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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0182-05T2

BOSTON MARKET CORPORATION f/k/a
GOLDEN RESTAURANT OPERATIONS, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

MYRUS HACK,

Defendant-Appellant/
Cross-Respondent.

Argued February 27, 2007 – Decided August 20, 2007

Before Judges Axelrad, R. B. Coleman and Gilroy.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-400-02.

Brian J. Molloy argued the cause for appellant/cross-respondent Myrus Hack (Wilentz, Goldman & Spitzer, attorneys; Mr. Molloy and Willard C. Shih, on the brief).

Frederick W. Alworth argued the cause for respondent/cross-appellant Boston Market Corporation (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. Alworth and Terrence S. Brody, on the brief).

PER CURIAM

Defendant, Myrus Hack, LLC, appeals from an August 10, 2005, Amended Final Judgment, entered following a bench trial before Judge Gerald C. Escala. The judge determined, for reasons stated in a written decision, dated May 31, 2005, that plaintiff Boston Market Corporation, a tenant in a commercial building owned by defendant, was not in default of provisions relating to insurance requirements in the lease between the parties and that the lease continued in full force and effect. Defendant also challenges the court's earlier order, dated July 11, 2003, denying its motion for leave to amend its counterclaim to assert claims of fraudulent concealment against plaintiff. Plaintiff cross-appeals from that portion of the Amended Final Judgment that denied plaintiff's motion for an award of reasonable attorneys' fees pursuant to R. 4:58-2. We affirm each of the orders from which the parties appeal.

The central dispute involves the proper interpretation of the parties' lease agreement and, more particularly, whether the insurance obtained by plaintiff, with high deductibles of up to one million dollars, constituted self-insurance or no insurance at all, as defendant charges. Judge Escala, who had also presided over an earlier trial between the parties concerning a different aspect of the same lease, framed the issue thusly: "The simple question posed here is whether or not the insurance

arrangements made by [plaintiff] comply with the lease provisions respecting the tenant's insurance obligation." He concluded that "the position taken by Rosen [the general partner of defendant] that no deductible is permitted under the lease is not a reasonable position and is not sustainable as an argument to declare the tenant to be in breach." We agree.

On appeal, defendant argues that the court should not have considered plaintiff's creditworthiness, post-termination efforts to cure the breach, defendant's failure to purchase insurance itself and seek reimbursement from plaintiff for its cost, and defendant's motivation in terminating the lease. We are satisfied that the factors and circumstances that defendant argues the judge should not have considered are relevant to the implied covenant of good faith and fair dealing, which exists in every contract. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420-21 (1997). As the Court has recognized, "[a]lthough the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." Wade v. Kessler Institute, 172 N.J. 327, 341 (2002) (quoting Wilson v. Ameroda Hess Corp., 168 N.J. 236, 244 (2001)). In Wilson, the Court articulated the test for determining whether

the implied covenant of good faith and fair dealing has been breached as follows:

> a party exercising its right to use discretion in setting price under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract.
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> [Wilson, supra, 168 N.J. at 251.]

A party's purported exercise of discretion to attempt to terminate a lease for an asserted breach is likewise subject to scrutiny to determine whether that action is arbitrary, unreasonable or capricious. Indeed, the trial judge observed, with justification, that "the real motivation here is to escape from a lease that is economically disadvantageous to [the] landlord and becoming more so over the years."

Language in a contract that may result in a forfeiture of one party's interest should be strictly construed. Mandia v. Applegate, 310 N.J. Super. 435, 447 (App. Div. 1998). "The polestar of contractual interpretation is the intention of the parties." Communications Workers v. Monmouth Co. Bd. of Soc. Serv., 96 N.J. 442, 452 (1984). "The starting point in ascertaining that intent is the language of the contract." Ibid. But, it is also permissible, to shed further light on the

parties' intent, to consider and examine the circumstances that existed when the contract was made." Ibid. "[T]he chosen words and phrases are to be realistically assessed, in relation to the context and the obvious general purpose of the compact, for the meaning that is reasonably clear, such as is within the reasonable understanding of the symbols of expression." Great Atl. & Pac. Tea v. Checchio, 335 N.J. Super. 495, 501 (App. Div. 2000) (quoting Cozzi v. Owens Corning Fiber Glass Corp., 63 N.J. Super. 117, 121 (App. Div. 1960)).

The obvious purpose of the insurance provisions of the lease in this case is to require the tenant to obtain insurance naming the landlord as an additional insured to protect the landlord by eliminating or reducing the risk of financial loss to the landlord during the term of the lease. To that end, the lease, which was negotiated by the predecessors of these parties, requires the tenant to maintain at its expense hazard insurance and general public liability insurance of the type and amount specified in Paragraph 13 of the lease. In pertinent part, Section 13 of the lease specifies the following insurance requirements:

> § 13.1. Types and Amounts of Insurance Required. Tenant shall at all times maintain at its expense the following insurance with respect of the Leased Premises:

> (1) Insurance against loss or damage by fire, lightning, explosion, smoke damage and other risks from time to time included under "extended coverage" endorsements in amounts sufficient to prevent Landlord or Tenant from becoming a co-insurer of any loss under the applicable policies but in any event in amounts not less than 100% of the full insurable value of the Leased Premises. The term "full insurable value," as used herein, means actual replacement value, less actual physical depreciation.
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> (2) General public liability insurance against claims for bodily injury, death or property damage occurring on, in or about the Leased Premises and the adjoining streets, sidewalks and passageways, with limits of not less than $500,000 with respect to bodily injury or death to any one person, not less than $1,000,000 with respect to any one accident, and not less than $500,000 with respect to property damage.
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> . . . .
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> All such insurance shall be written by companies of recognized financial standing which are authorized to do insurance business in the state in which the Leased Premises are located, and such insurance shall name as the insured parties Landlord, Tenant . . . (as their respective interests may appear). Such insurance may be obtained by Tenant by endorsement on its blanket insurance policies; provided, that such blanket policies fulfill the requirements specified in this § 13[.]

Notably, the lease does not expressly prohibit insurance with a high deductible amount. It does not even mention deductibles. And as the trial judge observed, it is "not

uncommon for there to be some deductible amount on the risk insured against in order to economize on the premium." Accordingly, in the absence of language in the lease that specifies a maximum allowable deductible or that directly prohibits insurance that features a deductible amount, the trial court could, and did, justifiably conclude that a deductible was not only permissible; it was reasonably to be expected.

The reasonableness of the size of the deductible includable in the insurance program put in place was, however, a subject of more serious dispute. As to that, deference must be given to the "feel" of the trial judge, who thoughtfully analyzed plaintiff's deductible of up to one million dollars and found, nevertheless, that the insurance program that included such large deductibles was "not in and of itself violative of the lease provisions respecting insurance." The judge's analysis in arriving at that conclusion appropriately entailed consideration of plaintiff's creditworthiness and other factors bearing upon the risk of a loss or damage to which the landlord might be realistically exposed as a result of the insurance program utilized by plaintiff. The trial judge concluded the insurance dispute was, at worse, technical and that it did not relate to a material breach that would justify termination of the lease.

The scope of our appellate review of a judgment in a non-jury case is limited. We are guided by the following oft-quoted principles:

> Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence. It has otherwise been stated that "our appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice."
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> [Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974) (internal citations omitted).]

Applying that limited scope of review, we are satisfied that there is no basis for us to disturb the trial judge's determination that plaintiff maintained insurance that was in compliance with the requirements of the lease, as that determination is supported by credible evidence in the record.

"Though a deductible is frequently referred to as self-insurance, its functional purpose is to simply alter the point at which an insurance company's obligations to pay will ripen." Am. Nurses Ass'n v. Passaic Gen. Hosp., 98 N.J. 83, 88 (1984). According to John Randal Miller, plaintiff's senior vice-president and general counsel, the term "self-insurance," as used by Ernst & Young in its audit report, referred to

plaintiff's retained exposure under its deductible program; that is, it was not true self-insurance. Miller insisted that the properties occupied by plaintiff and its related companies were not subject to self-insurance. Carol Bowker, plaintiff's senior director of risk management, confirmed that the financial statement's use of the term "self-insured" referred to an accounting principle.

Further, according to Kimberly Stokluska, an account executive for Arthur J. Gallagher & Co., plaintiff's insurance broker, the general liability insurance provided by plaintiff and its parent corporation, McDonald's Corporation, was a blanket policy issued by Zurich American (Zurich) that covered all of plaintiff's stores in the United States. Although there was a deductible, the policy provided first-dollar coverage, pursuant to which Zurich would pay the claims fully on a first-dollar basis; plaintiff would then reimburse Zurich up to the deductible amount. Hence, the landlord would be unaffected by the size of the deductible and, as between plaintiff and Zurich, plaintiff issued letters of credit in the total amount of 9.7 million dollars to Zurich to secure the deductible obligation.

Plaintiff maintained property insurance through Lexington Insurance and Zurich, who split the twenty-five million dollars policy limit on a fifty-fifty basis. Under Zurich's half, the

deductible for all of plaintiff's locations other than the Hackensack Avenue property was one million dollars. Zurich eventually issued an endorsement that reduced the deductible for the Hackensack Avenue location to $25,000. Under Lexington's half, the deductible for this location was also $25,000. Unlike the general liability insurance, the property insurance would not be paid by the insurer on a first-dollar basis. The deductible amount actually would be deducted from the amount of any loss before it was paid. Accordingly, the creditworthiness of the tenant certainly is relevant to a fair assessment of the reasonableness of the deductible amount contained in the policy.

Defendant's insurance consultant, Robert Sterling, opined that the original attempt by plaintiff to reduce the property insurance deductible from one million dollars to $25,000, by way of indemnification agreement, did not in fact reduce the deductible on the policy. However, he agreed that, if in fact the policy deductible was reduced to $25,000, then plaintiff would be in compliance with the lease. In that respect, Rosner, disagreed with his own expert. He maintained that no deductible was allowed under the terms of the lease.

Defendant points out that plaintiff's original million-dollar deductible was higher than any potential loss defendant would sustain if the property were totally destroyed,

effectively making defendant rely on plaintiff for repayment. However, when that criticism was voiced, the deductible was reduced to $25,000, first by way of an indemnification agreement and then by way of an actual endorsement on the policy. Although defendant argues that a tenant may not avoid termination of the lease by retroactively curing a breach, where, as here, the asserted breach is purely technical, we agree with the trial court that there was no material breach of the lease.

No loss was sustained at the property. Even if, as defendant argues, obtaining retroactive insurance coverage "amounts to nothing more than attributing part of the premium for coverage to days already passed, when no loss occurred," 49 Am. Jur. 2d Landlord & Tenant, § 381 (2006), that is not what occurred here. Plaintiff always had insurance coverage. It sought, in apparent good faith, to accommodate the landlord's stated concern by lowering the deductible. Under such totality of the circumstances, there was no material breach and no grounds for us to reverse the trial court's determination that plaintiff had insurance within the meaning of the lease. See, e.g., Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285-86 (App. Div. 1998) (recognizing that a material breach by either party to a bilateral contract excuses the other party

from rendering any further performance, but noting that whether a breach is material is generally a question for the factfinder).

Defendant also appeals from the court's denial of its motion to amend its counterclaim to include a count of fraudulent concealment. The decision whether or not to grant a motion for leave to file an amended pleading rests within the sound discretion of the court. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998); Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994). Ordinarily, such leave should "be freely given in the interest of justice." R. 4:9-1. Even so, courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 257 (App. Div. 1997).

In this instance, the proposed amended pleading was essentially redundant. Defendant's original answer and counterclaim, filed in February 2003, included a count for fraud based on false statements allegedly made by plaintiff with the intent to deceive defendant into believing that plaintiff had an insurance policy in force as required by the lease. Four months later, defendant moved to amend its counterclaim to add a count for fraudulent concealment on the grounds that plaintiff had

produced certificates that did not reflect the actual status of insurance coverage on the property and on the further ground, that plaintiff had presented testimony in court that its insurance coverage satisfied the terms of the lease when it knew that not to be the case.

By a July 22, 2003, order, the judge denied defendant's motion to amend without stating the reasons for that decision. On October 1, 2003, the court denied defendant's motion for reconsideration, again without stating the reasons. While we agree with defendant that the judge should have made explicit findings of fact regarding these motions, we do not find that reversal is warranted. The reason is implicit.

Defendant even admits that the cause of action for fraudulent concealment had been virtually pleaded in the initial pleading. When he dismissed the original counterclaim for fraud, the judge stated that any error by plaintiff in submitting certificates with incorrect deductibles was the result of mistake or inadvertence, and not the result of an intention to deceive. That finding inevitably impacted the decision on defendant's motion to amend the counterclaim. In our view, it renders harmless the failure of the court to state explicitly the reason for the denial of the motion.

Finally, in its cross-appeal, plaintiff argues that the court erred in denying its motion for attorneys' fees and costs pursuant to the offer of judgment rule, R. 4:58-1. We disagree.

According to the version of Rule 4:58-1 that was in effect prior to the amendments effective September 1, 2006,[1] a party may,

> at any time more than 20 days before the actual trial date, serve upon any adverse party, without prejudice, and file with the court, an offer to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein or for property or to the effect specified in the offer (including costs).

The consequences of non-acceptance of an offer made by a claimant are set forth in R. 4:58-2. The version of the rule in effect when plaintiff made its offer, that is prior to the September 2004 amendments, read as follows:

> If the offer of a claimant is not accepted and the claimant obtains a verdict or determination at least as favorable as the rejected offer, the claimant shall be allowed, in addition to costs of suit, (a)

[1] Notably, effective September 1, 2006, the rule was amended to provide that the offer be one "to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs)." The amendment was intended to deal with "the difficulty of comparing an offer with a judgment actually rendered where non-monetary relief is sought, in full or in part, and is granted." Pressler, Current N.J. Court Rules, comment 1 on R. 4:58 at 1632 (2007).

> all reasonable litigation expenses incurred following non-acceptance; (b) eight per cent interest on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later; and (c) a reasonable attorney's fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance. In an action for unliquidated damages, however, no allowances under this rule shall be granted to the offeror unless the amount of the recovery is in excess of 120% of the offer. A claimant entitled to interest under R. 4:42-11(b) shall be allowed interest under this rule only to the extent it may exceed the interest allowed under R. 4:42-11(b).

The September 2004 version of this rule, which was in effect when the judgment in the instant case was entered, provided that litigation expenses, counsel fees, and prejudgment interest could be recovered if the offer was not accepted "and the claimant obtains a verdict or determination at least as favorable as the rejected offer or, . . . a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees." R. 4:58-2 (effective September 1, 2004). This amendment eliminated "the former dichotomy between liquidated and unliquidated damages in respect of the so-called margin of error." Pressler, Current N.J. Court Rules, supra, comment 1 on R. 4:58 at 1632.

The consequences of non-acceptance of an offer made by a party who is a non-claimant is governed by R. 4:58-3. At the

time plaintiff made its offer here, i.e., prior to the September 2004 amendments, the rule allowed for the recovery of litigation expenses and attorneys' fees as prescribed by R. 4:58-2 if "the determination is at least as favorable to the offeror as the offer." However, in an action for unliquidated damages, no allowances were to be granted unless "the amount awarded to the claimant is in excess of $750.00 and is less than 80 percent of the offer." Ibid.

As noted, the 2004 amendments to this rule (in effect when the final judgment was entered in the instant case) eliminated the dichotomy between liquidated and unliquidated damages. That is, it defined a favorable determination qualifying for allowances as "a verdict or determination at least as favorable to the offeror as the offer or, if a money judgment, is in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less." R. 4:58-3 (effective September 1, 2004). The 2004 amendment also provided that no allowances may be granted if the claimant's claim was dismissed, if a no-cause verdict was returned, or if only nominal damages were awarded.

On June 4, 2004, plaintiff filed an offer of judgment with the court pursuant to R. 4:58-1, in which it offered

> to take judgment against it and in favor of defendant . . . and . . . to reimburse the

> defendant for the cost of property and general liability insurance purchased by defendant and required by the Lease from May 26, 2000 and for 2001, 2002, 2003 and 2004 (and going forward until expiration of the Lease) to resolve the counterclaim and the Complaint in this matter.

The parties do not dispute that defendant did not respond to this offer. After the court considered the proofs, it issued a written opinion in the matter that did not award damages to either party. Rather, it found that plaintiff was in compliance with the lease and dismissed defendant's counterclaim. Plaintiff then moved for attorneys' fees pursuant to R. 4:58-2.

In opposing the motion, defendant urged that acceptance of the offer of judgment would have materially changed the obligations of the parties under the lease, and that the offer of judgment rule should not be used to induce a landlord to alter the terms of a lease. Defendant also argued that plaintiff's offer was to reimburse defendant for premiums, whereas defendant's suit sought eviction, not money damages. In addition, the offer would have affected future years and would have required renegotiation each year until the end of the lease term. The offer did not state that plaintiff would reimburse defendant annually.

Defendant also argued that the type of insurance referred to in plaintiff's offer of judgment could not be purchased. In

support of that argument, defendant submitted a letter that Sterling had written to Rosner on August 2, 2004, in which Sterling advised that a commercial general liability insurance policy for the period, May 26, 2000, through May 26, 2014, was unattainable in the marketplace. Specifically, Sterling told Rosner that the domestic insurance market was reluctant to write multi-year policies except where the insured was willing to assume a significant amount of risk, and that retroactive insurance coverage was very difficult. On February 23, 2005, Sterling wrote to Rosner again, advising that he had made inquiries in the commercial insurance market and was unable to generate interest in such a policy at any price.

Defendant also argued that the insurance it purchased in 2000 to protect itself was not the insurance referred to in plaintiff's offer of judgment. That is, according to defendant, the offer of judgment referred to insurance "as required by the Lease," which was not the insurance defendant had purchased.

In denying plaintiff's motion for fees and costs, Judge Escala ruled that the offer of judgment rule did not apply because of the nature of the relief sought and the nature of the offer made. According to the judge, R. 4:58-1 contemplated either a calculable amount (a "sum stated" or "property") or a definable thing ("the effect specified in the offer"). He

explained, "[T]he notion of compliance with the insurance provision of the lease agreement is an amorphous concept, not one that can be calculated, defined, or measured. Thus an offer to pay for the cost of insurance does not come foursquare within the concepts that the rule addresses." In short, plaintiff did not offer something that could be measured.

The purpose of the offer of judgment rule is to encourage and promote the early out-of-court settlement of litigation by imposing financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment. Schettino v. Roizman Dev., Inc., 158 N.J. 476, 482 (1999). Even if an offeree rejects an offer in good faith, the consequences of its non-acceptance are mandatory under the rule. McMahon v. N.J. Mfrs. Ins. Co., 364 N.J. Super. 188, 192 (App. Div. 2003).

We note that plaintiff moved for fees pursuant to R. 4:58-2, not R. 4:58-3. That is, it regarded itself as a "claimant" making an offer. As a claimant, plaintiff was seeking to enforce the lease and to enjoin defendant from further interference with it. It did not claim to have suffered economic loss or damage, except to the extent it had incurred litigation expenses.

Plaintiff was also a "non-claimant" with respect to defendant's counterclaim. That counterclaim sought damages for fraud and breach of contract and also sought possession of the property. The damages sought would have been unliquidated damages. Firefreeze Worldwide Inc. v. Brennan & Assocs., 347 N.J. Super. 435, 439-40 (App. Div. 2002) (unliquidated damages are those of an uncertain quantity, depending on no fixed standard, that can be made certain only by agreement of the parties or by a judicial verdict). Any party who asserts a right, a demand, or a claim should be considered a claimant, even if another party has asserted a claim against it, and the same party cannot be considered both a claimant and a non-claimant for the purpose of this rule. Id. at 441. Rule 4:58-3 is structured to apply in the context of a party against whom judgment is taken. Casino Reinvestment Dev. Auth. v. Marks, 332 N.J. Super. 509, 514 (App. Div.), certif. denied, 165 N.J. 607 (2000). As a claimant, rather than a non-claimant, plaintiff would not be entitled to costs, expenses and fees because it was seeking injunctive relief only.[2] Thus, the trial judge properly denied plaintiff's post-trial motion.

[2] Even if plaintiff's pleading is read liberally to encompass a claim for compensatory damages, it did not attempt to prove any loss or damage other than what may have been occasioned by (continued)

Plaintiff made its offer in June 2004, prior to the September 2004 amendments to the rule. Judgment was not entered until June 2005. The version of R. 4:58-2 in effect both prior to and after September 2004 required that the claimant obtain either a determination at least as favorable as the rejected offer or a money judgment that was 120 percent or more of the offer. However, even if the trial court's determination that plaintiff's insurance program was in compliance with the lease is viewed as a judgment at least as favorable as plaintiff's offer to pay for the insurance that defendant purchased, it would not permit a valid comparison between the offer and the judgment for purposes of R. 4:58-2.

In other words, plaintiff did not offer anything sufficiently definite to which the final determination in the matter could be compared. As defendant noted, plaintiff offered to pay for something that defendant did not, and apparently could not, purchase, i.e., insurance for the next fourteen years. Even if one accepts the offer only referred to the insurance that defendant had purchased, and that such insurance was quantifiable, that insurance was not "required by the lease" and such insurance was offered on an annual basis only. Hence,

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(continued)
defendant's failure to respond to and accept the offer of judgment.

plaintiff would have had to pay defendant a new amount each year, rather than a definite sum.

We also agree with defendant that its acceptance of plaintiff's offer would have resulted in an alteration of the parties' obligations under the lease. That is, it was the obligation of the tenant, not of the landlord, to purchase the insurance. If the landlord elected to purchase insurance because the tenant had not, it had the right to do so and to charge the tenant for its cost. Hence, plaintiff's offer of judgment offered nothing more than that which plaintiff was already required to do under the terms of the lease.

Under all the circumstances, we agree with the trial court's assessment that the nature of the relief sought and the nature of the offer justified a denial of plaintiff's motion.[3]

Affirmed.

[3] Under the current version of R. 4:58, "if both an injunction and money damages are sought, a valid offer cannot be made." Pressler, Current N.J. Court Rules, supra, comment 1 on R. 4:58 at 1632.