nor plaintiff identified what non-propensity purpose that served.

In any event, the trial court failed to consider the standards of Cofield, supra, including its fourth prong that "[t]he probative value of the evidence must not be outweighed by its apparent prejudice." 127 N.J. at 338; see N.J.R.E. 403. It was highly prejudicial to read the "findings" before the jury, with reminders that defendant entered into and his counsel signed the Consent

Order. The "findings" stated defendant misrepresented multiple facts to numerous other investors about CMC, the CM notes, and Indigo-Energy. However, the "findings" had no probative value because they were allegations defendant never admitted. Any probative value was "'so greatly outweighed by the prejudicial effect -- namely, the jury's inevitable assumption that defendant has a propensity to engage in such conduct -- as to render it inadmissible.'" State v. J.M., 225 N.J. 146, 161 (2016) (citation omitted).

Such "other-crimes evidence has a 'unique tendency' to prejudice a jury against the defendant[.]" State v. Gillispie, 208 N.J. 59, 85 (2011) (citation omitted). Further, plaintiff's closing arguments stressed the Consent Order. Plaintiff detailed the "findings of fact," which defendant "neither admitted or denied, whatever that means," and concluded: "He can't run away from what he admitted to, or what he neither admitted nor denied in a consent order that he entered in a prior case."

The prejudice "was compounded by the failure of the judge to issue the careful limiting instruction that Cofield and Rose require." State v. Jones, 425 N.J. Super. 258, 275 (App. Div. 2012) (citations omitted). "[L]imiting instructions must be provided to inform the jury of the purposes for which it may, and for which it may not, consider the evidence of defendant's

uncharged misconduct, both when the evidence is first presented and again as part of the final jury charge." Rose, supra, 206 N.J. at 161. No such instructions were given here. When a juror said "[t]here was a lot of discussion" about the Consent Order, and asked its nature and purpose, the court merely told the jurors that it was a "consent order from a court" which defendant "neither admitted or denied," and that they could consider the discussion about the "findings".

"When a trial court fails to employ the Cofield test to analyze the admissibility of other-crimes evidence, 'no deference is to be accorded the trial court's decision to admit that evidence; nor is that decision entitled to be reviewed under an abuse of discretion standard'"; instead, appellate courts "undertake a plenary review of whether the other-crimes evidence was admissible." State v. Reddish, 181 N.J. 553, 609 (2004) (citation omitted). We conclude that the Consent Order evidence was inadmissible, and that its admission had the "clear capacity of producing an unjust result." R. 2:10-2. Therefore, we reverse the jury's verdict and remand for a new trial.[14]

[14] Plaintiff disclaims reliance on N.J.R.E. 406, so we need not consider defendant's argument that the evidence was also inadmissible under that rule.

2.

We address the remaining evidentiary issues, which may arise during the retrial. Defendant argues the trial court erred in permitting testimony from Michael P. Pompeo, the receiver for Miller and CMC appointed in the Miller action brought by the Attorney General. Defendant argues Pompeo's testimony was inadmissible under N.J.R.E. 602 because Pompeo had no "personal knowledge" of the events that transpired.[15]

However, as receiver in the Miller action, Pompeo was charged with reviewing the books and records of and pertaining to Miller and CMC. That review also caused Pompeo to learn facts concerning defendant and CMA.[16] Plaintiff called Pompeo to testify concerning the facts he uncovered.

The trial court allowed Pompeo to testify, "analogiz[ing] [him] to the Court's expert." However, the court did not permit Pompeo to testify that he was appointed as a receiver. Pompeo was

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[15] N.J.R.E. 602 provides:

> [A] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge, may, but need not, consist of the testimony of that witness.

[16] The receiver entered into a confidential settlement agreement with defendant and CMA, requiring them to pay restitution, disgorgement, and a civil monetary penalty.

instructed to "talk about what [he] found," but not to speak about "findings of guilt" or "finding[s] of violations."

Pompeo informed the jury he was retained to investigate CMC. He testified as follows. CMC "raised money from individual investors through the sale and issuance of nine-month promissory notes." The notes were required to be registered with the New Jersey Bureau of Securities, but were not, and thus were illegally sold. Indigo-Energy "was never a profitable company." "There was substantial doubt concerning Indigo Energy's viability" from the time CMC began investing in it.

Pompeo testified CMC was a Ponzi scheme, "when a company raises funds from an investor and uses those funds to pay back old investors." CMC raised $41 million with only $11.7 million returned to investors. Plaintiff invested $1,584,900 with CMC, but received only $401,954 from CMC.

Pompeo testified "the principal of Carr Miller Capital, Everett Miller, used Carr Miller Capital and its funds indistinguishable from his own." CMC paid commissions to defendant, and rent to CMA, and defendant received $200,206 more from CMC than he contributed to CMC.

Pompeo had sufficient personal knowledge of the facts about which he testified. His investigation into CMC gave him personal knowledge of its finances and the financial information about the

Ponzi scheme. See United States v. Christie, 624 F.3d 558, 568 (3d Cir. 2010) (holding a lead investigator's "responsibilities gave him sufficient information to testify about various aspects of the investigation" under Fed. R. Evid. 602, "even if he did not conduct each step himself"). Because that financial information was recorded in business records, it was not necessary for Pompeo to be personally involved during the Ponzi scheme. See United States v. Weaver, 281 F.3d 228, 231 (D.C. Cir. 2002) (holding an active participant in an investigation may testify under Fed. R. Evid. 602 about "personal knowledge he gained during the course of his examination" of business records); see also 3-602 Weinstein's Federal Evidence § 602.02[3] (2017). The facts he testified to were relevant to plaintiff's action against defendant, and were helpful to the jury.

Defendant argues Pompeo's testimony violated the best evidence rule, as defendant could have provided some of the same information provided by Pompeo. However, "a witness who has personal knowledge of the matter about which he is asked to testify should not be precluded from testifying merely because another potential witness might be in a better position to testify about that matter." Biunno, Weissbard & Zegas, N.J. Rules of Evidence, comment on N.J.R.E. 602 (2017) (citing Gunter v. Fischer Sci. Am.,

193 N.J. Super. 688, 693 (App. Div. 1984)). Therefore, it was not an abuse of discretion to admit Pompeo's testimony.[17]

Plaintiff also argues the trial court erred in restricting testimony concerning the value of the millions of restricted Indigo-Energy shares he received. He testified he "can't do anything with them, they're worthless." He stated "[t]he value right now is zero. In fact we're getting sued by the receiver for these shares." Defense counsel objected, arguing the shares were now "trading at 49 cents a share."

Both counsel agreed to the trial court striking plaintiff's answer and instructing the jury "[t]hat the stock that the witness just spoke about, he cannot sell . . . because a governmental representative is trying to repossess the stock."

On cross-examination, defense counsel asked plaintiff whether he had "gone online to determine the price of that stock." Plaintiff indicated he did not check the price on the shares.

We find no abuse of discretion because both sides agreed to the court's instruction and because plaintiff apparently had no knowledge of the value of the shares. We note that both the value of the shares and the restrictions on selling them are relevant, and may be proven through appropriate evidence at a new trial.

[17] Defendant does not challenge, and we do not address, whether Pompeo gave expert testimony.

Finally, defendant argues the trial court erred in prohibiting the parties from using the complaint in cross-examining plaintiff. He cites that the trial court told the parties "don't talk about the pleadings in either opening." However, the court never said anything about not using the pleadings during cross-examination, nor did defense counsel attempt to do so.

In sum, we affirm the motion court's grant of summary judgment on plaintiff's fraud claim and its imposition of sanctions against him. We reverse the court's grant of summary judgment on his aiding and abetting fraud claim, vacate the court's denial of summary judgment on his negligent misrepresentation claim, and reverse the denial of summary judgment on his negligence claim. For those reasons, and because it was prejudicial error to allow testimony regarding the Consent Order, we reverse the jury's verdict. We remand for further proceedings on plaintiff's aiding and abetting fraud claim and on his averment that the non-disclosure that CMC securities were unregistered and non-exempt constituted negligent misrepresentation. Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.