SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2481-22
A-2482-22

LARRY SCHWARTZ and NJ 322, LLC,

Plaintiffs-Appellants,

v.

NICHOLAS MENAS, ESQ., COOPER, LEVENSON, APRIL NIEDELMAN & WAGENHEIM, PA, ERIC FORD, and PULTE HOMES,

Defendants-Respondents,

and

BRAD INGERMAN and MBI DEVELOPMENT COMPANY, INC.,

Defendants.

———————————————

LARRY SCHWARTZ,

Plaintiff-Appellant,

v.

NICHOLAS T. MENAS, ESQ.,
and COOPER, LEVENSON,
APRIL, NIEDELMAN &
WAGENHEIM, PA,

Defendants-Respondents

Argued (A-2481-22) and Submitted (A-2482-22)
December 12, 2024 – Decided January 2, 2025

Before Judges Natali, Walcott-Henderson, and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket Nos. L-3904-11 and L-4776-13.

Giovanni De Pierro argued the cause for appellants Larry Schwartz and NJ 322, LLC in A-2481-22 (De Pierro Radding, LLC, attorneys; Giovanni De Pierro, Alberico De Pierro, and Davide De Pierro, on the briefs).

De Pierro Radding, LLC, attorneys for appellant Larry Schwartz in A-2482-22 (Giovanni De Pierro, Alberico De Pierro, and Davide De Pierro, on the briefs).

John L. Slimm argued the cause for respondents Nicholas Menas, Esq. and Cooper, Levenson, April, Niedelman & Wagenheim, PA in A-2481-22 (Marshall Dennehey, PC, attorneys; John L. Slimm and Jeremy J. Zacharias, on the brief).

Trevor J. Cooney argued the cause for respondents Eric Ford and Pulte Homes in A-2481-22 (Hill Wallack,

LLP, and Archer & Greiner, PC, attorneys; James G. O'Donohue and Trevor J. Cooney, on the brief).

Cooper Levenson, PA, attorneys for respondents Nicholas T. Menas and Cooper, Levenson, April, Niedelman & Wagenheim PA in A-2482-22 (Frederick L. Shenkman and Rebecca D. Winkelstein, on the brief).

PER CURIAM

In these related appeals, which we consolidated for the purpose of issuing a single opinion, plaintiffs Larry Schwartz and NJ 322, LLC (NJ 322) appeal from the March 9, 2023 order granting defendants Nicholas T. Menas, Esq., Cooper Levenson April Niedelman & Wagenheim, P.A. (Cooper), Pulte Homes, and Eric Ford's motions to bar the lost profits damages report and testimony of Dr. Robert S. Powell, and for summary judgment.[1] We affirm.

The trial court previously granted summary judgment in these cases finding plaintiff's claims for lost profits damages were barred by the "new business rule" set forth in Weiss v. Revenue Building & Loan Association, 116 N.J.L. 208 (E. & A. 1936), and we affirmed. Schwartz v. Menas, No. A-3187-18 (App. Div. Nov. 6, 2020). In Schwartz v. Menas, 251 N.J. 556, 561 (2022), our Supreme Court "join[ed] the majority of jurisdictions that reject a per se ban

[1] For ease of reference, we refer to plaintiffs collectively in both appeals as plaintiff.

on claims by new businesses for lost profits damages" and declined "to follow Weiss." The Supreme Court held claims by new businesses for "lost profits damages are governed by the standard of reasonable certainty" and remanded these cases to the trial court for consideration of defendants' motions to bar plaintiff's proofs of lost profits damages. Id. at 561, 577.

On January 19 and 20, 2023, the court conducted a hearing pursuant to N.J.R.E. 104 at which plaintiff's expert testified. On March 9, 2023, the court entered an order granting defendants' motions supported by a written opinion. This appeal followed.

I.

The relevant facts are set forth in our prior opinion. Schwartz, slip. op. at 3-8. We summarize them here to place plaintiff's arguments in context. These appeals arise out of underlying actions alleging legal malpractice and other tortious conduct in connection with two separate real estate transactions. In the first, plaintiff sued his former legal counsel and others alleging defendants deprived him of the opportunity to construct an affordable housing complex in Monroe Township. In the second, plaintiff sued his former counsel for legal malpractice alleging defendants deprived him of the opportunity to construct a mixed residential and commercial development in Egg Harbor Township.

Plaintiff is the owner of a dry-cleaning business in Staten Island and has operated this enterprise as a sole proprietorship for over twenty years. He never owned any other businesses and "never developed any pieces of property" or real estate. Between 2000 and 2011, he purchased two or three "shells" in Newark and "rehabbed them." He provided no further explanation concerning his role in the completion of this work and did not recall whether he earned any money from these endeavors.

Nothing in the record indicates plaintiff ever directed or worked on a project where he would have to break ground, frame houses, or construct the core and shell of a building. He never created the infrastructure, including water, electric, sewage, roadways, or parking lots for a new development. He never owned any construction equipment or had a workforce to construct a residential or commercial project, nor did he have experience constructing, planning, or financing an affordable housing project or any other type of housing project. He did not understand zoning laws and conceded he "is not a developer" and "never developed any pieces of property."

A.

In the first action, plaintiff alleges in 2006, Menas, who was a member of Cooper, contacted plaintiff's friend, Salvatore Surace, about a real estate project in Monroe Township. According to plaintiff, Surace "was a very wealthy individual [who] had multiple years and experience of building." Menas proposed plaintiff and Surace purchase a thirty-seven-acre property in Monroe Township known as "Duncan Farms" and develop it as a mixed-use rental townhouse and commercial development (the Monroe project). Menas formed NJ 322 with plaintiff and Surace as the sole members, and NJ 322 purchased the property.

The property was subsequently rezoned for one hundred percent affordable housing. Once the nature of the Monroe project changed to an affordable housing development, Surace dropped out of the venture and sold his interest in NJ 322 to plaintiff. Plaintiff had no experience with, or knowledge of, the requirements imposed on developers of affordable housing by the Fair Housing Act, N.J.S.A. 52:27D-301 to -329, and knew nothing about the New Jersey Counsel on Affordable Housing (COAH).[2]

[2] Effective March 20, 2024, COAH, formerly an agency of the Department of Community Affairs, was abolished. See S. 50/A. 4 (2024).

Plaintiff had preliminary discussions with Martin G. Bershtein, Esq., an attorney with experience in obtaining financing for affordable housing projects through COAH. At his deposition, Bershtein explained COAH provided federal low income "tax credits" as a "mechanism to [at]tract private capit[a]l into an under-served market." The tax credits are then sold "and the equity is used to help fund these projects. Most of the purchasers of these credits are banks . . . ." "It[is] a private/public partnership" with a bank or other investor "provid[ing] construction financing and . . . tax credit equity."

According to Bershtein, to make a project such as the Monroe project feasible, a developer would need to apply for and be awarded a nine percent tax credit.[3] Bershtein explained "[t]he [nine percent] [was] highly competitive and limited, but it fund[ed] [eighty] to [ninety percent] of [the] deal." At the time, "it [was] extremely competitive, three to five to one," and "people c[a]me to [him] for assistance . . . because it [was] a challenging process."

Between spring and summer of 2008, plaintiff met with Bershtein four or five times. Bershtein described his work as "just simply preliminary . . . trying to put some different models together." He understood plaintiff had "never done

[3] Bershtein explained there are also four percent tax credit awards that are less competitive, but that option was not considered in this case.

a [COAH] development." Ultimately, he would have "put together an application []to the agency" and "to get the deal closed, obviously find[] an investor and the financing that would be involved, and if a partner was needed, to partner [plaintiff] up with another developer."

In the summer of 2008, plaintiff terminated his relationship with Bershtein. Bershtein never signed a retainer agreement or other written agreement with plaintiff and never created a file in connection with his work. Up to that time, they were "just talking about some ideas on how to make [the Monroe project] work." Plaintiff did not provide him with any documents, project plans, financial statements, tax returns, or bank statements.

Bershtein "r[a]n some very preliminary models in terms of . . . how to possibly make it work, but [they] never really went very far, because it was terminated fairly quickly." Bershtein was not able to prepare a "legitimate model" because "it was too short a timeframe" and "[t]hese deals typically evolve over years." At the time the relationship was terminated, the models he created were "very preliminary," "would[not] be accurate," and "would[not] even be relevant." Bershtein stopped working before he was able to determine if a COAH deal was possible or if plaintiff would have been qualified to pursue such a deal.

Despite his limited contact with plaintiff, Bershtein believed he could have assisted plaintiff to obtain a nine percent tax credit deal because he previously obtained such a deal for a "large [Black] church in Burlington County" that "had land and a campus" and "wanted to build a senior development." In that case, after working with the church "for well over a year," he "partnered [the church] with a developer, Michaels Development[,] . . . and made an arrangement where it was a [sixty]/[forty] split" with the church "able to retain [sixty percent] of all the benefits." According to Bershtein, prior to 2010 or 2011, it was possible for a novice developer to win an award of COAH tax credits.[4]

Plaintiff contends Menas and other defendants prevented him from acting as the affordable housing developer and allowed MBI Development Company (MBI) to acquire the project from plaintiff and complete the development. In his complaint, plaintiff alleges legal malpractice against Menas and Cooper. He also alleges defendants conspired to commit fraud, conversion, and tortious

[4] Bershtein testified he also assisted "an experienced developer" that "had never done tax credit deals previously" to develop affordable housing through a joint venture. As noted, plaintiff was not an experienced developer, but a novice attempting to start a new business.

interference with a contract and business advantage. He seeks damages, including lost profits.

In support of the claim for lost profits, plaintiff presented an expert report, dated August 15, 2017, prepared by Dr. Powell. Dr. Powell "assess[ed] the profits that would have likely been earned by [p]laintiff[] in the event that [his] development goals and objectives in connection with the development of [the Monroe] [p]roject had not been frustrated." Dr. Powell's analysis was based on "profits that would likely have been earned by a development team which would have included" plaintiff.

Dr. Powell identified two possible projects that could have been constructed on the property. The first option would have involved building "100 residential townhomes for sale along with 20,000 square feet of commercial space. The townhomes would [have been] a mix of two[-]and three[-]bedroom units," and would have been "sold at market prices." Dr. Powell's report did not account for, or even mention, that plaintiff had never developed a project of this size or complexity. Instead, he opined that based on a similar project in a neighboring municipality that had been constructed by a national homebuilder, plaintiff would have earned a $5,135,804 profit if he had developed this project.

In the alternative, Dr. Powell postulated plaintiff would have earned a profit of $4,900,450 to $8,167,416 if he constructed the development in the same manner as MBI, the actual, experienced developer that completed it. MBI built 132 rental apartments "with controls designed to make such units affordable to low[-]and moderate[-]income persons." Again, his opinions did not consider that plaintiff had never developed any project like this in the past. Instead, he assumed plaintiff would have obtained the same nine percent tax credit COAH deal awarded to MBI. He also assumed plaintiff would have obtained the same $3,612,994 long-term loan from the New Jersey Housing and Mortgage Finance Agency (HMFA) that was secured by MBI.

With respect to this second option, Dr. Powell opined, based on Bershtein's deposition testimony, "[p]laintiff . . . would have been able to share up to [sixty percent] of the development fees and profits . . . if [he] elected to form a joint venture with another developer experienced in such projects, or alternatively, receive 100 [percent] of such development fees and profits by undertaking the project on his own." "This would have resulted in[] a gain for [p]laintiff . . . of between $4,900,450 and $8,167,416."

B.

In the second action, plaintiff alleges in 2009, Menas proposed he purchase an approximately thirty-eight-acre property on Delilah Road in Egg Harbor Township and develop it (the Egg Harbor project).[5] The site was previously approved for the development of 208 multi-family, age-restricted units over one level of parking, with "a six-acre man-made lake, a community center, pool, tennis courts[,] and waterfront promenade." Plaintiff contends he wanted to undertake the Egg Harbor project, but defendants breached their duties to him and prevented him from doing so. Ultimately, the age-restriction was lifted, and the development was constructed with 204 market-rate units.

Once again, plaintiff sought damages for lost profits. Dr. Powell prepared an expert report, dated June 15, 2016, concerning the proposed Egg Harbor project. He opined that plaintiff would have earned: (1) a profit of $2,270,525 if he had constructed "a 'for sale,' upscale condominium project" consisting of 208 units; (2) a profit of $3,579,724 if he built "a 208-unit rental apartment project"; or (3) a $1,907,241 profit if he instead developed an age-restricted "for-

[5] The transaction involved another property on Stafford Avenue in Egg Harbor Township that is not relevant to the issues raised in this appeal.

sale condominium[] [project]." As was the case with his other report, Dr. Powell did not mention plaintiff's lack of experience in real estate development.

II.

On January 19 and 20, 2023, Dr. Powell testified at the N.J.R.E. 104 hearing. He testified the Monroe Township property was ultimately developed as a "100 percent affordable development" by MBI, an "affiliate of one of the leading affordable housing developers in New Jersey, the Ingerman Company." It was the same 132-unit affordable rental apartment development plaintiff proposed.

The project "required . . . financial assistance from, among other agencies, the [HMFA], in two forms of assistance[:] . . . a long-term loan and . . . federal low-income housing tax credits." Specifically, a "nine percent low-income housing tax credit . . . was provided to the developer." In this case, the HMFA "provided $122 million dollars or so in financing for the project." Dr. Powell used the "data . . . provided or generated" by MBI to formulate his opinions and "project the likely profits over time."

According to Dr. Powell, "[one hundred] percent affordable projects tend to be developed with only a modest amount of traditional developer equity put into the project." Developers are attracted to these projects "because of the high

up-front fee income that can be generated" from the tax credits during the first fifteen years of the project, but it "does require some expertise in the business." Based on his review of Bershtein's testimony, he concluded plaintiff could have "partnered with a developer in this project and participated substantially in the profits." Dr. Powell testified, "Bershtein . . . said in his deposition . . . it was possible for applicants to qualify for [COAH tax credits] without having a very strong financial statement."

On cross examination, Dr. Powell conceded he did not review any of plaintiff's financial statements and did not know plaintiff's prior business experience. He was not aware plaintiff never developed any property or real estate or directed or worked on a project involving breaking ground or constructing the core of a building, and had no experience constructing, planning, or financing an affordable housing project. He conceded affordable housing is a highly regulated and very complex area involving a limited amount of federal funds allocated by the HMFA through a competitive process and "not all applications are approved."

However, Dr. Powell opined plaintiff "would have been able to organize a team to undertake the project[] and would have been able to proceed on essentially the same basis" as MBI did. And plaintiff's lack of experience as a

contractor or real estate developer would not "have made a difference" because "he could have engaged professionals to perform those services."

Dr. Powell testified if plaintiff was able to enter into a partnership with another developer, he would have been able to share "up to [sixty] percent" of the profits. He was not able to offer an opinion on what plaintiff's share might have been in this case because plaintiff "never got to that point in the process." He conceded plaintiff's share could have been significantly lower and agreed it "might have been [twenty] percent, [thirty] percent, or anything in between."

With respect to the Egg Harbor project, Dr. Powell testified the project as ultimately developed with 204 market-rate rental apartments would have been very attractive to investors and plaintiff's "search for an investor would have been successful" because plaintiff owned the property, had site plan approval, and the project had a high projected rate of return. Dr. Powell assumed plaintiff would have been able to obtain approvals with the age restriction lifted because that is what eventually happened. Ultimately, he concluded the project was economically possible and financially feasible.

On cross examination, Dr. Powell conceded his report assumes plaintiff would have been "part of the development team to build [the] project." In fact, he projected the total development costs of the project to be over twenty-nine

million dollars, which would have needed to be funded by the development team and lenders. Dr. Powell estimated the development team would have needed to raise approximately $9,700,000, but in his "opinion and experience[,] it would not have been difficult to raise" that amount, and he did not consider "[w]hether that came from [plaintiff] or a team of investors" working with plaintiff.

Dr. Powell did not consider whether plaintiff would have required equity partners because "[i]t was not necessary for the purposes of [his] report" and his report is "silent on that question." Dr. Powell also assumed the developer would secure a short-term construction loan, an interim loan after construction was completed, and eventually a permanent long-term loan in excess of nineteen million dollars after the project was stabilized. He testified, "the risk period is during construction," and to secure the construction loan, "the development team [would] have to provide the construction lender with sufficient comfort about . . . the team's financial ability to build and finish the project." That is why he "assumed that the project . . . would require a financial partner as part of the team to attract the financing." But "[i]t could have been [plaintiff]. It could have been [plaintiff] and his partners. [Plaintiff] could have sold the rights to the project. There could have been other people developing it." Because he did not consider "the formation of the development partnership that would have

built the project," he could not say what plaintiff's share of the profits might have been.

Dr. Powell was not aware when the age restriction was lifted, nor was he aware that happened after plaintiff's involvement with the project terminated. Dr. Powell also agreed the property is located in the Pinelands, and "there are very many very precise laws that govern construction in the Pinelands," but he did not consider that in his report. Dr. Powell conceded he prepared his report without detailed design drawings and, as a result, was not able to use an independent construction cost estimating service but relied on his own experience to estimate the costs.

III.

In its March 9, 2023 opinion, the court determined, "Dr. Powell's reports and opinions do not account for [plaintiff's] lack of experience in development. Rather, they ignore it."

> In the context of developing large tracts of more than [one hundred] units (and in the case of the [Egg Harbor project] more than [two hundred] units), with both projects having estimated costs substantially exceeding [twenty million dollars], in a heavily regulated industry, Dr. Powell's failure to account for [plaintiff's] inexperience is fatal.
>
> . . . .

> [B]oth [developments] involved heavily regulated, labyrinthian business and building requirements, including affordable housing and Pinelands Commission overlays. . . . The substantial complexity and scope make comparisons to other novice developers and consideration of [plaintiff's] inexperience critical. Yet, Dr. Powell ignored such in his reports and testimony.

With respect to the Monroe project, the court observed Dr. Powell estimated plaintiff's lost profits damages to be "$4.9 to $8.1 million – a broad range by any assessment. Indeed, [the] more than [three million dollar] delta . . ., in and of itself, call[s] into question the reasonable certainty of Dr. Powell's prediction but, at a minimum, highlights and underscores the report['s] faulty foundation built upon frail assumptions."

The court noted Dr. Powell based his report on the results obtained by MBI, a "well-established and experienced" developer that is "well known" in the industry and "on any short list of competitive firms." Dr. Powell did not consider "[h]ow. . . financing [would] be impacted for a novice developer" or whether plaintiff ever approached a lender regarding a loan. He also did not consider whether "a novice developer [would] be expected to have less negotiation leverage and, accordingly, be required to provide an experienced partner with a greater percentage of profits."

The court found Dr. Powell's assumption that plaintiff would be able to partner with an experienced developer was speculative because "there is nothing in the record indicating [he] ever had a lone conversation with an experienced partner." "Any reliance on the involvement of [Bershtein] was misplaced, as any conversations or communications in that regard were in their infancy, such that any partnership remained speculative, at best, illusory at worst." Dr. Powell did not consider "that any conversations between [plaintiff] and Bershtein were very preliminary, with nothing being definitive." His "misplaced reliance on Bershtein's involvement led to assumptions built on assumptions that ultimately led to [his] speculation regarding involvement of a partner[] [or partners] and a wide range of impacts on [p]laintiff's purported lost profits."

The court also noted Dr. Powell's estimates of plaintiff's potential share of the profits were contradictory. In his August 15, 2017 report, Dr. Powell opined plaintiff "'would have been able to share up to [sixty] percent of the . . . profits,'" but also that he "could have received between [sixty percent] [to] [one hundred percent]" of the profits. The court found his "testimony endeavoring to clarify same during the [N.J.R.E. 104] hearing was unsatisfying. This contradiction is substantial and further underscores the speculative nature of his broad range of estimates." Dr. Powell's opinion that the Monroe project

was "'economically possible and feasible'" did not mean plaintiff's alleged lost profits damages were reasonably certain.

As to the Egg Harbor project, the court observed Dr. Powell did not provide any "information as to whether any of the comparable projects he evaluated were developed by novice developers such as [plaintiff]." He left "unanswered . . . whether a project of this scope is appropriate, let alone feasible, for a first-time entrant into the development project." "[N]owhere in his report nor his testimony does Dr. Powell indicate that he . . . factored into his analysis [plaintiff's] inexperience." The court found "it is notable that Dr. Powell in no way discusses any information – let alone his own experience – that considered the unique circumstances of a novice developer on profits." Specifically, "how does a lack of experience factor into obtaining loans, risk of project completion, negotiation leverage on contracts, etc." In fact, Dr. Powell admitted "for purposes of his conclusion on lost profits, it did not matter who the developer was. His report and conclusions apply to the project regardless of developer."

The court also found his analysis was speculative because "he never saw an architectural plan" and "did not conduct 'a thorough market analysis.'" In addition, "Dr. Powell [sought] to circumvent the failure to consider [plaintiff's]

lack of experience by hypothetically assuming a partnership with an experienced developer" even though "nothing in the record indicates any factual basis . . . for such an assumption." He "provided no insight to how a partnership involving a novice developer" would affect the novice's "leverage on a variety of issues." "[I]f a partnership existed, as Dr. Powell hypothetically postulates . . . what percentage of the profits would be shared – [thirty] percent? [Forty] percent? [Sixty] percent? Who knows." Finally, Dr. Powell failed to consider that this development was in the Pinelands, "an environmentally sensitive and heavily regulated geographic area." The court further stated:

> At day's end, the [Supreme] Court established a heightened bar for introduction of lost profits by new or novice business – "reasonable certainty." Here, . . . Dr. Powell's expert reports and testimony are silent regarding his consideration or contemplation of [plaintiff's] novice developer status and lack of experience. Nowhere . . . does Dr. Powell compare his projected lost profits with projects done by similarly inexperienced developers, nor does he offer any indication whether a novice developer could undertake – let alone complete – multi-unit housing developments . . . .
>
> Without considering the unique circumstances of a novice developer with respect to large scale . . . , costing more than [twenty-four] million [dollars] each to develop, involving a complex, highly regulated, competitive industry, Dr. Powell's expert opinions do not satisfy the "reasonable certainty" standard, and

> accordingly, are too speculative for introduction and presentation to a jury.

On appeal, plaintiff argues the court: (1) made numerous errors of fact, and impermissibly and inappropriately acted as a rebuttal expert to Dr. Powell and contested facts established by Bershtein; (2) erroneously barred Dr. Powell's expert report and granted summary judgment by impermissibly creating its own standard and failing to correctly apply the standard set forth by the Supreme Court in Schwartz; and (3) erred by not permitting Bershtein to testify at the N.J.R.E. 104 hearing.

IV.

We affirm substantially for the reasons set forth in the court's written opinion. We add the following comments.

"When . . . a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010)). "Appellate review . . . proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid. (quoting Est. of Hanges, 202 N.J. at 385).

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Id. at 52. An appellate court "must apply an abuse of discretion standard to a trial court's determination, after a full [N.J.R.E.] 104 hearing, to exclude expert testimony on unreliability grounds." In re Accutane Litig., 234 N.J. 340, 391 (2018) (citing Hisenaj v. Kuehner, 194 N.J. 6, 12, 16 (2008)); see Schwartz, 251 N.J. at 570.

This court reviews a motion for summary judgment de novo, applying the same standard governing the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). Thus, this court must determine, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, 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., 142 N.J. 520, 540 (1995).

In Schwartz, our Supreme Court rejected a per se rule precluding recovery of lost profits damages by a new business and held such claims are subject to the "general rule that . . . '[l]ost profits may be recoverable if they can be established with a 'reasonable degree of certainty,' but [a]nticipated profits that are remote, uncertain or speculative . . . are not recoverable." 251 N.J. at 576

(alterations in the original) (citing Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 609-10 (2011)). A new business, however, is not "in the same position as an established business with respect to such damages claims." Id. at 577. The Court recognized "that it is substantially more difficult for a new business than for an experienced business to prove lost profits damages with reasonable certainty." Ibid. (citing Restatement (Second) of Contracts § 352, cmt. b; Blinds to Go (U.S.) Inc. v. Times Plaza Dev., L.P., 931 N.Y.S.2d 105, 108 (App. Div. 2011)). "[T]here is a sharp distinction between an established business and a new business with respect to such claims." Id. at 575.

"In its role as gatekeeper, a trial court should carefully scrutinize a new business's claim that, but for the conduct of the defendant, it would have gained substantial profit in a venture in which it had no experience." Id. at 577. "If a new business seeks lost profits that are remote, uncertain, or speculative, the trial court should bar the evidence supporting that claim and should enter summary judgment pursuant to Rule 4:46-2." Ibid.

We are satisfied the trial court did not misapply its discretion by finding plaintiff, as a new business entering an enterprise in which he had no experience,

failed to establish lost profits damages with reasonable certainty.[6] As the court correctly found, plaintiff fails to meaningfully address how his status as a novice entering a new business would affect his ability to develop the projects. Instead, he attempts to sidestep that issue by declaring it irrelevant. We are not convinced.

In connection with the Monroe project, the court correctly found plaintiff's claim that he would have applied for and been awarded COAH tax credits despite his novice status is highly speculative. Plaintiff's claim is based solely on his meetings with Bershtein who ran "some very preliminary models in terms of . . . how to possibly make it work." Bershtein testified the nine percent COAH tax credit awards were "limited" and the application process was "extremely competitive, three to five to one," and "challenging." Based on that alone, plaintiff's lost profits claim was far less than reasonably certain. Even if he continued to pursue such an award with Bershtein beyond some initial meetings and preliminary modeling, it was not "reasonably certain" he would have been awarded one of the nine percent COAH tax credit deals. Moreover, Bershtein conceded they "never really went very far, because [his relationship

[6] There is no dispute plaintiff was entering a new business for purposes of a lost profits claim. Ibid. ("[T]he development projects that gave rise to both cases constituted new businesses.").

with plaintiff] was terminated fairly quickly." He was not able to prepare a "legitimate model" because "[t]hese deals typically evolve over years."

Bershtein's claim that he would have been able to assist plaintiff to obtain the COAH tax credits based on his prior experience with a church in Burlington County is not persuasive. Putting aside the obvious differences between a church applying to build senior housing on its property and a novice developer attempting to construct a 132-unit affordable housing project, Bershtein's experience with a single other new business does not lend significant support to plaintiff's claim it was reasonably certain he would have prevailed. At most, plaintiff established a possibility he would have been able to develop the Monroe project. The "reasonable certainty" standard requires much more than that. Schwartz, 251 N.J. at 576.

We are also satisfied the court correctly determined Dr. Powell's opinion regarding the percentage of profits plaintiff may have received from the Monroe project was impermissibly speculative. Based on nothing more than Bershtein's testimony about his experience with the Burlington County church, Dr. Powell opined plaintiff would have been able to negotiate a deal for "up to [sixty] percent" of the profits for the Monroe project. Dr. Powell conceded, however, he did not know what type of arrangement plaintiff would have been able to

negotiate, and his share of the profits might have been as low as twenty percent. To establish damages with reasonable certainty, a plaintiff must do more than venture arbitrary, unsupported guesses as to what might have been. See Schwartz, 251 N.J. at 576. Plaintiff is unable to do that in this case.

We reach the same conclusions with respect to the court's decision to bar Dr. Powell's testimony and report on the Egg Harbor project. Again, Dr. Powell did not consider plaintiff's status as a novice entering a new business in reaching his opinions. As he conceded, his report is based on the profits any developer, experienced or otherwise, might potentially have earned from the development. For purposes of his analysis, it did not matter plaintiff had no experience as a developer, knowledge of relevant laws and regulations, or financial ability to participate in the development. Just as he did for the Monroe project, Dr. Powell dismissed all those issues by assuming plaintiff would have been "part of the development team to build [the Egg Harbor] project."

As the court found, however, there is no evidence in the record to support such an assumption "other than Dr. Powell's conclusory statement that the profit margin makes the possibility of a partnership 'self-evident.'" More importantly, despite his assumption plaintiff would be part of a development team, his report does not address the share plaintiff possibly could have negotiated. Again, this

is because Dr. Powell's report is intended to predict the profits the Egg Harbor project may have produced for any developer; not what plaintiff might have realized as a member of a hypothetical development team. Dr. Powell did not consider any comparable projects developed by a novice real estate developer and did not evaluate how plaintiff's inexperience with the real estate industry would have affected his participation in the project. Instead, he opined plaintiff's lost profits damages would have been no different than those of the most experienced, well-respected developer.

We are not convinced by plaintiff's argument that the court impermissibly "rebutted" Dr. Powell's opinions. Factfinders may use their common sense when determining the weight to give expert testimony. See Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001) (citing In re Yaccarino, 117 N.J. 175, 196 (1989)). "[A] factfinder is not bound to accept the testimony of an expert witness, even if it is unrebutted by any other evidence." Id. at 431 (citing Johnson v. Am. Homestead Mortgage Corp., 306 N.J. Super. 429, 438 (App. Div. 1997)). In this case, in its role as gatekeeper, the court challenged some of the factual underpinnings of Dr. Powell's opinions as speculative and lacking support in the record. The court did not misapply its discretion by doing so.

Plaintiff's claim that the court improperly refused to permit Bershtein to testify at the N.J.R.E. 104 hearing is also unconvincing. We review a trial court's decision regarding the conduct of proceedings for abuse of discretion. State v. Jones, 232 N.J. 308, 311 (2018). "N.J.R.E. 104(a) prescribes a procedure by which a trial court may 'assess the soundness of [an expert's] proffered methodology and the qualifications of the expert.'" Townsend, 221 N.J. at 53-54 n.5 (alteration in the original) (quoting Rubanick v. Witco Chem. Corp., 125 N.J. 421, 454 (1991)). Pursuant to N.J.R.E. 611(a)(2), "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to . . . avoid wasting time."

The matter before the court was the admissibility of Dr. Powell's testimony and opinions. Bershtein's deposition testimony was relevant because Dr. Powell relied on portions of his deposition to form his opinions. As the court aptly noted, there was no reason to hear additional testimony from Bershtein because the court already had the information Dr. Powell considered. In addition, Bershtein was deposed at length regarding the issues relevant to the hearing and the parties referred to his deposition testimony and moved certain portions into evidence during the hearing. His live testimony on the same issues

would have been cumulative. The court did not misapply its discretion by refusing to permit him to testify at the hearing. See Jones, 232 N.J. at 311.

Plaintiff fell far short of establishing his alleged lost profits damages with a reasonable degree of certainty. At most, plaintiff established a possibility he might, as a novice entering a new enterprise, have been able to develop these large, extremely expensive, and heavily regulated construction projects. A showing of "reasonable certainly" requires significantly more than a mere possibility. Where, as here, a new business seeks lost profits that are remote, uncertain, or speculative, the trial court should bar the evidence supporting the claim. See Schwartz, 251 N.J. at 577.[7]

To the extent we have not addressed any remaining arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[7] Plaintiff does not appeal from the March 9, 2023 order to the extent it also granted defendants' motions for summary judgment. That argument, therefore, is waived. See Telebright Corp. v. Dir., N.J. Div. of Tax'n, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any supporting arguments in its brief); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024) ("[A]n issue not briefed is deemed waived.").