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CLORINDA PISANO Plaintiff-Respondent/Cross-Appellant, v. JOHN PISANO Defendant-Appellant/Cross-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000242-23 Civil Action **On Appeal from:** In the Superior Court of New Jersey, Chancery Division, Family Part, Morris County Docket No.: FM-14-122-18 Sat below: Hon. James A. Farber, J.S.C.

APPELLATE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT/CROSS-RESPONDENT JOHN PISANO
[Da1 to Da112]

Of Counsel and On the brief:

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PRELIMINARY STATEMENT

This appeal addresses three critical and unconventional decisions rendered by the trial court in a matrimonial case concluding a 29-year marriage. Central to this appeal is the trial court's unorthodox approach to open durational alimony, particularly its inclusion of an additional $12,300 per month "savings component" into an otherwise $38,150 alimony award. This component, aimed at ensuring plaintiff accumulates $1,000,000 in savings from defendant's post-divorce earnings in 57 months at a 5% interest rate, bears no relationship to the actual marital lifestyle where there was no savings, and represents a sharp departure from both traditional alimony considerations and the 2014 amendment to the alimony statute, N.J.S.A. 2A:34-23(j)(1).

In stark contrast to Lombardi v. Lombardi, which permits a savings component in alimony when reflecting a regular and consistent pattern of savings during the marriage, the trial court's decision rests on speculative projections centered on its concern defendant may retire in five years. This approach not only deviates from legal precedent, but also contravenes the legislative intent of the 2014 amendment to the alimony statute, N.J.S.A. 2A:34-23(j)(1), which mandates the reassessment of alimony based on actual financial conditions at retirement, not on conjectures made years in advance.

The trial court's determination that plaintiff requires $38,150 per month of alimony to meet her spending needs is grounded on solid legal reasoning.

This figure mirrors the trial court's assessment that a lifestyle reasonably comparable to the family's $97,239 per month marital standard requires plaintiff's individual expenditure of $43,223 monthly on Schedule A, B, C, and health insurance, less her $5,070 net monthly income. Defendant, recognizing these calculations and his ability to pay, does not contest this amount. However, the trial court's imposition of an additional $12,300 monthly "savings component," inflating the alimony to $50,450, lacks this sound legal footing. This increase, intended to mirror defendant's $1,000,000 of post-cut-off date retirement savings, bears no resemblance to the marital lifestyle, and improperly converts his future earnings into a form of deferred equitable distribution — a clear deviation from Stern v. Stern, which held earning capacity is not a marital asset subject to equitable distribution. Moreover, this approach directly contradicts the 2014 statutory amendment's directive to treat retirement as a material change in circumstances. These errors necessitate its reversal.

Additionally, this appeal scrutinizes the trial court's handling of the couple's pre-divorce financial decisions, revealing a significant inconsistency. In the two years leading up to plaintiff's divorce announcement, defendant diligently paid down the parties' mortgage balances by $1,758,885, thereby increasing the equity of the marital home and securing a lower interest rate. This financial maneuver, however, left a substantial pre-complaint joint tax liability of $1,631,282 unresolved. The trial court's subsequent decision to equally

distribute the proceeds from the marital residence, while solely assigning the entire tax burden to the defendant, represents a stark deviation from the principles of equitable distribution. This approach fails to recognize the real impact of the defendant's financial decisions: while the mortgage pay down increased the marital home's equity, diverting those funds towards the tax liability would have equally preserved the marital estate's value, albeit in a different form. The trial court's decision effectively penalizes defendant for his choice of debt repayment, overlooking the fundamental principle that the allocation of marital assets and debts should reflect the overall financial status of the marital estate, not the specific nature of the debts paid. Such a discrepancy underscores a profound inconsistency and calls for a reassessment to ensure a fair and just division of the entire marital balance sheet — both assets and debts.

Lastly, the trial court's award of a $250,000 credit to the plaintiff for the alleged devaluation of the marital home due to landscaping issues ignores the clear terms of an interim order dated November 17, 2021 entered by an earlier judge. This order specifically assigned responsibility for landscaping maintenance to plaintiff, yet the court cited these very issues as evidence of the defendant's failure to maintain the property. This decision not only overlooks the specific directives of the previous order but also lacks substantial credible evidence in the record to support the claimed $500,000 decrease in property value, corresponding to the $250,000 credit awarded to plaintiff.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The parties' marriage, which began on September 17, 1988, [Da1], transitioned into a complex legal chapter in March of 2017 when the plaintiff announced her intent to divorce. Ibid. This decision, alongside a subsequent cut-off agreement treating May 1, 2017 as the date the complaint for divorce was filed, [Da7], marked the end of a nearly 29-year union and the onset of extensive litigation. Three children were born of the marriage, all of whom were emancipated by the end of trial. [Da2].

Plaintiff filed her Complaint for Divorce on August 1, 2017, [Da1], and defendant filed his Answer and Counterclaim on September 11, 2017. [Da110]. The Trial Court conducted a thirteen day trial over various dates between February and May of 2023.[2] [Da27]. During the course of the trial, the parties entered into two consent orders that narrowed several of the equitable distribution related issues. [Da18; Da21]. The first consent order, dated

[1] The relevant facts and procedural history have been combined to avoid repetition.

[2]The transcripts have been designated as follows: 1T February 13, 2023 vol. 1; 2T February 13, 2023 vol. 2; 3T February 14, 2023; 4T March 21, 2023 vol. 1; 5T March 21, 2023 vol.2.; 6T March 22, 2023 vol. 1; 7T March 22, 2023 vol. 2; 8T March 23, 2023; 9T March 24, 2023; 10T April 10, 2023; 11T April 12, 2023 vol. 1; 12T April 12, 2023 vol. 2; 13T May 1, 2023 vol. 1; 14T May 1, 2023 vol. 2; 15T May 2, 2023 vol. 1; 16T May 2, 2023 vol. 2; 17T May 3, 2023 vol. 1; 18T May 3, 2023 vol. 2; 19T May 24, 2023 vol. 1; 20T May 24, 2023 vol. 2; 21T May 25, 2023.

February 15, 2023, pertained to the selection of the realtor and listing price for the marital residence, which the real estate broker originally set at $6,985,000. [Da18; Da28; Da8l]. The second consent order, dated April 10, 2023, awarded plaintiff $1,100,000 as her equitable distribution share of defendant's law practice, less certain credits, and agreed the sum would be paid to her from defendant's portion of the proceeds from the sale of the marital residence.[Da21; Da28]. The central issues left for the trial court to decide were the equitable distribution of additional marital assets and marital debts, alimony and counsel fees. [Da21; Da28].

Husband's Income

Defendant, who was 62 years old at the time of trial, [DCa2], is a licensed attorney in New Jersey who owns and operates a personal injury practice as a solo practitioner. [11T96-5]. The trial court concluded defendant's average pre-complaint after-tax income for the four years ending 2016 was $1,528,844. [Da31]. Regarding his post-complaint income, after adding $100,000 for perquisites associated with the business, [Da34], the trial court found his after-tax income for 2018 to 2021 to be the following: 2018 $1,291,108; 2019 $1,342,099; 2020 $1,213,486 and 2021 $1,044,289. Ibid.

Wife's Income

Plaintiff, who was 61 years old at the time of trial, [3T18-5], had been out of the workforce for years, and argued she should not have to seek employment.

[Da35]. The trial court disagreed and imputed $31,200 of minimum wage employment income to her, as well as $43,285 per year of investment income (5% on the $865,700 net business buyout equitable distribution payment), for total imputed gross income of $74,485 per year, which the trial court rounded to $74,500. [Da38]. The trial court then determined plaintiff would pay $8,650.50 in Federal income tax, $2,623.63 in New Jersey State Income tax and $2,386.80 of Social Security and Medicare Tax, resulting in total taxes of $13,660.93, leaving plaintiff with approximately $60,839[3] per year of net income, or $5,070 per month to contribute towards her monthly expenses. Ibid.

Marital Lifestyle

For purposes of appeal, defendant does not challenge the trial court's marital lifestyle spending factual findings which were based upon substantial credible evidence contained in the trial record. [Da39-41]. To summarize, on the basis of the trial testimony, the trial court found that the parties and their children lived "a very high-end lifestyle." Ibid. They resided in a house in Harding Township on 8.5 acres and covering over 14,000 square feet that was originally listed for sale for $6,985,000. [Da59]. The home had a pool, tennis court and a host of other amenities. [Da60]. The parties owned multiple high-end cars, including a Ferrari, Aston Martin and multiple Mercedes Benz. Ibid.

[3] The trial court calculated net income as follows: [$74,500 - $13,660.93 = $60,839] / 12 months = $5,070 per month.

The parties' children attended private schools and expensive colleges. Ibid. The family shopped at high-end stores, vacationed often and frequented high-end New York City restaurants. Ibid. In total, Plaintiff's expert determined in a marital lifestyle report adopted by the Trial Court that the parties' and their children spent an average of $97,239 per month in the 28 month period leading to the cut-off date, January 1, 2015 through April 30, 2017. [DCa53]. That amount was broken down as $27,713 per month Schedule A shelter expenses; $12,915 per month Schedule B transportation expenses and $56,610 per month Schedule C personal expenses. Ibid.

Alimony

In its alimony assessment, the trial court calculated plaintiff's individual post-divorce needs, based on a detailed analysis of Schedule A, B and C expenses, to require $43,223 per month of spending in order for her to live reasonably comparable to the family's $97,239 per month marital lifestyle. [Da43]. That amount was calculated on the basis of plaintiff needing $18,042 per month for Schedule A shelter expenses, $2,422 of Schedule B Transportation expense, and $22,759 per month of Schedule C expense, with the Schedule C expenses including an additional $1,000 per month for health insurance. Ibid. After factoring in plaintiff's $5,070 per month of net income, the trial court concluded that plaintiff was left with a $38,150 per month deficit. Ibid.

Defendant will not quibble with those findings for purposes of appeal, and agrees with the trial court that he had the financial ability to pay $38,150 per month of open durational alimony necessary for plaintiff to live in a manner reasonably comparable to the marital lifestyle. However, extending beyond this conventional finding, the trial court then augmented the alimony by an additional $12,300 per month, introducing a "savings component" unrelated to the established marital lifestyle. Ibid. This $12,300 per month enhancement, aimed at enabling plaintiff to save $1,000,000 over the 57 post-divorce months prior to defendant turning age 67, arose from the trial court's speculative concerns about defendant's potential retirement, despite no evidence of actual retirement plans or plaintiff's need for such a substantial savings amount at that time. [Da42].

The trial court rationalized this exceptional savings component, which bears no relationship to the marital lifestyle, by focusing on the fact "Mr. Pisano saved a million dollars in retirement funds since the divorce complaint...", [Da41]. As stated in the trial court's opinion:

> Mr. Pisano is 62 years old and reaches, under current law, full Social Security age at 67. **Though if alimony is awarded, this would be an open durational alimony case, presumptively Mr. Pisano could seek to retire at 67,** less than five years from now in approximately 57 months. **While no law states or implies there must be dollar-for-dollar savings equality, to obtain a future value of one million dollars in 57 months would require Ms. Pisano to save approximately $12,300 per month prospectively at 5%. Mr. Pisano argues there were no saving during the**

> **marriage.** The court finds they are entitled to a similar lifestyle as the marital lifestyle not just for the years until Mr. Pisano retires, which **might** be less than five years away, but to a lifestyle that can be sustained as much as possible into the retirement years. Otherwise they have a thirty year marriage, they live well for almost five years post-judgement, and then he continues to live high off the hog while she relies on public assistance. That cannot possibly be what is intended by the state's alimony scheme.
>
> [Da42]. (Emphasis added).

The trial court's unique and unconventional approach of awarding a savings component not related to the marital lifestyle on the basis of speculative concerns about a hypothetical retirement five years in the future not only departs from well settled case law treating retirement as a material change in circumstances, but also conflicts with the 2014 amendment to N.J.S.A. 2A:34-23(j)(1), which mandates the reassessment of alimony based on actual financial conditions at the time of the retirement motion. [infra., p. 23]. It also amounts to the impermissible equitable distribution of defendant's earning capacity in violation of well settled New Jersey Supreme Court precedent. [infra., p. 29].

Equitable Distribution of Marital Residence Equity and Pre-Complaint Tax Debts.

The key contention in equitable distribution revolves around the trial court's decision to allocate the proceeds from the marital home differently than the joint pre-complaint tax liabilities, raising questions about the consistency and fairness in the division of marital assets and debts. [Da11; Da15]. In the two years leading up to plaintiff's unexpected announcement that she wanted to

divorce, defendant aggressively paid down the parties' home equity line of credit and mortgage balances with monies that otherwise would have been used to pay taxes. [Da61; 17T106-10; 11T71-3]. The undisputed goal of this financial maneuver was to reduce the mortgage balance down to $1,000,000 so that the parties could qualify for a mortgage refinancing that would reduce their mortgage interest rate from 4.375% to 2.5%, thereby saving them $18,750 per year in interest going forward.[4] [Da61; 1T35-19; 17T105-3 to 25; 17T106-10].

According to plaintiff's own expert, Stacy Collins, these efforts resulted in the parties paying down the home equity line of credit by $615,000 in 2015, [6T84-1; DCa58], and $843,885 in 2016. [6T84-4; DCa58]. In addition, Ms. Collins further testified that in 2016 the couple paid down the mortgage balance by an additional $300,000. Ibid. Therefore, the parties' efforts resulted in a total reduction of $1,758,885 in mortgage debt for 2015 and 2016, consequently enhancing the marital home's equity in that same amount. [Ibid.; 11T69-25].

However, prioritizing this mortgage paydown strategy over the payment of taxes led to the accumulation of a $1,631,282 tax debt for 2016 that existed as of the 2016 cut-off date. [DCa328; DCa361; 17T106-10; 11T71-3]. The existence of this $1,631,282 of 2016 tax debt was substantiated by J-55 in evidence which are the parties' 2016 joint income tax returns showing that as of

[4] $1,000,000 x (4.375% - $2.5% = 1.875%) = $18,750.

the October 2017 tax return filing date the parties still owed $1,337,362 for 2016 joint Federal taxes, [DCa328; 7T214-13][5], and $293,920 for joint New Jersey 2016 state income taxes. [DCa361; DCa370; DCa388; DCa417][6].

In its decision, the trial court decided to divide the proceeds from the marital residence equally, resulting plaintiff benefiting from the decision to pay down the mortgage debt. [Da11; Da64]. In contrast, the trial court assigned the entire pre-complaint 2016 tax debt solely to defendant. [Da15; Da76]. This ruling disregards the interconnectedness of the couple's financial choices on which debt to prioritize and the overall marital balance sheet, effectively penalizing defendant for a financial decision that did not change the net value of the overall marital estate and providing plaintiff with a windfall. [17T106-10; 11T71-3]. If Defendant had utilized the $1,758,885 for settling the tax obligation instead of the mortgage pay down, he would not solely bear the unpaid tax obligation, and Plaintiff would have received $879,442 (50% x $1,758,885 =

[5] J-55 are the parties' 2016 Federal and NJ State income tax returns which were filed in October of 2017 for pre-complaint income stemming from 2016. DCa327 on line 63 shows the total Federal Income Taxes owed at the cut-off date were $1,337,362. Plaintiff's expert confirmed during her testimony that the $300,000 tax payment referenced on line 74 of the return was made post-complaint in October 2017. [7T214-13].

[6] J-55, the joint 2016 NJ State income tax return, shows $293,920 of 2016 joint taxes were owed as of the cut-off date. [DCa361; DCa370; DCa388]. D-180, a letter from the parties' tax accountant admitted into evidence, confirms that as of November 13, 2017 the $293,920 2016 tax debt had grown to $323,031 inclusive of penalties. [DCa417].

$879,442) less in the equitable distribution of the marital residence. Ibid. The equitable distribution result should remain consistent, irrespective of Defendant's pre-complaint financial decision to prioritize the payment of the mortgage debt over the tax debt, since the choice of which debt to pay had no impact whatsoever on the marital balance sheet. [See infra., p. 33].

$250,000 Credit to Plaintiff For Defendant's Alleged Failure to Maintain the Marital Residence.

In paragraph 6 of an order dated November 17, 2021, which was entered as J-8 in evidence below, an earlier judge assigned to the case had ordered:

> 6. Plaintiff SHALL directly arrange for all landscaping/snow removal services for the marital property. Plaintiff SHALL ensure that the landscaping/snow removal service providers have access to the landscaping/snow removal equipment at the marital home.
>
> [Da9].

Despite that interim order squarely assigning responsibility for landscaping related items associated with the marital residence for the period November 17, 2021 through the August 16, 2023 entry of the Final Judgment of Divorce on **plaintiff**, in paragraph E(1) of the Final Judgment of Divorce the trial court erroneously granted a $250,000 credit to plaintiff for the alleged devaluation of the marital home allegedly caused by defendant's so-called bad faith in failing to properly maintain the home during the *pendente lite* period. [Da11; Da63 to Da64]. The trial court cited to the following as evidence of defendant's supposed failure to adequately maintain the residence:

> P-144 pictures vividly demonstrate what he has allowed and caused to undermine the appearance of the residence's exterior - a lawn no longer manicured but brown and ungroomed; untrimmed bushes; patches of dirt; broken and chipped masonry; weeds growing between steps; deteriorating stone and cement; leaf-filled gutters and plantings overhanging gutters; dying trees; dead insect carcasses; crumbling steps; unwashed tiles; broken and missing grout; damaged and rotting wood surfaces; and significant visible buckling in the tennis court.
>
> [Da63].

In its decision, the trial court acknowledged the lack of evidence in the record to substantiate a $500,000 reduction in the home's value due to certain landscaping issues. [Da64]. Despite this, the trial court ordered defendant to pay plaintiff $250,000 from his share of the home's proceeds. [Da11; Da63 to Da64]. This amount was determined as an adjustment for what the court deemed as the defendant's "intentionally manipulative" actions, which purportedly affected the home's marketability. [Da64]. Notably, this decision disregarded Paragraph 6 of the November 17, 2021, court order, which clearly assigned responsibility for these landscaping issues to the plaintiff, not the defendant. [Da9; Da64]. This oversight in attributing responsibility, coupled with the arbitrary determination of the $250,000 credit, calls for a reversal and remand of this aspect of the judgment, ensuring decisions are based on the evidentiary record and compliance with established court orders. [infra., p. 40].

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY INCREASED THE $38,150 PER MONTH OF OPEN DURATIONAL ALIMONY NECESSARY FOR PLAINTIFF TO LIVE REASONABLY COMPARABLE TO THE MARITAL LIFESTYLE TO $50,450 PER MONTH. THIS INCREASE INCORPORATES A $1,000,000 SAVINGS COMPONENT, UNRELATED TO THE MARITAL LIFESTYLE, THEREBY DISTORTING THE ALIMONY AWARD. [Da41 to Da42].

Alimony in New Jersey is of statutory creation. Glass v. Glass, 366 N.J. Super. 357 (App. Div. 2004); N.J.S.A. 2A:34-23. The concept of alimony was created in recognition of the important fact that, "marriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which is financial." Cox v. Cox, 335 N.J. Super. 465, 479 (App. Div. 2000) (citing Sally F. Goldfarb, Marital Partnership and the Case for Permanent Alimony, 27 J. Fam. L. 351, 354-55 (1988-89). Thus, "Alimony is a claim arising upon divorce, which is rooted in the prior interdependence occurring during the parties' marital relationship." Reese v. Weis, 430 N.J. Super. 552, 569 (App. Div. 2013).

"The basic purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation." Innes v. Innes, 117 N.J. 496, 503 (1990) (citing Mahoney v. Mahoney, 91 N.J. 488, 501-02 (1982)). See also Crews v. Crews, 164 N.J. 11, 16 (2000) (The goal in fixing an alimony award

"is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage.") "The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income", Glass, 366 N.J. Super. at 371(quoting Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998)), or if they chose to accumulate savings. Lombardi v. Lombardi, 447 N.J. Super. 26, 29 (App. Div. 2016), certif. denied, 228 N.J. 445 (2016)("The Family Part **must** in its assessment of marital lifestyle give due consideration to evidence of regular savings adhered to by the parties during the marriage.") See also S.W. v. G.M., 462 N.J. Super. 522, 531 (App. Div. 2020).

"New Jersey cases have long expressed the view that alimony is neither a punishment for the payor nor a reward for the payee." Mani v. Mani, 183 N.J. 70, 80 (2005)(citing Aronson v. Aronson, 245 N.J. Super. 354, 364 (App. Div. 1991); Turi v. Turi, 34 N.J. Super. 313, 322 (App. Div. 1955); O'Neill v. O'Neill, 18 N.J. Misc. 82, 89 (Ch.) aff'd 127 N.J. Eq. 278 (E. & A. 1940)). "Rather, it is an economic right that arises out of the marital relationship and provides the dependent spouse with 'a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage.'" Id. See also Stiffler v. Stiffler, 304 N.J. Super. 96, 99 (Ch. Div. 1997) and Koelble v. Koelble, supra., 261 N.J. Super. at 192-93. Accordingly,

"it is the quality of economic life during the marriage that determines alimony." Hughes v. Hughes, 311 N.J. Super. 15, 31 (App. Div. 1998) and Lepis v. Lepis, 83 N.J. 139, 150 (1980). Moreover, as the New Jersey Legislature reemphasized when amending New Jersey's alimony statute in September of 2014, "neither party [has] a greater entitlement to that standard of living than the other". N.J.S.A. 2A:34-23(b)(4).

The amount of any alimony award, whether pendente lite, at final hearing or post-judgment, is determined by performing the three-part examination articulated by our Supreme Court in Lepis v. Lepis, 83 N.J. at 152, and subsequently reaffirmed by our Supreme Court in Crews v. Crews, 164 N.J. at 32-33, Miller v. Miller, 160 N.J. 408, 420 (1999) and other cases. That test requires the trial court to ascertain the: (1) Dependent spouse's reasonable needs in light of the marital lifestyle; (2) Dependent spouse's ability to contribute to their own expenses; and (3) The amount of alimony the payor spouse has the ability to pay towards the dependent spouse's monthly shortfall, while recognizing the payor spouse's equal right to live reasonably comparable to the marital lifestyle. Crews v. Crews, 164 N.J. at 32-33; N.J.S.A. 2A:34-23b(4). See also Gross v. Gross, 22 N.J. Super. 407, (App. Div. 1952)(Applying three-part examination to a *pendente lite* alimony award); Miller v. Miller160 N.J. at 420 (Reaffirming the three-part examination articulated in Lepis as the proper analysis for post-judgment modification of an alimony award).

A. The Trial Court Correctly Determined the Base Alimony at $38,150 Per Month Reflecting the Marital Lifestyle, but Committed Reversible Error by Inappropriately Augmenting it with a $12,300 Monthly Savings Component, Unrelated to the Marital Lifestyle, Based on Speculative Future Circumstances and Conjecture.

The first part of the three-part examination for determining the amount of an alimony award requires the trial court to evaluate the dependent spouse's reasonable needs in light of the marital lifestyle. Lepis v. Lepis, 83 N.J. at 152. This process is anchored in the parties' economic life during their marriage, with the dependent spouse's needs "contemplate their continued maintenance at the standard of living they had become accustomed to prior to the separation" Glass v. Glass, 366 N.J. Super. at 370 (citing, Lepis, 83 N.J. at 150); Khalaf v. Khalaf, 58 N.J. 63, 69 (1971); Mani v. Mani, 183 N.J. 70, 81 (2005). "The importance of establishing the standard of living experienced during the marriage cannot be overstated." Crews, 164 N.J. at 16. "It is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award." S.W. v. G.M., 462 N.J. Super. at 531. In determining the marital lifestyle, the trial court looks at various elements including "the marital residence, vacation home, cars owned or leased, typical travel and vacations each year, schools, special lessons, and camps for [the] children, entertainment (such as theater, concerts, dining out), household help, and other personal services." Weishaus v.

Weishaus, 360 N.J. Super. 281, 290-91 (App. Div. 2003), rev'd in part on other grounds, 180 N.J. 131 (2004).

In this case, plaintiff's expert's marital lifestyle report, which the trial court adopted, showed the parties and their children spent an average of $97,239 per month in the 28 month period leading to the cut-off date, January 1, 2015 through April 30, 2017. [DCa53]. This spending was categorized into $27,713 per month for Schedule A shelter expenses, $12,915 per month for Schedule B transportation expenses and $56,610 per month for Schedule C personal expenses. Ibid. The trial court, applying the three-part examination and using the $97,239 per month marital lifestyle finding as the "touchstone" of its award, determined plaintiff requires individual spending of $43,223 monthly on Schedule A, B, C, and health insurance in order to live reasonably comparable to the marital lifestyle. [Da43]. Thus, after subtracting her imputed net monthly income of $5,070, the trial court concluded plaintiff needs $38,150 per month of alimony to meet her spending shortfall. Crews v. Crews, 164 N.J. at 12; S.W. v. G.M., 462 N.J. Super. at 531.

Defendant, recognizing these calculations and his ability to pay, does not contest this amount. However, the trial court's imposition of an additional $12,300 monthly "savings component," increasing the alimony to $50,450, is not grounded in sound legal reasoning. This enhancement, intended to facilitate the plaintiff's accumulation of $1,000,000 over 57 months post-divorce and

before the defendant's 67th birthday, is rooted in mere presumptions rather than concrete factual findings. The trial court speculated about defendant's potential retirement within five years, without conclusively finding that he planned to retire at age 67. [Da42]. Moreover, the trial court failed to explain why it believed plaintiff had a need for an additional $1,000,000 of savings five years in the future. Ibid. Therefore, as will be discussed in greater detail below, this additional $12,300 monthly "savings component," which bears no relation to the marital lifestyle and is based on conjecture rather than solid evidence, fails to comport with controlling legal principles, necessitating its reversal.

B. The Trial Court's Addition of a $12,300 Per Month Savings Component Not Reflective of the Marital lifestyle Deviates from Established New Jersey Alimony Law.

While the trial court accurately assessed the base alimony amount at $38,150 per month as reflective of the amount plaintiff needed to spend to live reasonably comparable to the marital lifestyle, its subsequent decision to award an extra $12,300 monthly savings component starkly contrasts with the principles of New Jersey alimony law, as outlined in Crews v. Crews, 164 N.J. at 12, and underscored by the 2014 amendment to N.J.S.A. 2A:34-23(b)(4). This additional savings component artificially inflates the alimony award to a level that does not accurately reflect the lifestyle experienced by the parties prior to their separation.

Historically, New Jersey courts have recognized a savings component could be included in an alimony award to protect against the day alimony might end due to death or change in circumstances. Khalaf v. Khalaf, 58 N.J. 63, 70 (1971). More recent legal developments, however, have evolved the focus on maintaining a lifestyle reasonably comparable to the marital one, with the emphasis being on the parties' economic life during their marriage. Glass v. Glass, 366 N.J. Super. at 370 (citing, Lepis, 83 N.J. at 150). Consequently, the marital standard of living has become the "touchstone" of an alimony award, Crews v. Crews, 164 N.J. at 12, with trial courts now being mandated to quantify the marital lifestyle numerically in all contested divorce cases. S.W. v. G.M., 462 N.J. Super. at 532.

In Crews, the New Jersey Supreme Court underscored the importance of aligning alimony awards with the marital standard of living, rather than creating a financial paradigm based on speculative future needs. The marital lifestyle finding is therefore crucial — it "is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award." S.W. v. G.M., 462 N.J. Super. at 531. The trial court's decision in the present case to inflate the alimony award with a substantial savings component aimed at addressing hypothetical post-retirement financial scenarios fails to consider the actual, present-day financial circumstances of the parties and the marital

lifestyle, which together are the essence of the three-part alimony determination process. Crews, 164 N.J. at 27.

The trial court, fixated on the fact "Mr. Pisano saved a million dollars in retirement funds since the divorce complaint...", [Da41], explained the reason for its awarding this unique and unconventional savings component — bearing no relationship to the marital lifestyle — as follows:

> Mr. Pisano is 62 years old and reaches, under current law, full Social Security age at 67. **Though if alimony is awarded, this would be an open durational alimony case, presumptively Mr. Pisano could seek to retire at 67,** less than five years from now in approximately 57 months. **While no law states or implies there must be dollar-for-dollar savings equality, to obtain a future value of one million dollars in 57 months would require Ms. Pisano to save approximately $12,300 per month prospectively at 5%. Mr. Pisano argues there were no saving during the marriage.** The court finds they are entitled to a similar lifestyle as the marital lifestyle not just for the years until Mr. Pisano retires, which **might** be less than five years away, but to a lifestyle that can be sustained as much as possible into the retirement years. **Otherwise they have a thirty year marriage, they live well for almost five years post-judgement, and then he continues to live high off the hog while she relies on public assistance. That cannot possibly be what is intended by the state's alimony scheme.**

[Da42]. (Emphasis added).

By preemptively addressing hypothetical future disparities with a significant savings component, the trial court has sidestepped the Lepis change in circumstances framework and statutory mechanisms designed to address such issues as they arise. To that end, the trial court's approach is reminiscent of the

error identified in Boardman v. Boardman, 314 N.J. Super. 340, 347 (App. Div. 1998), where the Appellate Division cautioned against courts making assumptions about future circumstances without a factual basis, and expressly held any "modification should abide the event, especially here, where the supporting spouse is many years away from normal retirement age." Ibid.

In the instant matter, the trial court's decision to factor in a hypothetical future scenario into the alimony award not only goes against the established marital lifestyle standard but also represents a speculative foray into future financial circumstances, a practice explicitly rejected in Boardman. The inclusion of the savings component, therefore, represents a misapplication of alimony principles, as it attempts to protect against a potential future change in circumstances rather than reflecting the actual lifestyle enjoyed during the marriage. Crews, 164 N.J. at 16; S.W. v. G.M., 462 N.J. Super. at 534.

In conclusion, the addition of a $12,300 monthly savings component, which is not reflective of the marital lifestyle and is based on speculative future circumstances, is a clear deviation from New Jersey alimony law. Ibid.; Boardman, 314 N.J. Super. at 345-47. This error necessitates a reversal to ensure that alimony awards remain true to their intended purpose: to support a standard of living reasonably comparable to that enjoyed during the marriage. Crews, 164 N.J. at 17.

C. The Trial Court's Decision to Impose a $12,300 Monthly "Savings Component" Is Inconsistent with the Legislative Intent Embodied in N.J.S.A. 2A:34-23(j)(1).

The trial court's imposition of a $12,300 monthly "savings component" for the plaintiff, ostensibly aimed at ensuring a sustainable post-retirement lifestyle, deviates from the legislative intent of the 2014 amendment to N.J.S.A. 2A:34-23(j)(1). "The 2014 amendments added a new subsection (j), which lists objective considerations a judge must examine and weigh when reviewing an obligor's request to modify or terminate alimony when an obligor retires. L. 2014, c. 42, § 1." Landers v. Landers, 444 N.J. Super 315, 321 (App. Div. 2016). The newly enacted provisions of N.J.S.A. 2A:34-23(j)(1), which is applicable to all alimony awards entered after the September 2014 effective date of the Amendment, Ibid., states in pertinent part:

> j. Alimony may be modified or terminated upon the prospective or actual retirement of the obligor.
>
> (1) There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age, except that any arrearages that have accrued prior to the termination date shall not be vacated or annulled. The court may set a different alimony termination date for good cause shown based on specific written findings of fact and conclusions of law.
>
> The rebuttable presumption may be overcome if, upon consideration of the following factors and for good cause shown, the court determines that alimony should continue:
>
> (a) The ages of the parties at the time of the application for retirement;

(b) The ages of the parties at the time of the marriage or civil union and their ages at the time of entry of the alimony award;

(c) The degree and duration of the economic dependency of the recipient upon the payor during the marriage or civil [***9] union;

(d) Whether the recipient has foregone or relinquished or otherwise sacrificed claims, rights or property in exchange for a more substantial or longer alimony award;

(e) The duration or amount of alimony already paid;

(f) The health of the parties at the time of the retirement application;

(g) Assets of the parties at the time of the retirement application;

(h) Whether the recipient has reached full retirement age as defined in this section;

(i) Sources of income, both earned and unearned, of the parties;

(j) The ability of the recipient to have saved adequately for retirement; and

(k) Any other factors that the court may deem relevant.

In the instant matter, the trial court expressed concern about a potential disparity in the parties' post-retirement lifestyles, stating:

> **Mr. Pisano argues there were no saving during the marriage**. The court finds they are entitled to a similar lifestyle as the marital lifestyle not just for the years until Mr. Pisano retires, which might be less than five years away, but to a lifestyle that can be sustained as much as possible into the retirement years. **Otherwise, they have a thirty-year marriage, they live well for almost five years**

> **post-judgment, and then he continues to live high off the hog while she relies on public assistance. That cannot possibly be what is intended by the state's alimony scheme.**

[Da42]. (Emphasis added).

The trial court's rationale, however, overlooks the nuanced approach of the 2014 legislative amendments. The statute explicitly provides for a rebuttable presumption that alimony terminates upon the obligor reaching full retirement age, with the option for the court to continue the existing award, modify the amount or set a different termination date based on the specific circumstances of the case at the time of the retirement motion. N.J.S.A. 2A:34-23(j)(1); Landers v. Landers, 444 N.J. Super. at 321.

The clear and unambiguous language of the statute demonstrates that the legislature anticipated scenarios where post-retirement financial disparities could be stark, as hypothesized by the trial court. Consequently, the amendments allow for a continuation of alimony beyond the obligor's retirement age if certain conditions are met, such as significant disparities in the parties' financial circumstances. This flexibility addresses the trial court's concerns about one party "living high off the hog" while the other struggles, without the need to speculate and impose a significant savings component years in advance. [Da42].

The trial court's awarding of a substantial savings component, based on hypothetical future scenarios, is inconsistent with the legislative intent of the 2014 amendments. The statute's focus is on actual, present-day financial

conditions at the time of the retirement application, not on conjectures made years before the obligor's potential retirement. N.J.S.A. 2A:34-23(j)(1); Landers, 444 N.J. Super. at 321. This approach by the trial court not only misaligns with the statute's intent but also overlooks the statute's built-in mechanisms designed to address the very concerns raised by the court. Ibid. As previously noted in the context of Boardman v. Boardman, 314 N.J. Super. at 345-347, the trial court's reliance on speculative future scenarios here similarly warrants reversal. Under the trial court's speculative approach, if defendant continues to work beyond age 67 plaintiff receives a $1,000,000 alimony windfall over and above the amount required to live reasonably comparable to the marital lifestyle. Mani v. Mani, 183 N.J. at 80 ("alimony is neither a punishment for the payor nor a reward for the payee."); Aronson v. Aronson, 245 N.J. Super. at 364 ("Alimony is neither a punishment for the payor nor a reward for the payee. Nor should it be a windfall for any party."). Such a result is entirely inconsistent with the legislative intent. Ibid.

In sum, the evident divergence of the trial court's decision from the legislative intent of N.J.S.A. 2A:34-23(j)(1) underscores the need for reversal. By imposing a "savings component" based on speculative future scenarios, the trial court has not only misaligned with the statute's intent focusing on actual conditions at the time the retirement motion is made, but also neglected the statute's mechanisms for addressing such concerns. Thus, this decision should

be reversed to uphold the legislative intent and ensure alimony remains tethered to its rightful purpose in New Jersey family law.

D. The Record Lacks Evidence Supporting Defendant's Intent to Retire at Age 67 or Plaintiff's Need for an Additional $1,000,000 in Assets.

The trial court's decision to include an additional $1,000,000 savings component in the alimony award rests on a foundation of speculation and conjecture, significantly lacking in empirical support. Notably, there was no testimony or concrete evidence indicating defendant intended to retire at age 67. The absence of a factual basis for such a pivotal assumption in the court's rationale is troubling and warrants reversal for that reason alone. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974).

Furthermore, the trial court's rationale behind this substantial financial augmentation — equalizing the plaintiff's post-divorce financial status with the $1,000,000 of retirement savings defendant had accumulated through his post-divorce complaint work efforts — fails to comport with controlling legal principles. This approach appears to be an attempt to ensure financial parity post-divorce, a concept that is not only unsupported by the evidence in the record but also strays from the established principles of alimony and equitable distribution under our case law and statutory scheme. See Crews v. Crews, 164 N.J. at 35 (A dependent spouse has no right to share in a former spouse's post-divorce income and post-divorce good fortune beyond the amount necessary for

them to live reasonably comparable to the marital lifestyle); S.W. v. G.M., 462 N.J. Super. at 534 (The Legislature declined to adopt a formulaic or equalization approach in alimony cases when adopting the 2014 Amendment)(citing Assemb. 845, 216th Leg., 2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage)).

The speculative nature of the court's decision is further exacerbated by the pronounced absence of evidence substantiating plaintiff's need for an additional $1,000,000. Such a significant financial obligation necessitates a robust foundation of substantial credible evidence, which is conspicuously absent in this case. Lombardi v. Lombardi, 447 N.J. Super. at 33; J.E.V. v. K.V., 426 N.J. Super. 475, 485 (App. Div. 2012). The trial court's justification for the unconventional $1,000,000 award — based solely on defendant's post-divorce complaint savings of an equivalent amount — fails to establish plaintiff's actual financial need for this sum. This glaring gap in evidentiary support renders the decision unsupported constraining its reversal. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. at 484.

In sum, this lack of evidence and reliance on speculation regarding a future retirement contradicts the guidance in Boardman v. Boardman, 314 N.J. Super. at 347, and is particularly concerning given the overall implications of the trial court's decision. It effectively allocates a substantial portion of the defendant's future earnings to the plaintiff, under the guise of alimony, without

sufficient legal justification. Given the speculative basis of the trial court's decision and the conspicuous absence of supporting evidence, a reversal is not only justified but essential to uphold the principles of fairness and accuracy in the determination of alimony awards under New Jersey law. Gnall v. Gnall, 222 N.J. 414, 428 (2015); Boardman v. Boardman, 314 N.J. Super. at 347. Moreover, as discussed in the following Subpoint E, this approach not only deviates from the intended purpose of alimony but also blurs the lines between alimony and equitable distribution.

E. The Trial Court has Mischaracterized What is a Form of Deferred Equitable Distribution as Alimony.

Nearly fifty years ago, in Stern v. Stern, 66 N.J. 340, 345 (1975), the New Jersey Supreme Court decisively rejected the notion that an individual's earning capacity should be treated as a divisible marital asset under equitable distribution. The Court clearly stated:

> **We agree with defendant's contention that a person's earning capacity, even where its development has been aided and enhanced by the other spouse, as is here the case, should not be recognized as a separate, particular item of property within the meaning of N.J.S.A. 2A:34-23.1.** Potential earning capacity is doubtless a factor to be considered by a trial judge in determining what distribution will be "equitable" and it is even more obviously relevant upon the issue of alimony. **But it should not be deemed property as such within the meaning of the statute.**
>
> [Stern v. Stern, supra., 66 N.J. at 345].

This doctrine was further reinforced in Mahoney v. Mahoney, 91 N.J. 488, 497 (1982) where the Court clarified that a spouse's professional degree, influencing future earnings, is not an asset eligible for equitable distribution:

> **Equitable distribution of a professional degree would similarly require distribution of "earning capacity"** — income that the degree holder might never acquire. The amount of future earnings would be entirely speculative. **Moreover, any assets resulting from income for professional services would be property acquired after the marriage; the statute restricts equitable distribution to property acquired during the marriage.** N.J.S.A. 2A:34-23.
>
> [Mahoney, supra., 91 N.J. at 497]. (Emphasis added).

In the present case, the trial court's award of an additional $1,000,000 to the plaintiff as "savings" under alimony is a covert form of equitable distribution drawn from defendant's future earnings. This approach deviates from the holding in Stern v. Stern prohibiting future earnings from being treated as a divisible marital asset.

The trial court itself recognized in its decision that the underlying rationale behind its savings component, explicitly aimed at providing plaintiff with an amount equal to the $1,000,000 of retirement savings defendant had accumulated through his post-complaint work efforts, has no basis under existing New Jersey law:

> **While no law states or implies there must be dollar-for-dollar savings equality**, to obtain a future value of one million dollars in 57 months would require Ms. Pisano to save approximately $12,300 per month prospectively at 5%.

[Da42]. (Emphasis added).

The trial court's stated intent of ensuring "dollar-for-dollar savings equality" over 57 post-divorce months fundamentally misconstrues the nature of alimony and results in an enhanced award not authorized under our statute or case law. S.W. v. G.M., 462 N.J. Super. at 534 (The Legislature declined to adopt a formulaic or equalization approach in alimony cases when adopting the 2014 Amendment)(citing Assemb. 845, 216th Leg., 2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage)).

Simply put, while a dependent spouse is justly entitled to a lifestyle reasonably comparable to that experienced during the marriage, an amount the trial court properly identified as requiring $38,150 per month of alimony in this particular case, expanding that amount to include a share of the payor's future post-divorce earnings so the dependent spouse can accumulate additional wealth through the payor spouse's post-divorce work efforts is untenable. Crews v. Crews, 164 N.J. at 35 (A dependent spouse has no right to share in a former spouse's post-divorce income and post-divorce good fortune beyond the amount necessary for them to live reasonably comparable to the marital lifestyle). Such an approach effectively transfers future earning capacity from the payor to the dependent spouse, directly contravening the doctrine set forth in Stern. It also

transforms alimony from a means of support based on the marital standard of living into a mechanism for wealth accumulation post-divorce based upon speculative conjecture. This not only strays from well-established and controlling legal principles, but also risks creating an inequitable and unpredictable legal landscape in family law.

In conclusion, the trial court's decision to recharacterize a portion of defendant's future earnings as alimony, under the guise of labeling it a savings component, is an improper attempt to do an end around Stern v. Stern. This approach, aiming for "dollar-for-dollar savings equality," while perhaps well-intended in its effort to secure the plaintiff's financial future, fails to align with the nature of alimony and exceeds the legislative and judicial boundaries set by our statutes and judicial precedents. S.W. v. G.M., 462 N.J. Super. at 534. Such a transformation of alimony from a support mechanism to a tool for future wealth accumulation beyond what is necessary for the marital standard of living to be achieved is not only contrary to the doctrine set forth in Stern but also risks creating an unpredictable and inequitable precedent in family law. It is imperative to correct this decision to preserve the fundamental tenets of equitable distribution and the true purpose of alimony, by ensuring that alimony remains a support mechanism aligned with the marital standard of living and not a tool for speculative wealth accumulation. For the foregoing reasons, it is respectfully submitted that reversing this decision is essential, not only to

address the specific errors in this case, but also to uphold the integrity of New Jersey family law and the crucial distinction between alimony and equitable distribution, thereby ensuring fairness and predictability in our legal system.

POINT II

THE TRIAL COURT'S INCONSISTENT TREATMENT OF THE MARITAL RESIDENCE'S ENHANCED EQUITY AND THE ACCRUED 2016 JOINT TAX DEBT CAUSED BY PRIORITIZING THE PAY DOWN OF MORTGAGE DEBT OVER THE PAYMENT OF TAXES IN THE TWO YEARS LEADING UP TO PLAINTIFF'S DIVORCE ANNOUNCEMENT VIOLATES EQUITABLE DISTRIBUTION PRINCIPLES. [Da64; Da76].

The trial court's decision to equitably distribute the enhanced equity of the marital residence, while disproportionately assigning the entire burden of the accrued 2016 joint tax liabilities to the defendant, represents a clear misapplication of equitable distribution principles. This inequitable allocation fails to acknowledge the intrinsic connection between the mortgage debt paydown and the resulting tax liabilities, leading to an unjust and disproportionate financial burden on defendant.

The goal of equitable distribution is to effect a fair and just division of marital assets and marital debts, recognizing that marriage is a shared enterprise and joint undertaking, akin to a partnership. Steneken v. Steneken, 367 N.J. Super. 427, 434 (App.Div.2004), aff'd in part, modified in part, 183 N.J. 290 (2005); Chalmers v. Chalmers, 65 N.J. 186, 194 (1974). Equitable distribution

aims to divide fairly assets and debts "acquired when both parties contributed to the marital enterprise, whether by earned income or as a homemaker." Carr v. Carr, 120 N.J. 336, 347 (1990)(quoting Portner v. Pornter, 186 N.J. Super. 410, 415 (App. Div. 1982).

It is well settled that "in dividing marital assets the court must take into account the liabilities as well as the assets of the parties." Slutsky v. Slutsky, 451 N.J. Super. 332, 348 (App. Div. 2017)(citing Monte v. Monte, 212 N.J. Super. 557, 567 (App. Div. 1986); see also N.J.S.A. 2A:34-23.1(m)(requiring consideration of "debts and liabilities of the parties" in equitable distribution). "In other words, if the assets are to be divided between the parties, the debts incurred in obtaining those assets should likewise be allocated between the parties." Monte v. Monte, 212 N.J. Super. 557, 567 (App. Div. 1986). Accordingly, "[w]here marital debts are proven, courts should deduct marital debts from the total value of the estate, or allocate the obligations between the parties. Slutsky v. Slutsky, 451 N.J. Super. 332, 348 (App. Div. 2017)(citing Pascarella v. Pascarella, 165 N.J. Super. 558, 563 (App. Div. 1979) (holding the trial judge was required to deduct debt incurred during the marriage between husband and his mother); Ionno v. Ionno, 148 N.J. Super. 259, 262 (App. Div. 1977) (holding obligations should be allocated between the husband and wife).

The distribution of marital assets and debts involves a three step process. Sculler v. Sculler, 348 N.J. Super. 374, 380 (Ch. Div. 2001). The court first

determines what property is eligible for distribution, then values each property, and finally decides how allocation can most equitably be made, applying the statutory factors set forth in N.J.S.A. 2A:34-23.1. Ibid. (quoting Rothman v. Rothman, 65 N.J. 219, 232 (1974)). Nevertheless, this court has further recognized that often an equal allocation of property and debt is compelled by virtue of the relative contributions of the parties to the marriage. Wadlow v. Wadlow, 200 N.J. Super. 372, 377-78 (App. Div. 1985).

Here, the trial court's divergent allocation of the marital residence proceeds, which were ordered divided equally, with the pre-complaint tax debt incurred enhancing those proceeds allocated 100% to defendant, fails to comport with these controlling legal principles. Leading up to plaintiff's announcement of divorce, defendant prioritized reducing the mortgage debt to qualify for a refinancing at a lower interest rate, aiming to save significant annual interest costs. [Da61; 17T106-10; 11T71-3]. Testimony from plaintiff's expert, Stacy Collins, indicated $1,758,885 of mortgage debt was paid off in 2015 and 2016, thereby enhancing the home's equity in that amount. [6T84-1; DCa58]. The undisputed goal of this financial maneuver was to reduce the mortgage balance down to $1,000,000 so that the parties could qualify for a mortgage refinancing that would reduce their mortgage interest rate from 4.375% to 2.5%, thereby saving them $18,750 per year in interest going forward. [Da61; 1T35-19; 17T105-3 to 25; 17T106-10]. This financial strategy, while enhancing the

home's equity, simultaneously led to a substantial joint tax liability, with the marital partnership having an outstanding joint tax liability of $1,631,282 for the 2016 tax year as of the May 1, 2017 cut-off date, comprised of $1,337,362 for 2016 joint Federal taxes, [DCa328; 7T214-13] and $293,920 for joint New Jersey 2016 state income taxes. [DCa361; DCa370; DCa388; DCa417]. See also FN 5, p. 5 and FN6, p. 6, supra. The trial court's failure to recognize this interdependence in its decision skews the equitable distribution, disproportionately favoring the plaintiff while penalizing the defendant for a financial strategy that had no impact on the value of the marital estate.

In addressing the allocation of marital assets and debts, the trial court's decision to equitably divide the home equity, while singularly imposing the entire $1,631,282 tax debt on the defendant, deviates from the principles of equitable distribution. This decision ignores the critical link between the mortgage paydown and the subsequent tax liability, leading to an unjust penalization of the defendant. [17T106-10; 11T71-3]. The strategy to reduce mortgage debt, which directly led the home's enhanced equity, was counterbalanced by the accrued tax debt — a fact the trial court failed to consider equitably. Cf. Monte, 212 N.J. Super. at 567("if the assets are to be divided between the parties, the debts incurred in obtaining those assets should likewise be allocated between the parties."). Stated differently, if the $1,758,885 used to pay down the mortgage debt had instead been used to pay the taxes, there would

have been no tax debt owed and the marital residence would have had $1,758,885 less of equity, highlighting the choice of which debt to pay had no material impact on the marital balance sheet. [17T106-10; 11T71-3].

The trial court's rationale for allocating the entire tax liability to the defendant is fundamentally flawed and contradicts the established facts of the case. In its decision, the court posited that "Ms. Pisano has already shared in the tax burden" due to taxes being considered in the *pendente lite* alimony calculations. [Da76]. However, this claim is directly at odds with the trial court's own findings regarding the *pendente lite* support payments. The trial court acknowledged that the defendant consistently provided plaintiff with *pendente lite* support ranging from $46,000 to $51,000 per month from 2017 to 2023. [Da53]. This amount substantially surpasses the court-determined requirement of $38,150 per month spending needed for the plaintiff to maintain a lifestyle reasonably comparable to the marital standard. Moreover, it is crucial to note that these significant monthly payments do not include the additional, considerable private school and college educational expenses for their daughter, Claire, which the court found were exclusively borne by the defendant, amounting to over $75,000 annually. [Da55].

The clear disconnect between the trial court's assertion and the actual financial contributions made by the defendant is evident. The record unequivocally demonstrates that the *pendente lite* support payments not only

exceeded the plaintiff's needs but also did not contribute towards mitigating the joint tax liability, specifically the $1,631,282 owed for the 2016 tax year. When evaluated in conjunction with the fact that the defendant singularly shouldered the entire tax debt, while plaintiff equally shared in the enhanced equity of the marital residence, an inequitable financial burden is revealed. This disproportionate allocation starkly diverges from the principles of fair and equitable distribution. Monte, 212 N.J. Super. at 567 ("if the assets are to be divided between the parties, the debts incurred in obtaining [or enhancing the equity in] those assets should likewise be allocated between the parties.") The trial court's oversight in this regard — failing to recognize the true financial dynamics between the parties and the disproportionate burden placed on the defendant — necessitates a reevaluation to ensure an equitable distribution that truly reflects both parties' contributions and responsibilities in the marital partnership. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)(An "abuse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment."(citing Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)(An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'")).

Finally, it is well settled that, "A party to a matrimonial action cannot use marital assets to discharge support obligations and then claim that those marital assets are unavailable for equitable distribution" Weiss v. Weiss, 226 N.J. Super. 281, 291 (App. Div. 1988). The corollary of that well settled rule of law is equally true: a party cannot be required to use their separate post-complaint income to pay joint marital debts without an appropriate credit or contribution from the other party, especially when the pre-complaint jointly titled debt was incurred to acquire or enhance marital assets that are being equally divided. Monte, 212 N.J. Super. at 567 ("if the assets are to be divided between the parties, the debts incurred in obtaining those assets should likewise be allocated between the parties.")

In conclusion, the trial court's decision, while ostensibly aimed at equitable distribution, falters in its fundamental application by neglecting the intertwined nature of the marital assets and debts. This lapse has led to an unjust allocation, heavily weighted against the defendant. The trial court's approach — splitting the enhanced equity of the marital residence equally but unduly burdening the defendant with the entire $1,631,282 tax debt resulting from the pre-complaint mortgage paydown — is not only unbalanced but also diverges markedly from the principles of equitable distribution. It is imperative, therefore, that this decision be reassessed and reversed, ensuring an outcome that truly reflects the financial realities of the marital partnership and upholds

the integrity of equitable distribution. Only through a careful and fair consideration of both marital assets and marital debts can a genuinely equitable division be achieved in line with New Jersey's legal standards. Slutsky v. Slutsky, 451 N.J. Super. at 348; Pascarella v. Pascarella, 165 N.J. Super. at 563.

POINT III

THE TRIAL COURT'S AWARD OF A $250,000 CREDIT TO PLAINTIFF FOR ALLEGED DEVALUATION OF THE MARITAL HOME IS CONTRARY TO AN EARLIER COURT ORDER AND LACKS SUBSTANTIAL CREDIBLE EVIDENCE, REQUIRING REVERSAL. [Da63 to Da64].

This brief point addresses the trial court's erroneous award of a $250,000 credit to the plaintiff for the purported devaluation of the marital home, which is not only contrary to a prior court order but also unsupported by substantial credible evidence. Paragraph 6 of the November 17, 2021 order unambiguously imposes responsibility on plaintiff, as opposed to defendant, for landscaping and exterior maintenance of the marital home from November 17, 2021 through the August 16, 2023 Final Judgment of Divorce:

> Plaintiff SHALL directly arrange for all landscaping/snow removal services for the marital property. Plaintiff SHALL ensure that the landscaping/snow removal service providers have access to the landscaping/snow removal equipment at the marital home.
>
> [Da9].

Despite this clear directive assigning responsibility for landscaping and exterior maintenance to the plaintiff, the trial court in its Final Judgment of

Divorce dated August 16, 2023, erroneously attributed a significant part of the property's perceived devaluation to the defendant's supposed negligence. This misattribution by the trial court directly contradicts the explicit terms of the November 17, 2021 order, which placed the responsibility for landscaping solely on the plaintiff. Indeed, the trial court's description of the property's condition in its opinion vividly details the alleged state of disrepair highlighting it primarily consisted of landscaping related problems:

> P-144 pictures vividly demonstrate what he has allowed and caused to undermine the appearance of the residence's exterior - a lawn no longer manicured but brown and ungroomed; untrimmed bushes; patches of dirt; broken and chipped masonry; weeds growing between steps; deteriorating stone and cement; leaf-filled gutters and plantings overhanging gutters; dying trees; dead insect carcasses; crumbling steps; unwashed tiles; broken and missing grout; damaged and rotting wood surfaces; and significant visible buckling in the tennis court.
>
> [Da64].

Moreover, the speculative nature of the $250,000 credit award is evident in the trial court's own admission: "[There is] no way the court would be able to quantify the loss in marketability due to [defendant's] shenanigans which the court deems intentionally manipulative." [Da64]. This admission underscores the lack of substantial credible evidence required for the $250,000 equitable distribution award and highlights a clear departure from the judicial standard of basing decisions on substantial credible evidence. Lombardi v. Lombardi, 447 N.J. Super. 26, 32-33 (App. Div. 2016)(An equitable distribution award must be

based upon substantial credible evidence); La Sala v. La Sala, 335 N.J. Super. 1, 4 (App. Div. 2000). The New Jersey Supreme Court has defined "substantial evidence" as being "such evidence as a reasonable mind might accept as adequate to support a conclusion." In re Public Serv. Electric & Gas Co., 35 N.J. 358, 376 (1961). Here, the trial court's arbitrary assignment of a $500,000 decrease in value, admittedly without a concrete basis, does not meet this threshold. It is "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence" as to be considered arbitrary, contradicting the Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974) standard.

In conclusion, the trial court's decision, which disregards an earlier judge's November 17, 2021 order and bases a significant financial award on speculative findings, undermines the fundamental principles of equitable distribution. The award is not grounded in the clear and credible evidence required for such determinations, violating the tenets of fairness and equity central to the equitable distribution process. The reversal of this award is imperative not only to correct the misapplication of responsibility as per the prior court order but also to uphold the integrity of the judicial process, ensuring significant financial decisions in the context of equitable distribution are firmly anchored in substantial credible evidence. Consequently, it is respectfully submitted that the trial court's decision to award the plaintiff a $250,000 credit

for the alleged devaluation of the marital home, in contradiction to the November 17, 2021 order and without a factual basis for the property's alleged devaluation, constrains its reversal so it aligns with these foundational legal principles.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Paragraphs C, E(1) and E(15) of the Final Judgment of Divorce should be reversed and vacated. On remand, the trial court should be instructed to:

1. Revise Paragraph C so that plaintiff is awarded the $38,150 per month of open durational alimony the trial court found she needs to live reasonably comparable to the marital lifestyle, while excluding the additional $12,300 per month savings component which was not reflective of the marital lifestyle.

2. Revise Paragraph E(1) to remove the unwarranted $250,000 credit granted to plaintiff from defendant's portion of the proceeds from the sale of the marital residence for its alleged devaluation due to landscaping issues.

3. Revise Paragraph E(15) to mandate an equitable 50/50 distribution of the 2016 pre-complaint joint Federal and State tax liability of approximately $1,631,382. This marital debt was incurred when defendant diligently paid down, to the parties' equal benefit, their mortgage balances by $1,758,885 in the two years leading up to plaintiff's divorce announcement.

These amendments are essential to remedy the trial court's departure from established legal principles, thereby ensuring a fit, reasonable and just dissolution of this long term marital partnership.

Respectfully submitted,

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Dated: 1/3/2024

By: 
Brian G. Paul, Esq.

CLORINDA PISANO, Plaintiff-Respondent, vs. JOHN PISANO, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. : A-00242-23T2 On Appeal From: Superior Court of New Jersey Chancery Division: Family Part Morris County Below: Hon. James A. Farber, J.S.C. Docket No. FM-14-122-18

CROSS APPELLATE BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT CLORINDA PISANO

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PRELIMINARY STATEMENT

This case boils down to the simple fact that Defendant-Appellant, John Pisano ("Defendant"), has never wanted to pay fair alimony or equitable distribution, abusing Plaintiff and the legal system in the process, up to and including trial. In fact, that sentiment was specifically noted and addressed in the trial judge's Statement of Reasons after thirteen days of trial wherein Defendant was contemptuous, abusive and outright brazen. Defendant was unable to control himself and was admonished by the Court on too many occasions to count. But his positions and contempt of the legal system were worse than his conduct. Worse yet, he is a trial lawyer who knew better.

Just as Defendant sought to pull the proverbial wool over the trial court's eyes at trial, Defendant now seeks to do the same to this Court. Defendant barely included any of the trial evidence in his Appendix, all while knowing that he was supposed to recreate the record for this Court to the extent it was anticipated Plaintiff would address same. The reason why Defendant's Appendix is so narrow is because there was no evidence to support his bad faith positions at trial and thus, no evidence now to support his spurious, bad faith claims on appeal.

Defendant, from the onset of this matter, ignored and/or lied about the basic facts of this case as to his income and the alimony factors. Despite not contesting the marital lifestyle of over $97,000 per month, Defendant still, in his appeal, seeks to lower the correctly calculated alimony owed to Plaintiff, Clorinda Pisano

("Plaintiff"). Despite Defendant's multi-million dollar income, substantial assets that he surreptitiously added millions of dollars to during the divorce while underpaying support, over the top upper class lifestyle, Defendant continued to argue unsupportable positions, which did not and cannot hold up to legal scrutiny.

While the parties irrefutably entered the marriage with little assets and accumulated over $10,000,000 in assets, Defendant still on appeal makes the baseless argument that the parties did not save or invest during the marriage. Defendant merely equates the "regular" savings of a retirement account, for example, when the relevant case law specifically includes the utilization of "non-regular" savings in the calculation of a savings component.

Similarly, Defendant once again attempts to rewrite the marital lifestyle by claiming that they did not pay taxes historically late, even beyond the annual October extension deadline when the evidence at trial irrefutably proved otherwise. Defendant intentionally misled the trial court that there was substantial marital tax debt which required a significant reduction in Plaintiff's *pendente lite* support when in practice the 2016 IRS debt was not marital as the parties never paid the tax debt until well after the next year. The parties' cut-off agreement fully insolated Plaintiff from that liability Defendant was seeking to place onto Plaintiff.

Plaintiff's cross-appeal centers around the trial court's failure to apply the only relevant testimony as to the monetary value of the disrepair caused by Defendant to the former marital residence, the misapplication of Mallamo as it

relates to the pendente lite support, and the under-award of counsel fees as the trial court did not fully consider the bad faith behavior of Defendant throughout the litigation not to mention his greater ability to pay.

Through the competent and credible testimony at trial, the trial court determined that Defendant intentionally attempted to lower the value of the former marital residence in an effort to buy-out Plaintiff's equitable share at a lower figure. Defendant, by consent, was responsible for the maintenance and repair of the property and was the sole facilitator with the various professionals throughout the pendency of the divorce. During the testimony, the only calculations and estimates was done by Defendant's expert, who's report was stipulated into evidence.

Plaintiff testified as to all of the gross violations of Court Orders and directives that Defendant thumbed his nose at during the litigation. Plaintiff was forced to file application after application to address Defendant's willful noncompliance with not only the *pendente lite* support order, but additionally to require Defendant to produce discovery and pay his various support obligations.

Left without reasonable ability to address Defendant's continued bad faith positions, Plaintiff beseeches this Court for relief. Plaintiff seeks to have the Court deny Defendant's appeal in its entirety, to reverse the Court's error in utilizing too low of a figure as to the disrepair in the former marital residence, to reverse the trial court's denial of a Mallamo credit, and to award additional attorneys' fees as the trial court did not sufficiently address Defendant's bad faith during the litigation.

COUNTER STATEMENT OF FACTS / PROCEDURAL HISTORY[1]

A. Basic Background

The parties were married on September 17, 1988. Da1. The parties have three (3) children together. All three (3) children are currently emancipated, although their youngest daughter was only recently emancipated in May 2022 and was unemancipated for the vast majority of the litigation. Da2. The parties are both sixty-two (62) years old. DCa2. Throughout the parties' approximately twenty-nine (29) year marriage, Defendant was the sole breadwinner and earned substantial income as a highly successful personal injury attorney based out of Cranford, New Jersey. Da29.

Prior to a Complaint for Divorce being filed, in or around March 2017, Plaintiff advised Defendant that she was seeking a divorce. 1T:76-11 to 13. Shortly thereafter, on April 26, 2017, the parties entered into a Cut-Off Agreement, effectively ending their marriage as of May 1, 2017. Da7. On that very same day, April 26, 2017, Defendant intentionally withdrew $300,000 from the parties' Home Equity Line of Credit (HELOC), without Plaintiff's knowledge or consent, thereby artificially and in bad faith, increasing the alleged marital debt, which throughout

[1] The relevant facts and procedural history are combined so as to avoid duplication and for organization purposes.

the trial, Defendant claimed should be Plaintiff's responsibility. 11T:96-7 to 9. Defendant thereafter paid back the HELOC on May 16, 2017. PCa1[2].

Plaintiff filed her Complaint for Divorce on August 1, 2017. Da1. Defendant's Answer and Counterclaim was filed on September 11, 2017. Da110. As detailed hereafter, the was substantial *pendente lite* litigation resulting in over 30 Orders. Pa1-207.

The parties participated in a thirteen (13) day trial, which occurred over a number of months between February 13, 2023 and May 25, 2023. (1T – 21T). Thereafter, on August 16, 2023, the trial court issued the Judgment of Divorce (Da10) and Statement of Reasons (Da27). Defendant filed his Notice of Appeal on September 23, 2023 (Da102). Plaintiff filed her Notice of Cross Appeal on October 10, 2023 (Da105).

B. **Plaintiff's Limited Work History**

In the early years of the marriage, Plaintiff worked essentially as a cash manager for Haagen-Dazs. 1T:88-22 to 1T:89-1. However, when the parties' eldest child was born, Plaintiff undisputedly stopped working and has not been employed outside the home since approximately early 1992. 1T:106-23 to 1T:107-2. At the conclusion of the trial, in the Trial Court's Statement of Reasons, the Trial Court determined that Plaintiff was capable of earning minimum wage, which annualized

[2] Pa_ refers to the Plaintiff's Appendix and PCa_ refers to Plaintiff's Confidential Appendix.

equated to $31,200. Da38. Additionally, the Trial Court reasoned that with her investments stemming from equitable distribution, Plaintiff was capable of earning approximately an additional $43,300, for a total of $74,500 in gross annual income before the payment of any alimony. Da38.

C. **Defendant's Income**

Defendant operates a law practice known as the Law Office of John J. Pisano, Esq. and earned significant gross income that approached $3,500,000 at his peak, not inclusive of perquisites. DCa327. Pursuant to the Trial Court's Statement of Reasons, Defendant's average gross earned income for the tax years 2013 through 2016 (the last four years of the marriage) was $2,680,966 and the weighted averaged was $2,881,070. Da29. The Trial Court further rationalized that if the last four (4) months of the marriage in 2017 were extrapolated and included into the average gross income of Defendant, then the five year average would have been $2,924,440 and the weighted average would be $3,220,159. Da29-30. Plaintiff's expert utilized a weighted average due to the change as to how Defendant handled his business in the latter years by starting to take all client intake calls and other phone calls himself, turning into significantly higher revenues. 6T:67-6 to 15.

During the trial, there was much debate and testimony regarding Defendant's income and the confusion surrounding the joint tax returns both prior to and after the Complaint for Divorce. Defendant, throughout his testimony could not clearly or accurately testify as to his own tax returns, down to the point where there was

question as to the marital status utilized for the tax returns in certain years. 10T:86-13. The Trial Court noted that "Defendant's testimony respecting his income was so scattered and muddled, he made it appear he did not understand his own returns. In actuality, the [trial] court sensed [Defendant] sought to intentionally obfuscate the facts." Da34.

Nonetheless, the parties' joint tax return filed by the parties in 2016 indicated a total income of $3,464,381, almost all of which was Defendant's income from his law practice. DCa327. Before any perquisites are added back in, there was $1,829,938 at Defendant's disposal, net of all taxes. Da30. For 2013, 2014, and 2015, the same analysis yielded net income, before adding back perquisites, of $1,308,626, $1,139,456, and $1,415,633, respectively. Da30.

D. **Marital Lifestyle**

As Defendant is not challenging the marital lifestyle (and in fact, had a marital lifestyle report prepared that he never produced in discovery or at trial) (Pa208-245), there is no need to address same in great detail. However, it is important to address various facts that Defendant intentionally did not emphasize or note in his Brief. The trial court relied "heavily" on the analysis of Plaintiff's forensic expert, in determining the marital lifestyle. DCa171. While Defendant did not produce an expert report as to the marital lifestyle, it was evident through the credible evidence, as admitted during Defendant's testimony and his experts bills, that Defendant

procured his forensic expert to review the marital lifestyle as well incurring almost $100,000 in fees. 16T:262-1 to 16T:263-7; Pa208-245.

During the marriage, as admitted through Defendant's own testimony, the parties did not save in the regular sense. 11T:160-25 to 11T:161-9. Instead of putting their earned income into savings accounts or retirement accounts, for example, the parties resided in a house in Harding Township that is approximately 15,000 square feet that the parties custom built over a number of years. 1T:119-2 to 1T:120-4. The home had a pool, tennis court, golf simulator in the basement, as well as six (6) beds and nine (9) bathrooms. 1T:120-5 to 1T:121-9. Defendant testified that he spent approximately $320,000 renovating the basement, "when it should have cost $700,000." 20T:250-3 to 16. He also testified that the parties would resurface the tennis court every few years for a cost of approximately $5,000, which was not included in his Case Information Statement. 20T:253-4 to 21. The parties would continually update and maintain this property, continuing to invest in their former marital residence with additions and renovations that increased the value of the property.

In addition to the former marital residence, the parties testified significantly about the other assets that the parties purchased during the marriage for investment purposes. The parties purchased highly expensive furniture and paintings to decorate their high-end property. Pa246-404. Defendant, a collector of memorabilia and other valuable collectibles, invested in autographs from Babe Ruth, Neil Armstrong, and

Abraham Lincoln, just to name a few. Pa246-404. Additionally, Defendant invested in many significant high-end collectible and luxury vehicles, including, but not limited to, a Ferrari, Aston Martin, and multiple classic Mercedes Benz. 1T:134-16 to 22. In fact, there was so much expensive property that Plaintiff had it all appraised, which was stipulated into evidence (with the exception of a few items that were testified to at trial). Pa246-404.

On top of the investment in their marital residence, collectible vehicles, and collectibles / memorabilia, the parties further lived a "very high-end lifestyle," that included significant expenses for the children. Da39-41. The parties' three children attended private schools and expensive colleges, all paid without loans or financial aid. 1T:96-9 to 1T:98-18. The family, including the children, shopped at high-end stores and frequented expensive, high-end New York City restaurants. 1T:140-1 to 1T:142-10. When the children reached the appropriate age to drive, Defendant would purchase them luxury vehicles, two (2) BMWs and a Range Rover, respectively. 1T:105-11 to 21.

Moreover, throughout Plaintiff's forensic expert report, the main task was not only to determine what the parties spent each month, but also to dial into what expenses were related directly to Plaintiff as opposed to the remaining members of the family. Plaintiff's forensic expert determined that the marital lifestyle, on average, was $97,239 per month for the 2+ years leading into the cut-off date (from January 1, 2015 through April 30, 2017. DCa171.

As noted during Plaintiff's forensic expert's testimony, there was significant net income, in excess of the actual adjusted spending, that was available for savings and investment. 6T:83-1 to 11. In fact, it was noted that the mortgage principal paydown, for example, was a form of savings because the parties reduced their debt obligations and thereby improved their financial condition. 6T:84-8 to 13. The marital lifestyle, as noted during the expert's testimony, included renovations on the marital residence and other adjustments to the lifestyle formula that were not included, but would have been otherwise been available for the parties to either spend or save during the marriage. 6T:84-14 to 6T:87-9. For example, in 2015, Plaintiff's forensic expert testified that the available income, net of taxes and 'total adjusted expenses,' was $525,265. 6T:96-4 to 6T:98-5. For 2016, there was $721,231 otherwise available to spend or save in 2016 net of taxes and 'total adjusted expenses.' 6T:98-6 to 25.

Based upon this marital lifestyle, after a review of the relevant and credible evidence, the trial court determined that Plaintiff's post-divorce needs to maintain the marital lifestyle was $55,523 per month, which included two (2) components not addressed specifically in Plaintiff's expert report – health insurance of $1,000 per month and savings of $12,300 per month. Da43. By way of simple calculation, after accounting for Plaintiff's imputed net income of $5,070 per month, the trial court rounded her alimony to $50,450 per month. Da44.

The trial court made specific note that since the parties' cut-off agreement was signed in April 2017, Defendant had saved over $1,300,000 in a very short timeframe (approximately 48 months), which had alleged more than tripled through his investments. Da87. Instead of stipulating to the undisputed fact that there is additional available income now because Defendant no longer has to pay for the emancipated children, Defendant underhandedly deposited over $1,300,000 into a pension post-complaint in an attempt to shield it all from Plaintiff and while he repeatedly underreported his actual income/cash flow to the trial court. Da87. Defendant continuously misled the trial court in each and every Case Information Statement through the middle of 2022 wherein the pension is nowhere to be found. DCa31-51. The trial court addressed in the Statement of Reasons that even though Defendant's income dipped during the apex of the COVID-19 pandemic, he was able to save tremendously as the vast majority of the expensive children's expenses were no longer part of the parties' financial responsibilities. Da41. Defendant utilized the post-complaint investments in his pension to purchase a property in Florida for $7,375,000, where Defendant currently resides without any shelter expenses, while at the same time arguing that Plaintiff is not entitled to a comparable lifestyle. Pa405-448.

E. **Pendente Lite Support and Taxes**

At the October 2017 *pendente lite* support hearing, Defendant consented, through counsel, to pay all Schedule A shelter expenses and all Schedule B

transportation expenses during the pendency of this matter. 1T:168-12 to 1T:170-25. Defendant further consented to paying all unreimbursed medical expenses, including Plaintiff's nutritionist, for both Plaintiff and the parties' unemancipated (at the time) daughter. 3T:16-1 to 11. Defendant agreed to take care of the parties' daughter "in the manner that she's been accustomed to." 1T:169-5 to 18.

The trial court further indicated that Defendant should continue to pay for the county clubs, to wit "Trump International [and] Springbrook," as well as the housekeeper. Da51. The trial court made it "very clear in the order that Defendant will pay off all credit card balances for credit cards in the name of Plaintiff as of [October 20, 2017], for all charges." Da27. The trial court thereafter set the initial pendente lite support figure at $25,000 per month for Schedule C, subject to a lifestyle analysis to determine the actual marital lifestyle. Da27. This ruling was never conformed into an Order.

Despite never being part of an Order, Defendant recognized the binding nature of same as he filed a Motion for Reconsideration of the $25,000 per month for Schedule C expenses. Pa449. Defendant's new counsel at the time, made the representation that the parties "still owe over $400,000 for 2016 [taxes.]" Pa2531. Defendant, through counsel, further represented to the Court that the 2016 tax debt "pale[d] in comparison to 2017 and what may in fact be owed for 2018." Pa2531. Defendant thereafter represented that failure to pay taxes is "what [the parties] have done traditionally." Pa2533. Defendant then admitted that he paid off the Federal tax

obligation in full prior to the oral argument date of December 14, 2017, but an outstanding amount remained owed to the State for 2016 at the time in the amount of approximately $250,000. Pa2538.

On December 14, 2017, the Court entered an Order requiring Defendant to pay monthly unallocated support for Schedule C expenses in the amount of $10,000 per month, with Defendant simultaneously being required to live within the same $10,000 per month. Pa16 ; Pa2575-2576. The overwhelming evidence presented at trial indisputably showed that Defendant never abided the requirement that he also live on $10,000 per month – a requirement that existed until the entry of the Judgment of Divorce. 20T:268-23 to 20T:269-18.

For the 2017 tax returns, Defendant demanded that Plaintiff file jointly. Pa461. At that time, a Hold Harmless Agreement was prepared and both parties signed it. Id. The next year, for 2018 taxes, once again a Hold Harmless Agreement was prepared. Pa464. However, in this year, there were discrepancies, including $1,400,000 in redemptions that were included in the Tax Returns. 4T:80-3 to 22. Plaintiff, through counsel, requested the backup documentation for the 2018 Tax Returns so she could inspect same and thereafter sign the Hold Harmless Agreement. Pa468. Defendant substantively ignored the request and never provided the documentation. 4T:56-18 to 23. As such, Plaintiff never signed the Hold Harmless Agreement for 2018.

Defendant repeatedly misrepresented to the trial court, both before and during trial, that he incurred additional taxes for 2018 because Plaintiff refused to file joint and he filed Married Filing Separately. He continued to take this bad faith, perjurious position at trial and claimed and had exhibits evidencing he was entitled to credits for these additional taxes. In fact, Defendant actually filed 2018 taxes Married Filing Jointly, notwithstanding the lack of Plaintiff's signature on either the tax return or the Hold Harmless Agreement for 2018 Taxes. PCa401. Defendant even had the filing switched from e-filing to filing by mail and intentionally signed his name over both signature lines in filing the 2018 Tax Returns. Pa481. 17T:36-19 to 17T:37-5. Plaintiff received a notification from the IRS absolving her of any liability for the 2018 IRS debt as an innocent spouse due to Defendant's bad faith filings without her consent. Pa482.

Defendant, in multiple Certifications to the trial court, claimed that he was suffering financially (Pa484), while in the same timeframe secreted pension contributions without notifying plaintiff nor the trial court nor updating his Case Information Statement to evidence this new asset that he claims grew to almost $4 million.

By 2019, Defendant purchased his exempt Westfield, New Jersey home and began paying the mortgage on this property. 13T:145-10. The alleged federal and tax arrearages had been paid in full, yet Defendant never notified the trial court nor Plaintiff (nor Plaintiff's counsel) that the basis for the reduction in *pendente lite*

support, to wit, the payment of pre-Complaint tax liabilities, was no longer applicable. 19T:6-13 to 19T:8-6. While at the same time Defendant was in blatant violation of various Court Orders surrounding the maintenance and payments for the maintenance of the former marital residence, only at trial was it discovered during cross examination that Defendant was spending substantial untaxed income, because he deducted them from his law firm receipts, renovating the Westfield home to the tune of hundreds of thousands of dollars of improvements. 16T:219-24 to 16T:221-6. Because the renovations were paid for from his business, he also underreported and misrepresented his income during the post-complaint years. At the time of trial, Defendant did not even report that he had listed and sold the property for over $2,000,000. Da65.

As noted herein, commencing in late 2019, early 2020, Defendant became substantially in arrears in his *pendente lite* support obligation to Plaintiff. Da78. While Defendant was contributing hundreds of thousands of dollars to both his pension and updating his exempt Westfield property, Plaintiff was left with no means to pay monthly expenses and was forced to hold a significant receivable with her attorneys, the sum of which is still owed in great part. 3T:47-13 to 3T:48-23. In 2021, wherein Defendant claims to be the most impacted by COVID, Defendant once again contributed $360,324 into a pension, thereby greatly reducing his available cash flow during this time of alleged bleeding. 17T:94-17 to 17T:95-10. Defendant, at the same time, was also continuing to reduce his reportable income,

deducting substantial sums of money doing renovations on the Westfield property, while claiming it as a business expense. 19T:101-24 to 19T:102-7.

F. **Defendant's Various Bad Faith Acts**

Throughout the litigation, as noted throughout Plaintiff's direct testimony, Defendant acted in bad faith, both through his actions against Plaintiff directly as well as through his specific and intentional violation of a multitude of Court Orders. Pa1-Pa207. First, at the onset of the litigation, Defendant was caught placing a tracking device on Plaintiff's vehicle, resulting in the issuance of a Temporary Restraining Order against Defendant. PCa3472. This was done after the Cut-Off Agreement was signed.

Plaintiff, during the course of the litigation, was forced to expend significant counsel fees to address Defendant's failure to abide by the various Court Orders that had been previously ordered by the trial court. 3T:47-13 to 3T:48-23. On April 2, 2018, Plaintiff's Notice of Motion was granted to the extent that Defendant was ordered to pay the outstanding credit card balances that he was ordered to pay in October 2017. Pa32. On June 4, 2018, the trial court once again ordered that Defendant pay the outstanding credit card bills for Plaintiff that he was originally ordered to pay in October 2017. Pa54. On October 18, 2018, Defendant was restrained from exercising self-help and from taking any deduction from any court ordered obligation including but not limited to pendente lite support barring an Order of the Court or express written consent of Plaintiff. Pa114. Defendant was held in

violation of litigant's rights for his dissipation of marital assets in violation of the November 16, 2017 Court Order. Id.

In June 2021, Defendant was held in violation of litigant's rights for his failure to maintain *pendente lite* support. Pa156. Defendant was upwards of $58,000 in arrears (almost 6 months), while leaving Plaintiff and, at the time, their unemancipated daughter with an inactive gas card, and left Plaintiff with no money to support herself or the parties' daughter at the time. Id. Defendant was similarly held in violation of litigant's rights for his failure to pay the maintenance and repair costs of the former marital residence including failing to maintain the dishwasher, outdoor grill, icemakers, and oven. Id.

As to Defendant's intentional, belligerent violations of Court Orders regarding the payment of medical expenses and the parties' daughter's college tuition and related college expenses:

a. On June 4, 2018, Defendant was ordered to pay $13,912.67 in unreimbursed medical expenses that he refused to pay. Pa54. Plaintiff was left with no alternative but to seek this relief in motion practice and, in turn, expend significant counsel fees, which were not adjudicated at the time of the motion practice. Id.

b. On or about July 26, 2018, Plaintiff was left with no alternative but to file an Order to Show Cause because Defendant was refusing to pay the parties' daughter's Villanova tuition. Pa104. In the July 26, 2018 Order,

Defendant agreed that he will pay any and all monies owed to Villanova University for the Fall 2018 semester. Id. Defendant was also ordered to provide any and all documents related to a 529 plan for the parties' daughter, which he failed to previously disclose on his Case Information Statement. Id.

c. On August 22, 2018, Defendant was held in violation of litigant's rights for his failure to pay the unreimbursed medical expenses as outlined in the June 4, 2018 Court Order. Pa108. John was required to pay $1,500 in counsel fees for this application as a sanction. Id.

d. Defendant was found in violation of litigants rights for his failure to comply with the July 26, 2018 Court Order wherein he was required to certify to the Court regarding the college accounts for the parties' daughter. Pa114.

e. Defendant was likewise found in violation of litigant's rights for his failure to pay the parties' daughter's Villanova tuition for the Spring 2019. Pa119.

f. Defendant was once again ordered to pay the parties' daughter's outstanding Villanova University tuition for Spring and Fall 2021. Pa154. Defendant was likewise ordered to comply with his obligations for the parties' daughter's rent, utilities, books, gas, and the like. Id. Payment was made for these expenses through the insurance proceeds

from the flood insurance that was obtained when Defendant failed to maintain the cottage and a pipe burst due to lack of heat in the winter. 3T:49-5 to 24. $58,813 was to make Defendant's arrears current as of May 18, 2021, $19,540 was used to pay the parties' daughter's Spring tuition, $318.09 for books, $4,842 for rent and utilities, and $2,166.68 for gas and credit card charges for Plaintiff. Da78.

g. In January 2022, Defendant was required to pay the unreimbursed medical expenses once again that he failed to pay pursuant to the December 14, 2017 Order. Pa163.

h. On January 31, 2022, Plaintiff's Notice of Motion was granted directing Defendant to immediately pay Villanova University tuition bill for the Fall 2021 semester in the amount of $16,354. Pa167.

i. On May 4, 2022, Defendant was required to reimburse Plaintiff for payments made for the parties' daughter's psychological counseling and additionally for various unreimbursed medical expenses that Defendant refused to pay. Pa180.

j. On December 16, 2022, Defendant was ordered to pay additional invoices to for the parties' daughter's counseling that he previously refused to pay. Pa191.

Defendant likewise stonewalled discovery efforts and was adjudicated in multiple Court Orders to have violated discovery provisions:

a. Defendant refused to answer supplemental interrogatories and forced motion practice, which Plaintiff successfully was granted in July 2019. Pa103.

b. Defendant failed to provide his business records on multiple occasions, resulting in Court Orders commencing in July 2019 and continuing through May 2022. Pa103 ; Pa146 ; Pa156 ; Pa163 ; Pa180.

c. Defendant repeatedly failed to file a Case Information Statement which complies with Court Rules let alone one that accounts for his dissipation of a nearly a $1 million asset or his acquisition of a $1.9 million residence. Pa103. Pa180.

d. Defendant failed to disclose, prior to the filing of Plaintiff's motion, the name of the closing attorney related to the purchase of his new residence. Pa103.

e. Defendant repeatedly failed to disclose and provide documentation surrounding his claim of inheritance. Pa180. Eventually, at trial through the aid of the trial court, Defendant eventually provided the documentation in full, resulting in a Consent Order resolving the vast majority of the inheritance issues. Da10-27.

f. Defendant was required by Court Order to become compliant with his discovery obligations that remained outstanding. Pa161.

g. On January 31, 2022, Defendant was mandated to provide updated discovery and account statements that should have been provided voluntarily. Pa167.

h. Defendant was found in violation of litigant's rights on May 4, 2022 for his failure to comply with the discovery demands as outlined in the January 31, 2022 Court Order. Pa180.

i. Defendant was required (and failed) to provide statements for his pension and any other retirement asset from the Date of Complaint through the date of production. Pa180. Defendant testified that he did not have any documentation from the moment the pension money left Fidelity to the moment the Florida Property was purchased. 17T:158-4 to 25.

j. Defendant did not fully or completely comply with the Notice in Lieu of Subpoena (Pa2042), nor did he respond to the multiple deficiency notices thereafter. Pa2047 ; Pa2050.

In addition to the above, the trial court noted various bad faith positions that were taken by Defendant, all of which caused significant counsel fees to be expended by Plaintiff to defend throughout the litigation. Da27. Defendant repeatedly "pressed non-meritorious claims and contentions." Da86. He "did not display candor with the court or his adversary." Id. He "failed to disclose material facts." Id.

"Ad nauseum [Defendant] has claimed attorney's fees for periods when he has appeared pro-se, citing old cases." Da82. This was argued in various motions and oral arguments throughout the litigation, but was only conceded mid-trial, but only after "the [trial court] point[ing] to Segal v. Lynch, 211 N.J. 230 (2012)" and "only after exhausting Plaintiff with his insistence, running up legal fees." Id. Segal, however, was cited many times by Plaintiff's counsel when Defendant unsuccessfully sought legal fees yet he continued, in bad faith, to recycle the argument, including during trial.[3] Pa2501 ; Pa2505.

Plaintiff additionally took the position, throughout the litigation and even at trial, that his law practice was worth nothing in terms of equitable distribution. Da69. Plaintiff even testified to this at trial, stating that he was "totally one-man show." Da81. "This was his position even when [Plaintiff's counsel,] and the [trial] court, showed him that was not New Jersey law." Id. Defendant "finally came to terms with giving [Plaintiff] an interest in the Consent Order, but never fully accepted the concept." Id. This Consent Order was entered into during the trial, just prior to the cross-examination of his forensic accountant.

[3] Legal Briefs are included, in limited part, to evidence that Defendant was made aware of the improper legal positions taken on multiple occasions.

G. **Defendant's Misconduct During Trial**

From the onset of the trial, Defendant played games with even the most basic aspects of the process, including his representation. Da84. At the onset of the litigation, Defendant attempted to both litigate as a *pro-se* litigant while simultaneously having counsel with him. Da85. At first, for the first few dates of trial, Defendant had one attorney with him (Vincent Glorisi, Esq.) (1T:4-7) and then, after that, a different attorney with him for the remainder of the trial (Robert Dunn, Esq.). 6T:3-8. Defendant, unconventionally, took over cross examination of Plaintiff, firing Glorisi midway through the questioning and thereafter went on to raise his voice considerably on various occasions throughout the cross examination. 17T:170-7 to 18; . Defendant would continuously "step on [Plaintiff's] answers, constantly interrupt, blurt out inappropriate exclamations of pretended shock, and demonstrably gesticulate his frustration, disgust, or shock – little of which the [trial] court observed to be genuine." Da85.

During the trial, Defendant, a licensed attorney in the State of New Jersey, referred to Plaintiff's prior counsel, Mark Wechsler, Esq. (who is tragically deceased), as "Wechsliar" on more than one occasion. Da85. Defendant referred to Plaintiff as "Kookadoo" during the trial, "evil" and during the course of the litigation said, "she should feel the pain" and "needs to be smacked." 20T:269-21 to 24. Da85. Additionally, Defendant would baselessly threaten Plaintiff's counsel of various ethics violations throughout the trial and in motion practice. Da90.

Moreover, throughout the trial, Defendant attempted to mislead the trial court and delayed the trial considerably by refusing to answer any questions succinctly or directly during Cross Examination. Da90. In fact, on countless occasions throughout the trial, Defendant was admonished for his contemptuous behavior by the trial court.

> When he was the witness, [Defendant] would never answer questions raised by Plaintiff's counsel directly, but like a seasoned politician, would instead pontificate his own agenda. 'Yes or no' questions were a waste of time, as [Defendant] went off on tangents and rants. On more than a rare occasion, he stomped off the witness box to return to his counsel table to speak with co-counsel or retrieve documents without even requesting leave of court. The [trial] court had granted leeway to counsel to move about freely, but it did not intend it to apply to witness under examination, and even if it had, [Defendant] abused the privilege. More than once [Defendant] answered his cell phone while he was in the witness box to conduct business – sometimes briefly right there on the stand, and other times stepping outside. Proceedings would stop to wait for his reappearance. His conduct protracted the trial exponentially because it took multiple times to pin him down to an answer to the framed question, even those that were nothing more than predicate questions….
>
> Though the [trial] court is certain, with his practice field and even though in recent times he spends little time in a courtroom actually trying cases… that [Defendant] knows well the Rules of the Court and Rules of Evidence. Yet they were thwarted almost on a minute-by-minute basis. Da85-86.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY INCLUDED A SAVINGS AND INVESTMENT COMPONENT TO THE OPEN DURATIONAL ALIMONY AS THE PARTIES' MARITAL LIFESTYLE INCLUDED SIGNIFICANT INVESTMENT SAVINGS. [Da48].

Contrary to Defendant's position on appeal, the trial court was permitted, and in fact, required to include a savings and investment component to alimony and correctly calculated Defendant's alimony obligation. Considering Defendant's appeal is solely based upon the savings and investment component of the alimony award, this brief will not address in great detail the remaining portion of the alimony award.

A. **The Basic Principles of Alimony in New Jersey**

A trial court's findings regarding alimony should not be vacated unless the court clearly abused its discretion, failed to consider all of the controlling legal principles, made mistaken findings, or reached a conclusion that could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole. Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996). Substantial weight should be given to the judge's observations of the parties' demeanor and credibility. Id.

New Jersey jurisprudence is well settled that "alimony is neither a punishment for the payor nor a reward for the payee. Nor should it be a windfall for any party.

It is a right arising out of the marriage relationship to continue to live according to the economic standard established during the marriage as far as economic circumstances will allow." Aronson v. Aronson, 245 N.J. Super. 354, 363 (App. Div. 1991).

The Supreme Court has emphasized the goal of spousal support "is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." Crews v. Crews, 164 N.J. 11, 16 (2000), *see also* N.J.S.A. 2A:34-23(b)(4). "[T]he court shall also consider the practical impact of the parties' need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled, with neither party having a greater entitlement thereto." Id. (Emphasis added).

Because spousal support is so closely identified with the marital lifestyle, even where parties have settled their divorce, they must address the marital lifestyle in the settlement. *See* R. 5:5-2(e). The marital lifestyle is the yardstick to measure and establish appropriate spousal support, whether pendente lite or post-judgment. *See* S.W. v. G.M., 462 N.J. Super. 522, 532-33 (App. Div. 2020) (holding that fashioning spousal support from the pendente lite lifestyle is an error because it ignores the statutory mandate to consider marital lifestyle and does not capture how the parties actually lived).

As first noted in Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998), and then Crews, *supra*, at 11 (2000), and then Weishaus v. Weishaus, 180 N.J. 131 (2004), the Court must look at how the parties actually lived, "separate from the identification of the source of funds that supported that lifestyle…." Weishaus, *supra*, at 131 (2004). To that end, in S.W., *supra*, at 522 (2020), the Appellate Division reversed an alimony award because the trial judge did not numerically determinate the marital lifestyle and apportion it for the supported spouse The S.W. Court stated:

> The importance of finding the marital lifestyle cannot be overstated. It is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award.
> …
> The goal in fixing an alimony award "is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." Crews v. Crews, 164 N.J. 11, 16 (2000). "The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, . . . [or] limited themselves to their earned income," Glass v. Glass, 366 N.J. Super. 357, 371 (quoting Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998)), or if they chose to accumulate savings. Lombardi v. Lombardi, 447 N.J. Super. 26, 36-37 (App. Div. 2016).
> Id. (emphasis added).

Citing to Crews, *supra*, the Appellate Division in S.W. reiterated that the alimony award must be reviewed against the finding of marital lifestyle even if the

income earned during the marriage does not enable the divorcing couple to both live such lifestyle in separate households. Id.

> In Hughes, the parties spent more than they earned and relied on borrowing and parental support to meet the marital lifestyle. The trial judge discounted these additional funds and determined the lifestyle using only the family's earned income, which the judge termed the "real" standard of living. Ibid. We held "[t]he judge . . . confused two concepts. The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income."
>
> In many cases, parties live above their means or spend their earnings and assets to meet expenses. In such instances, a finding of the marital lifestyle must consider what the parties spent during the marriage and not merely offer a nod to a bygone, unattainable lifestyle. In this case, the trial judge overlooked the lessons from Crews and Hughes and our instruction to find, numerically, the marital lifestyle. To the extent Crews and Hughes implicitly required that marital lifestyle be determined numerically, we now explicitly state a finding of marital lifestyle must be made by explaining the characteristics of the lifestyle and quantifying it.
>
> In a contested case, a trial judge may calculate the marital lifestyle utilizing the testimony, the CISs required by Rule 5:5-2, expert analysis, if it is available, and other evidence in the record. The judge is free to accept or reject any portion of the marital lifestyle presented by a party or an expert, or calculate the lifestyle utilizing any combination of the presentations. Id. (internal citations omitted) (emphasis added).

The Appellate Division further confirmed that alimony is not a formula. Rather, alimony is based on the statutory factors as crafted by the Legislature that, indeed, rejected a formulaic approach. Id. Moreover, there is also not a formula to reduce expenses from a party's budget when such expenses are not limited to an

individual party and/or child but, rather, are attributable to more than one (1) family member. Id. Specifically:

> To be clear, N.J.S.A. 2A:34-23(b)(4) does not signal the Legislature intended income equalization or a formulaic application in alimony cases, even where the parties spent the entirety of their income. Had the Legislature intended alimony be calculated through use of a formula, there would be no need for the statutory requirement that the trial court address all the statutory factors. The Legislature declined to adopt a formulaic approach to the calculation of alimony. See Assemb. 845, 216th Leg., 2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage).
>
> The portion of the marital budget attributable to a party is likewise not subject to a formula. Contained in most marital budgets are expenses, which may not be associated with either the alimony payor or payee, including those associated with children who have since emancipated or whose expenses are met by an asset or a third-party source having no bearing on alimony. There are also circumstances where an expense is unrelated to either the payor or the payee but is met by that party on behalf of a child. And, as is the case here with defendant's photography hobby, there are expenses which only one party incurred during the marriage. Therefore, after finding the marital lifestyle, a judge must attribute the expenses that pertain to the supported spouse. Only then may the judge consider the supported spouse's ability to contribute to his or her own expenses and the amount of alimony necessary to meet the uncovered sum. Crews, 164 N.J. at 32-33. Id. (emphasis added).

B. **The concept of savings and investment is incorporated in the marital lifestyle and therefore the trial court did nor err by including same in the calculation of alimony.**

Since at least 1956, the New Jersey Supreme Court has embraced the theory that a spouse's reasonable savings needs for the future may be considered when determining alimony awards. Martindell v. Martindell, 21 N.J. 341 (1956). The

purpose of awarding a savings component in a spouse's budget is to enable the payee "to accumulate reasonable savings to protect herself against the day when alimony payments may cease because of her husband's death or change of circumstances." Davis v. Davis, 184 N.J. Super. 430 (App. Div. 1982); *see* Khalaf v. Khalaf, 58 NJ. 63, 70 (1971) (using a savings component permitting a former wife "to accumulate reasonable savings" as future security); Capadanno v. Capadanno, 58 N.J. 113, 120 (1971); *see also*, Jacobitti v. Jacobitti, 135 N.J. 571 (1994).

In determining the marital lifestyle, the trial court looks at various elements including "the marital residence, vacation home, cars owned or leased, typical travel and vacations each year, schools, special lessons, and camps for [the] children, entertainment (such as theater, concerts, dining out), household help, and other personal services." Weishaus, *supra*, at 290–91 (App. Div. 2003). The ultimate determination must be based not only on the amounts expended, but also what is equitable. Glass, *surpra*, at 372 (App. Div. 2004), certif. denied, 180 N.J. 354 (2004). In a contested case, a trial judge may calculate the marital lifestyle utilizing the testimony, the CISs required by Rule 5:5-2, expert analysis, if it is available, and other evidence in the record. The judge is free to accept or reject any portion of the marital lifestyle presented by a party or an expert, or calculate the lifestyle utilizing any combination of the presentations. S.W., *supra*, at 522 (App. Div. 2020). Similarly, the Supreme Court in Mani v. Mani, 183 N.J. 70 (2005), held that in cases

in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony.

"[A]n appropriate rate of savings ... can, and in the appropriate case should, be considered as a living expense when considering an award of ... maintenance." Lombardi, *supra*, at 26 (App. Div. 2016), (*citing*, Glass, *supra*, at 378 (second alteration in original)) (*quoting* In re Marriage of Weibel, 965 P.2d 126, 129–30 (Colo. App. 1998)). Thus, the court can take into account the marital standard of living and allow the supported spouse to save for the future. Lombardi, *supra*, at 26 (App. Div. 2016). This is particularly true when the supporting spouse can afford any amount paid to the supported spouse. Glass, *supra*, 366 N.J. Super. at 379. In short, savings has been a relevant and appropriate factor to be considered in the establishment of a reasonable and equitable alimony award because the amount of support awarded is subject to review and modification upon a showing of a change of circumstances, which could result in the supported spouse being incapable of supporting himself or herself. Lombardi, *supra*, 447 N.J. Super. at 38.

More specifically, the Lombardi Court specifically dictated that the trial court need not find "regular savings," but rather that "there is no demonstrable difference between one family's habitual use of its income to fund savings and another family's use of its income to regularly purchase luxury cars or enjoy extravagant vacations." Id. at 39. The use of family income for either purpose over the course of a long-term marriage requires the court to consider how the money is spent in determining the

parties' lifestyle, regardless of whether it was saved or spent on expensive purchases. Id. The fact that the payment of the support ultimately is protected by life insurance or other financial tools, does not make the consideration of the savings component any less appropriate. Id.

As part of the Case Information Statement, under Rule 5:5-2, the parties are required to address the marital lifestyle. One such component of that marital lifestyle, as set forth in Schedule C of the Case Information Statement, is the parties' "savings / investments." While the "savings" portion of the line item is addressed thoroughly, the investment piece of the equation is generally given short shrift, but should be treated no differently than what can be referred to as "regular" savings. *See* Lombardi, *supra*.

It is axiomatic that the parties' lifestyle included savings and investment over the course of the marriage given that neither of them entered the marriage with significant independent wealth. Da58. By the time the cut-off agreement was signed, there was in excess of $10,000,000 of assets, which only grew tremendously post-cut-off as Defendant continued to save/invest millions of dollars while Plaintiff was left without any vehicle for same. PCa195. Quite simply, wealth accumulation through saving and investments was the parties' standard of living.

Both parties specifically testified that they purchased the land that the former marital residence resides on and meticulously built the home custom to their likings. 1T:119-2 to 1T:120-4. As noted by Plaintiff, the property was constantly updated

and renovated to meet the parties consistent need for the latest innovations – including but not limited to a pool, tennis court, golf simulation machine, and the like. 1T:120-5 to 1T:121-9. The parties incorporated expensive, custom woodwork and continued to update the property accordingly, including the cottage adjacent to the main home. 17T:125-6 to 10. The property, at the time of the Judgment of Divorce, was listed for sale for over $6,400,000, and was, by Defendant's own admission, the source of the parties' savings component through the constant upgrades and paydowns of debt. 6T:84-14 to 6T:87-9. Plaintiff is going to have to sell this property, where she has resided for the better part of 20 years, while Defendant continues to reside in his $8,000,000 Florida residence that he claimed was exempt, but never fully proved same. Da66.

On top of the former marital residence, the parties purchased high-end, collectible and/or luxury vehicles repeatedly and regularly. While Defendant would like to claim that equitable distribution took care of the vehicles, what equitable distribution does not address plaintiff's right to continue to purchase these assets in the future, which Defendant has already testified to having done. 19T:113-7 to 10. The parties purchased regularly high end/classic vehicles such as classic Mercedes Benz, Ferraris, Aston Martins, BMWs and Range Rovers. 1T:134-16 to 22. These were not "one-offs," but rather repeated purchases that were utilized as investment vehicles and/or their lifestyle.

In addition, the parties accumulated significant collectibles, memorabilia, jewelry and the like on a consistent basis. Pa246-404. There was an entire plenary hearing based solely on approximately $300,000 worth of jewelry that went missing during the pendency of the divorce. 3T:73-14 to 21. The parties invested regularly in collectibles and memorabilia, including, but not limited to a Babe Ruth autograph, Astronaut autographed newspapers, rare old currency (i.e. 1886 Silver Certificate), vintage Lionel trains, and more. Pa246-404.

These above referenced expenditures continued throughout the marriage and were the parties' vehicle for savings and investment. As noted by the trial court, since the Complaint for Divorce was filed, Defendant utilized those same funds normally reserved for the renovations and updates to the former marital residence, purchase of vehicles, and purchase of memorabilia / jewelry, in addition to the increased availability of disposable income due to the emancipation of the children, to fund his own retirement accounts. Da90. The alimony statute specifically permits that the trial court address this inequity such that both parties can experience and maintain the same lifestyle, as neither party has a greater right to the marital lifestyle than the other. Throughout this matter, as evidenced by the huge lifestyle disparity pendente lite as well has the position's that he took, Defendant believed that only he is entitled to the marital lifestyle.

In short, the trial court did not err in awarding a savings component as the parties regularly and non-regularly accrued savings and investment throughout the

marriage. There was nothing "unorthodox" of the court's "approach to open durational alimony." It is consistent with both Lombardi and decades of law.

C. **N.J.S.A. 2A:34-23(j)(1) does not proscribe the use of a savings component to preserve a party's ability to maintain the marital lifestyle post-retirement of the payor as the trial court correctly determined that Plaintiff has a need for savings in an effort to keep both parties maintaining the marital lifestyle to that which they are accustomed.**

Defendant, in his argument surrounding N.J.S.A. 2A:34-23(j)(1), is misguided as to the intent of that provision and wholly disregards the relevant alimony factors outlined in N.J.S.A. 2A:34-23(b). N.J.S.A. 2A:34-23(j)(1) addresses the rebuttable presumption of a termination of alimony that occurs when the obligor reaches full retirement age. More specifically, the statute states the following:

> (1) There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age, except that any arrearages that have accrued prior to the termination date shall not be vacated or annulled. The court may set a different alimony termination date for good cause shown based on specific written findings of fact and conclusions of law.

In addressing this provision, Defendant erroneously cites to Landers v. Landers, 444 N.J. Super. 315 (App. Div. 2016), wherein the Wife appealed the trial court's decision to terminate alimony because the alimony award occurred before the 2014 amendment to the statute. The Landers case holds for nothing else other than the concept that a pre-2014 alimony award is held to a different standard than the effective date of the 2014 amendment, as specifically set forth in the statute.

This new section of the alimony statute does not negate the prior body of case law or Lombardi, *supra*, 447 N.J. Super. at 26. Moreover, even before the 2014 amendments, retirement was a material change in circumstances. *See, e.g.*, Deegan v. Deegan, 254 N.J. Super. 350 (App. Div. 1992), Silvan v. Sylvan, 267 N.J. Super. 578 (App. Div. 1993), Dilger v. Dilger, 242 N.J. Super. 380 (Ch. Div. 1990). Parenthetically, Defendant, throughout his brief, cites to approximately twenty (20) alimony cases that predate the 2014 statutory amendment, while at the same time argues (incorrectly) that the amendment elevates retirement from the decision law. The cases regarding savings component are before and after Lepis, as are the retirement cases. That being said, providing for a time where alimony ends does not sidestep the Lepis framework. The cases discuss both death and retirement as a reason for savings component, which are not "speculative" as Defendant would like this Court to believe.

However, what Defendant intentionally failed to address was the significantly more relevant factor within the statute, N.J.S.A. 2A:34-23(b)(8). This factor addresses "[t]he time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income." (Emphasis added).

When the trial court addressed Defendant's post-cut-off savings of over $3,500,000, which included the investment in his pension and eventual purchase of

his current $8,000,000 residence in Florida, the trial court was directly addressing this factor. Da67. Defendant testified, while refusing to provide the relevant documentation (in spite of Plaintiff's effort, repeatedly, to discover the information), that he invested over $1,000,000 into his pension and that it grew to $3,600,000 through the alleged investment in cryptocurrency. Id. Defendant refused to produce any documents or even sufficiently explain the investments, but the trial court utilized this as the means to provide the calculation for savings and investment. In fact, as noted above, the $1,000,000 doesn't mirror Defendant's post-cut off savings because it wasn't $1,000,000, rather it was over $3,500,000. Id.

Defendant likewise inappropriately argues that his retirement at age 67 is speculative. However, Defendant testified repeatedly that he was seeking to wind down his business and that he should not have to work like this past retirement age. 11T:170-17 to 23. Given that Defendant testified as such, Plaintiff's need to save for a time when alimony ends, there is no case law that prevents the trial court from positioning this savings component into the alimony calculus. Rather, there is significant case law requiring exactly this.

The trial court followed the proscriptions outlined by this Court repeatedly that alimony should not be based upon conjecture or a formula, but rather concretely established through the evidence. It was not speculation or based on hypotheticals, but rather the *actual* savings conducted by Defendant in a similar timeframe. The trial court did not err in making this calculation.

D. **The relevant case law requires equitable distribution to be addressed separately and in addition to alimony.**

As outlined above, the trial court is able to formulate a savings component as part of the alimony calculation to enable the payee "to accumulate reasonable savings to protect herself against the day when alimony payments may cease because of her husband's death or change of circumstances." Davis, *supra*, at 430 (App. Div. 1982); *see* Khalaf, *supra*, at 70 (1971) (using a savings component permitting a former wife "to accumulate reasonable savings" as future security); Capadanno, *supra*, at 120 (1971); *see also*, Jacobitti, *supra*, at 571 (1994). In Lombardi, *supra*, the Court specifically rejected the husband's assertion that the court already addressed the savings component through equitable distribution.

> The argument runs afoul of the rule that "equitable distribution determinations are intended to be in addition to, and not as substitutes for, alimony awards," which are awarded to provide for the maintenance of the marital lifestyle post-dissolution. [Steneken v. Steneken, 183 N.J. 290, 299 (2005)]. Moreover, it is not equitable to require plaintiff to rely solely on the assets she received through equitable distribution to support the standard of living while defendant is not confronted with the same burden. As expressed under the alimony statute's current version, the court must recognize that "neither party ha[s] a greater entitlement to that standard of living than the other." N.J.S.A. 2A:34–23(b)(4).

Defendant, in relevant part, incorrectly cites to Stern v. Stern, 66 N.J. 340 (1975) and Mahoney v. Mahoney, 91 N.J. 488 (1982) as to the theory that the trial court utilized earning capacity as a means to circumvent the equitable distribution

framework. First, Stern is an equitable distribution case, not an alimony case. A person's earning capacity, on both sides of the equations, is always part of the alimony calculus. For example, in Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979), the husband changed medical fields in good faith and the Lynn court took that prior income stream into account.

In no way, shape or form did the trial court in this matter morph or combine alimony with equitable distribution. On the contrary, the trial court looked at the continued growth of the parties' investments, even in a "non-regular" nature, to formulate a savings/investment component commensurate with the marital lifestyle.

Once again, to address alimony otherwise would permit Defendant to continue to utilize his discretionary income for the same savings and investment he enjoyed during the marriage and after, while Plaintiff is left with no ability to continue that same enjoyment of the marital lifestyle or a similar post-divorce lifestyle to the one Defendant was enjoying. To claim that this is merely a means to double-dip in equitable distribution would undermine the entirety of the savings/investment component of alimony, as regular savings (i.e. retirement assets) are subject to equitable distribution and likewise able to be accounted for in the alimony calculation.

E. **The extra disposable income, after the parties' children's emancipation should be distributed in accordance with N.J.S.A. 2A:34-23 and the relevant case law.**

The issues of savings and disposable income are inextricably linked – as the marital partnership makes a decision as to how to spend their money. As noted above, in Crews, *supra*, at 16, the goal in fixing an alimony award "is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." The Crews Court, as well as the 2014 amendment to the alimony statute dictates that the marital lifestyle does not belong to one spouse or the other, but rather to both spouses equally. N.J.S.A. 2A:34-23(b)(4).

An analysis of the statutory factors (particularly the word "each"), their legislative history, and the overall statute itself confirms the view that this entitlement is not allocated to one or the other as a matter of policy or law; it is a right to be equally enjoyed by both. *See*, Innes v. Innes, 117 N.J. 496 (1989). An examination of the precedent in defining what standard of living is confirms this analysis. Standard of living defines how a family lived during the marriage. The Appellate Division in Hughes, *supra*, at 34 (App. Div. 1998) suggests that the standard of living is "the way" a couple actually lived. It includes, but is not necessarily limited to, the type of home in which they lived, the cars they drove, the type and frequency of vacations and an overall analysis of how the family spent money. It includes how often and where they dined. In short, how did they expend their disposable income.

Once there is a life event wherein additional disposable income is available to the parties, the statute is clear that neither party should have a greater advantage to those funds than the other. N.J.S.A. 2A:34-23(b)(4). Defendant's position, that the excess funds are solely his, even though they were previously utilized elsewhere within the marital lifestyle, is wholly inequitable and belied by the underlying principles that both parties stand on equal footing to maintain the marital lifestyle after the marriage.

By way of analogy, this is no different than the "momentum of the marriage" analysis. *See*, *e.g.*, Guglielmo v. Guglielmo, 253 N.J. Super. 531 (App. Div. 1992). Akin to the momentum of the marriage analysis, wherein through perseverance, it is fairly common for the fruits of one's occupational labors to ripen well after the seeds are planted, Dudas v. Dudas, 423 N.J. Super. 69 (Ch. Div. 2011), it is analogous to note that once the children are emancipated, there will be additional discretionary income that will be utilized by the parties directly.

When the matrimonial litigation commenced, two (2) of the parties' children were already emancipated. Da1. Pursuant to the testimony of Plaintiff's forensic expert, which for purposes of this appeal Defendant is not contesting, the marital lifestyle totaled $97,239 per month in the 28 month period preceding the Cut-Off Agreement. DCa171. Without incorporating the savings component, the trial court determined that Plaintiff's individual spending required $43,223 in monthly income

for herself. Da43. After subtracting her imputed income, the trial court concluded Plaintiff needed $38,150 before any savings/investment. Id.

Defendant's position that the excess $54,016 per month in marital lifestyle should completely be left for his discretionary use is not settled in the law and goes firmly against the intent of N.J.S.A. 2A:34-23(b)(4). While of course some of the remaining lifestyle is Defendants, there is a significant portion of the remaining lifestyle that was previously accounted for by the children that both parties should be permitted to reap the benefits of, not just Defendant.

POINT II

THE TRIAL COURT'S EXCLUSION OF THE 2016 AND 2017 TAX DEBT FROM THE EQUITABLE DISTRIBUTION EQUATION WAS CORRECT AS IT WAS PART AND PARCEL OF THE MARITAL LIFESTYLE FOR THE PARTIES TO PAY TAXES WELL AFTER THE FILING DEADLINE. [Da75-77].

Defendant's attempts to once again recreate a revisionist version of the marital lifestyle to twist what the trial court did into something wholly unrecognizable. The trial court heard the testimony as to the taxes and correctly determined, for a variety of reasons, that the taxes for 2016 and 2017 were not marital. "It cannot be denied the parties' practice when married, all driven by [Defendant] with [Plaintiff] the acquiescent party, was to pay each year's taxes late, even beyond the typical October extension, incurring late fees and penalties as a regular course." Da75. Clearly, this was their lifestyle, specifically, how they actually lived. Hughes, *supra*, 311 N.J. Super. at 34; Weishaus, *supra*, 180 N.J. at 131. Defendant claims that the trial court left the tax debt unresolved, but that is flatly untrue for the following reasons.

A. The trial court correctly determined that the 2016 and 2017 tax debt was not part of the marital equation for purposes of equitable distribution.

The Supreme Court, in one of the seminal New Jersey cases concerning equitable distribution, Rothman v. Rothman, 65 N.J. 219, 232 (1974), established the "three-step procedure" to be used: (1) Identification of subject assets; (2) valuation of each asset; and (3) equitable division of the assets.

Defendant's arguments that the paydown of the mortgage was directly related to the non-payment of the 2016 debt is nothing more than a red herring and is directly controverted by the relevant testimony. While it is not disputed that there was a paydown of the mortgage in the beginning of 2017, that money is wholly unrelated to the non-payment of taxes during the first quarter of 2017 (for 2016 taxes). Moreover, it further evidences actual savings/investment by increasing the equity in the marital home.

After hearing all the relevant testimony, the trial court correctly determined that "[Defendant's] gambit to pay taxes in the spring of 2017 was for no purpose other than to beat his own cut-off date by drawing from the HELOC to deprive [Plaintiff] of as much equitable distribution as he could." Da75. Parenthetically, the increased equity in the former marital residence is already accounted for in the increased equitable distribution award each party is entitled to receive pursuant to the Judgment of Divorce. Da27-101.

Historically, there was a marital habit and lifestyle to pay down the debt in the next year and therefore Defendant must be held to that same lifestyle. The parties additionally signed a Cut-Off agreement, which would effectively insolate Plaintiff from any obligations after May 1, 2017. Da7.

Moreover, as evidenced during Defendant's cross examination, even after paying all business expenses and the entirety of the marital lifestyle, Defendant had in excess of $2,000,000 to pay the entirety of the 2016 taxes. 17T:193-17 to 17T:196-

12. Defendant had access to those monies and could have paid the debt, but intentionally chose not to as it was customary for the parties to pay the debt well after the taxes were originally due.

Given that the tax debt was not obligated to be paid, pursuant to the marital lifestyle, until after the May 1, 2017 date, the trial court correctly determined that the tax debt should not have been incorporated into equitable distribution.

B. **In the alternative, even if the 2016 and 2017 tax debt was part of the marital equation for purposes of equitable distribution, Plaintiff already contributed her share of same through a reduced *pendente lite* support award.**

Moreover, Defendant ignores the well settled law that debt, for purposes of equitable distribution, does not have to be divided equally (*see, e.g.*, N.J.S.A. 2A:34-23.1, Pascale v. Pascale, 140 N.J. 583 (1995), Rothman v. Rothman, 65 N.J. 219, 220 (1974)). Specifically, if the assets are to be divided between the parties, the debts incurred in obtaining those assets should likewise be allocated between the parties. Monte v. Monte, 212 N.J. Super. 557, 567 (App. Div. 1986), *citing* Hansen v. Hansen, 302 N.W.2d 801 (S.D. 1981). However, it may not be an abuse of judicial discretion to divide the assets of the parties equally without requiring them to share the debts. Id., *citing* Levy v. Levy, 277 S.C. 576, 291 S.E.2d 201 (1986).

Defendant misapplied the holding in Monte within his brief. Once again, as noted above, the tax debts were considered by the trial court, but the trial court found this to be a lifestyle issue, not debt. The trial court did not ignore it, but rather did

not divide it equally. Likewise, Defendant cites Weiss v. Weiss, 226 N.J. Super. 281 (App. Div. 1988) for the principle that "a party to a matrimonial action cannot use marital assets to discharge support obligations and then claim that those marital assets are unavailable for equitable distribution." However, Defendant thereafter inappropriately states the alleged corollary of that rule, which has no basis in the law and Defendant cites no cases that supports his proposition.

In the alternative, assuming *arguendo*, that Plaintiff has a responsibility towards the tax debt (which she should not), since the *pendente lite* support was undisputedly initially reduced due to this tax obligation, Plaintiff had been effectively paying for any portion of the debt that could be apportioned to her through the reduced support payments, and the created a windfall to Defendant once the taxes were paid but he continued paying reduced support.

In fact, once the alleged marital tax debt was paid off in full, which occurred prior to 2019, Defendant had an affirmative obligation to advise Plaintiff and the trial court of same, through at a minimum an updated Case Information Statement, and the *pendente lite* support award would have increased. The trial court "sensed" a combination of Defendant being "careless and find[ing] that the CIS requirement a nuisance not worth his attention" and Defendant being "intentionally and willfully concealing important, relevant and material information." Da68. Defendant's goal throughout was to "minimize his assets and income to cheat [Plaintiff] out of an appropriate alimony award and an equitable distribution of property." Id.

POINT III

THE TRIAL COURT CORRECTLY ALLOCATED THE NEGLECT TO DEFENDANT, BUT SHOULD HAVE UTILIZED THE ONLY EVIDENCE AVAILABLE IN THE RECORD AND AWARDED A CREDIT OF $500,000 TO PLAINTIFF FOR DEFENDANT'S FAILURE TO MAINTAIN THE FORMER MARITAL RESIDENCE. [Da64].

The trial court did not err by finding responsibility for the state of disrepair to be Defendant's liability. Throughout the *pendente lite* phase of the litigation, the parties were operating under the Consent Order dated October 24, 2017 which required that Defendant was to maintain the residence. Pa4. In fact, there was an abundance of testimony from Plaintiff that evidenced Defendant was on the property for purposes of maintenance on various occasions. 1T:166-6 to 1T:167-12. However, at trial, the only evidence presented to the trial court as to the damage to the marital residence related to Defendant's neglect was Defendant's own expert, who estimated the disrepair to be approximately $1,000,000. Pa496-499. As such, Plaintiff should have been awarded a credit of $500,000, not $250,000.

A. The Trial Court Correctly assigned fault for the state of disrepair on Defendant due to his bad faith tactics.

Application of the doctrine of unclean hands rests within the discretion of the trial court. Heuer v. Heuer, 152 N.J. 226, 238 (1998). "The essence of [the] doctrine . . . is that '[a] suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings.'" Borough of

Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 158 (2001) (*quoting* A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949)). The doctrine of unclean hands "'gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit.'" Ibid. (*quoting* Faustin v. Lewis, 85 N.J. 507, 511 (1981)). While "[u]sually applied to a Plaintiff, this maxim means that a court of equity will refuse relief to [any] party who has acted in a manner contrary to the principles of equity." Rolnick v. Rolnick, 262 N.J. Super. 343 (App. Div. 1993), *quoting* Johnson v. Johnson, 212 N.J.Super. 368 (Ch. Div. 1986).

Moreover, the Appellate Division in Rolnick opined that: A court of equity can never allow itself to become an instrument of injustice. Associated East Mortgage Co. v. Young, 163 N.J.Super. 315, 330, 394 A.2d 899 (Ch. Div. 1978)[.] [N]or will equity allow any wrongdoer to enrich himself as a result of his own criminal acts. Jackson v. Prudential Ins. Co. of America, 106 N.J. Super. 61, 68, 254 A.2d 141 (Law Div. 1969). In this respect, equity follows the common law precept that no one shall be allowed to benefit by his own wrongdoing. Neiman v. Hurff, 11 N.J. 55, 60, 93 A.2d 345 (1952). Thus, where the bad faith, fraud or unconscionable acts of a petitioner form the basis of his lawsuit, equity will deny him its remedies. Goodwin Motor Corp. v. Mercedes Benz of N.A., Inc., 172 N.J.Super. 263, 411 A.2d 1144 (App.Div.1980). [Sheridan v. Sheridan, 247 N.J. Super. 552, 556, 589 A.2d 1067 (Ch. Div. 1990)].

A trial court's credibility findings are binding on appeal "when supported by adequate, substantial, and credible evidence." Gnall v. Gnall, 222 N.J. 414 (2015) (*citing* Cesare v. Cesare, 154 N.J. 394, 411–12 (1998)). Deference to a trial court is particularly appropriate where the evidence at trial is largely testimonial and hinges upon a court's ability to assess credibility. Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474 (1974). In fact, the Appellate Division defers to the credibility determinations made by the trial court because the trial judge "hears the case, sees and observes the witnesses, and hears them testify," affording it "a better perspective than a reviewing court in evaluating the veracity of a witness." Gnall, *supra* (2015) (*citing* Pascale, *supra* (1988)). "Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" should the Court interfere to "ensure that there is not a denial of justice." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (*quoting* N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596 (2007)).

Here, the trial court was provided with testimony from Plaintiff that Defendant, throughout the litigation, demanded that the sale of the former marital residence not occur *pendente lite* because Defendant sought to buyout Plaintiff's equity at the time of final resolution. Da60. Not only did Defendant not deny that fact, but testified to it as well during his testimony. 19T:19-16 to 18. Plaintiff additionally testified that there was an interested buyer at $7,000,000, which Defendant intentionally sabotaged so as to leave the door open for him to buy it at a

significantly reduced value. 3T:27-18. Defendant even deposed the court appointed appraiser to get him to say that the house was worth less. 19T:22-1 to 25.

Additionally, the trial court heard the testimony from both parties as to the state of disrepair in the former marital residence. Contrary to Defendant's position, the disrepair extends well beyond just "lawn care" and impacts the foundation and structure of the home as well. Pa495. There was substantial testimony in the record by Plaintiff (and Defendant's admissions to a lesser extent about not doing the maintenance) and Defendant misled this Court as to what the issues are with the residence because it is more than just landscaping. Id.

The trial court correctly indicated that "[c]learly, if repairs and maintenance were going to occur, the onus was on Defendant." Da63. "Because he wanted to buy out Plaintiff's interest, [Defendant] has attempted throughout the litigation to minimize the house value and the [trial] court finds he intentionally allowed maintenance issues to slide so he could claim the house needed $1,000,000 in maintenance and repairs to bring it up to snuff, thereby lowering the value and thereby reducing what he would have to pay [Plaintiff.]" Id.

The trial court correctly determined that during the marriage, Defendant was meticulous about the appearance and every detail of the house, inside and out. Id. In fact, Defendant testified about how he used to do a lot of the care and upkeep himself. 19T:32-5 to 9. However, the current state of disrepair could have easily been fixed and the disrepair was "exactly [Defendant's] strategy." Id. The trial court

recognized that Defendant was the sole person who discussed the repairs and maintenance with the appropriate professionals. Da63. The trial court "could not fathom, was bewildered, by how any *pro se* litigant, but especially a licensed New Jersey attorney and officer of the court could conduct himself in this manner." Da64.

The trial court correctly assessed responsibility for the state of disrepair of the former marital residence on Defendant. That ruling should not be disturbed.

B. **The Trial Court erred by not utilizing the only credible evidence before it as it relates to the credit for the state of disrepair.**

An equitable distribution award must be based upon substantial, credible evidence. Lombardi, *supra*. The Supreme Court has defined The New Jersey Supreme Court has defined "substantial evidence" as being "such evidence as a reasonable mind might accept as adequate to support a conclusion." In re Public Serv. Electric & Gas Co., 35 N.J. 358 (1961).

At trial, the only evidence before the trial court quantifying the cost of the necessary repairs leading to the devaluation of the home was Defendant's expert report, which indicated that the state of disrepair as to the former marital residence was approximately $1,000,000. Pa496-499. In fact, the trial court, in its Statement of Reasons, even acknowledged this figure, by stating that Defendant's systematic and intentionally manipulative gamesmanship was to "claim the house needed $1,000,000 in maintenance and repairs to bring it up to snuff, thereby lowering the value and thereby reducing what he would have to pay to [Plaintiff.] Id.

Given that there was no testimony that controverted this figure by either party, the trial court should have utilized $1,000,000 as the amount of damage related to the former marital residence. The trial court divided the equity in the former marital residence equally. As such, the trial court should have, at a bare minimum, provided Plaintiff with a credit in the amount of $500,000 (half of the $1,000,000 of damage / disrepair), if not greater given Defendant's willful, belligerent, intentional, bad faith conduct amounting to a dissipation of a marital asset. Kothari v. Kothari, 255 N.J. Super. 500 (App. Div. 1992). Providing plaintiff with a credit of only $250,000 was arbitrary and not supported by the only evidence in the record.

POINT IV

THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF A CREDIT UNDER *MALLAMO v. MALLAMO*, FOR DEFENDANT'S UNDER-PAYMENT OF PENDENTE LITE SUPPORT DURING THE PENDENCY OF THE MATTER. [Da50].

While addressing Mallamo v Mallamo, 280 N.J. Super. 8 (App. Div. 1995) and the resulting requested credits associated with the relevant case law, the trial court failed to take into account that unallocated *pendente lite* support should have immediately been restored to the original figure of $25,000 per month at the time the 2016 and 2017 taxes were paid in full by July 2019. For purposes of this appeal, the trial court correctly determined that during the pendency of this matter Plaintiff needed approximately $55,500 in *pendente lite* support per month for herself. By the trial court's own calculation, there was $451,429 in underpaid support, but the trial utilized admitted speculation as to college and the parties' daughter's costs to undermine the payment of same to Plaintiff. Da53.

Pursuant to Mallamo, *supra*, 280 N.J. Super. At 12-13, "*pendente lite* support orders are subject to modification prior to entry of final judgment, and at the time of entry of final judgment." (*citing* Schiff v. Schiff, 116 N.J. Super. 546, 562-63 (App. Div. 1971), Capodanno v. Capodanno, 58 N.J. 113, 120 (1971); and Jacobitti v. Jacobitti, 263 N.J. Super. 608, 618 (App. Div. 1993)). In analyzing a request for a Mallamo adjustment, the trial court must consider whether the amount of *pendente*

lite support paid "was consistent with the marital lifestyle." Slutsky v. Slutsky, 451 N.J. Super. 332 (App. Div. 2017). In Mallamo, this Court determined that a court has the authority to retroactively modify a *pendente lite* support award at trial, as:

> Matrimonial *pendente lite* support awards are established through the submission of affidavits or certifications and case information statements. Oral argument is likely to precede the entry of the order; in virtually all instances the *pendente lite* support order will be entered without a plenary hearing.
>
> The temporary nature of the *pendente lite* support order is illustrated by the general rule that provisions of a *pendente lite* order do not survive the entry of a judgment of divorce unless expressly preserved in it or reduced to judgment prior to entry of final judgment.
> Id. at 12.
>
> The interpretation and application of N.J.S.A. 2A:17-56.23a must account for the vagaries of *pendente lite* matrimonial practice. In many instances the motion judge is presented reams of conflicting and, at times, incomplete information concerning the income, assets and lifestyles of the litigants. The orders are entered largely based upon a review of the submitted papers supplemented by oral argument. Absent agreement between the parties, however, a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted... Ibid., at 16. (emphasis added).

Similarly, in the unreported decision of A.J.V. v. M.M.V., 2021 WL 1936093 (App. Div. 2021) (Pa2509-2520), this Court upheld a savings component within the alimony calculation and upheld the savings component being retroactively applied under the Mallamo calculation. In A.J.V., the trial judge included $5,000 as a savings component in his 11 year limited duration alimony award of $11,500 per month. In

addition, the A.J.V. court awarded the savings component retroactively 52 months representing $260,000 due from the husband to the wife in the judgment of divorce. Id. This Court, in upholding this decision, recognized that "…[w]hen, as here, it is the latter, a judge may consider awarding the supported spouse a credit to equalize the fact that the supported spouse was short-changed during the pendente lite stage…." Id.

In this matter, the trial court correctly determined that Plaintiff needed, pursuant to the marital lifestyle, $55,550 per month in *pendente lite* support, setting aside the costs associated with the parties' daughter, who during the vast majority of the litigation was unemancipated. Da53. The Court, through a basic stepdown of need based upon an incremental increase in Plaintiff's ability to earn minimum wage during the pendency of the matter, determined that the total deficit for Plaintiff during the *pendente lite* phase of litigation was $451,429. Id.

The trial court, thereafter, conducted an analysis regarding the support of the parties' daughter and college tuition / expenses. Da54-55. The analysis conducted by the trial court was admittedly speculative, and where the trial court erred is by not properly considering that *pendente lite* support should have been substantially higher to include the costs associated with the parties' daughter. Moreover, in the trial court's calculation, the trial court negated the Mallamo claim made by Plaintiff by utilizing 100% of the private school / college expenses paid by Defendant. In fact, there would have been a division of those expenses (although what the proper

division is purely speculative) and therefore, in a best-case scenario for Defendant, the Mallamo claim would have only been reduced in kind, but not completely eliminated. For example, the trial court utilized a $492,000 figure for the parties' daughter's expenses, *pendente lite*, of which, by the trial court's own admission, only half would have been Plaintiff's responsibility. Da56. The arithmetic would still yield a Mallamo credit of no less $205,429, which Plaintiff is entitled to receive.

POINT V

THE TRIAL COURT SHOULD HAVE AWARDED ADDITIONAL ATTORNEYS FEES TO PLAINTIFF, FROM DEFENDANT, AS THE EXTREME AND BAD FAITH LITIGATION THAT OCCURRED DURING THE PENDENCY OF THE MATTER WAS NOT PROPERLY TAKEN INTO ACCOUNT. [Da80].

While the Court acknowledged that Defendant "protracted this litigation with his shenanigans," (Da100) the Court did not properly adjudicate counsel fees as it related to the manner by which Defendant conducted himself during the entirety of the litigation process. The Court's award of $325,000 in counsel fees, which, of note, is not being appealed by Defendant, did not take into account the substantial bad faith positions that Defendant took throughout the litigation, not to mention his greater ability to pay as evidenced by his $7 million plus post complaint home and $4 million or more post-complaint savings, thereby warranting a further award of counsel fees beyond what was already ordered at trial.

It is a well-settled principle that an award of attorneys' fees is within the sound discretion of the trial court. Williams v. Williams, 59 N.J. 229, 233 (1971). Further, in awarding counsel fees, it is well settled that the trial judge should consider the applicant's needs, the spouse's financial ability to pay and the applicant's good faith in instituting or defending against the action. Id. Counsel fees are not unlike any other category of "necessaries." Id. The Supreme Court in Williams held that "[a] disparity in income 'would suggest some entitlement … to a fee allowance.'" Id.

Furthermore, it is within the trial court's discretion to award counsel fees notwithstanding a prior award or agreement between the parties as to counsel fees. McGee v. McGee, 277 N.J. Super. 1, 15 (App. Div. 1994) (the trial judge's ruling that the husband had already paid "enough" legal fees was rejected by the Appellate Division.) The *pendente lite* activity in this case has resulted in Plaintiff's need for a considerable fee award. Dotsko v. Dotsko, 244 N.J. Super. 668, 679-682 (App. Div. 1990).

The conduct of a party must be considered as well. An award of counsel fees is appropriate if the court finds the proceedings to have been frivolous and instituted for the purpose of harassment and/or abuse of the judicial system. *See* Chestone v. Chestone, 285 N.J. Super. 453, 466 (App. Div. 1995); Kozak v. Kozak, 280 N.J. Super. 272, 278-279 (App. Div. 1994). An award of counsel fees is appropriate in order to prevent "costs of litigation to be used as a substantial form of economic coercion." Id. at 279. These awards are also designed "to prevent a maliciously motivated party from inflicting economic damage on an opposing party by forcing expenditures for counsel fees" by "sanction[ing] a maliciously motivated position and indemnif[ying] the 'innocent' party from economic harm." Id.

The court may also consider that a party engaged in bad faith litigation. Bad faith "implies the conscious doing of a wrong because of a dishonest purpose for moral obliquity." Borzillo v. Borzillo, 259 N.J. Super. 286, 292 (Ch. Div. 1992). Bad faith, warranting an award of attorney fees, can be shown or corroborated by

evidence of misuse or abuse of process to evade divorce obligations, seeking a relief not supported by fact or law, intentional misrepresentation of facts or law or acts of losing party that are vexatious, wanton or carried out for oppressive reasons. Id. Further, the Court Rules make it clear that an award of counsel fees is appropriate when a party takes a position that is not reasonable. *See* R. 5:3-5(c).

"Examples of bad faith include misusing or abusing process, seeking relief not supported by fact or law, intentionally misrepresenting facts or law, or otherwise engaging in vexatious acts for oppressive reasons." Slutsky v. Slutsky, 451 N.J. Super. 332, 367 (App. Div. 2017) (*citing* Borzillo v. Borzillo, 259 N.J. Super. 286, 293-94 (Ch. Div. 1992)). "When [a party]'s conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Id. (alteration in original) (*quoting* Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016)).

Specifically, Rule 1:10-3 states that a litigant "in any action may seek relief by application in the action." Such relief is appropriate where the party against whom the motion is made has failed to do something ordered by the Court for the benefit of the opposing party. Courts have ruled that "[t]he power of the Court to enforce an order has neither been put in question ... nor is it questionable." Board of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n, 352 N.J. Super. 501, 508 (Ch. Div. 2001). The relief sought through a motion under R. 1:10-3 to enforce a Court Order is essentially coercive. D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990). Thus,

orders entered pursuant to R. 1:10-3 motions are "coercive measures by a Court to force compliance by a recalcitrant party." Anyanwu v. Anyanwu, 339 N.J. Super. 278, 290 (App. Div. 2001).

Courts have also ruled that "[a] monetary sanction imposed pursuant to R. 1:10-[3] and unrelated to a litigant's damages is an entirely proper tool to compel compliance with a Court Order." Franklin Tp. Bd. of Educ. v. Quakertown Educ. Ass'n, 274 N.J. Super. 47, 55 (App. Div. 1994); *see also* Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997) ("[w]e do not dispute the view that a monetary sanction imposed pursuant to R. 1:10-3 is a proper tool to compel compliance with a Court Order.").

The goal of sanctions under Rule 1:10-3 "is compliance and nothing but compliance." Id. In addition, the Court must consider "the offending party's ability to pay and the sanction's impact on that party in light of its income, status and objectives, as well as the sanction's impact on innocent third parties." Franklin Tp. Bd. of Educ., *supra*, 274 N.J. Super. at 56 (*citing* East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 235 N.J. Super. 417 (App. Div. 1989)). Thus, when ordering a monetary sanction pursuant to R. 1:10-3, the Court must fashion relief that compels the party to comply, without punishing the party.

In addition to a monetary sanction to compel compliance, R. 1:10-3 also states that "[t]he Court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule." However, an

award of counsel fees under this rule is only available to a party that has obtained relief. *See* Jersey City Redevelopment Agency v. Clean-O-Mat Corp., 289 N.J. Super. 381 (App. Div. 1996).

For purposes of this Appeal, we need not address all the factors in Rule 5:3-5, as the trial court correctly applied the vast majority of the factors. Da80-100.

As to Factor 1, the financial circumstances of the parties, the trial court did not place appropriate weight as to the disparate nature of the two (2) parties. Defendant will be residing in his $8,000,000 exempt Florida property which was acquired through post-judgment savings and investment, while also reaping the benefit of the $2,000,000 sale of his exempt Westfield home. Da65. Defendant is still earning significant income and in 2022, the last year on the record, Defendant income approached the peak of what he earned during the marriage. PCa765. On the other hand, Plaintiff is in significant debt as a result of this litigation. While Plaintiff was able to resolve her outstanding fees owed to prior counsel, there is still significant fees owed to Plaintiff's original attorney, Ed Snyder, as well as to her experts utilized in this litigation. Moreover, as set forth in the Certification of Attorney Services filed contemporaneously herewith, Clorinda owes/paid Fox Rothschild, LLP a significant sum of money. Pa575.

Additionally, the trial court did not place appropriate weight on Factor 3, the reasonableness and good faith of the positions advanced by the parties, including the bad faith actions and positions of Defendant throughout the litigation.

Defendant has acted unreasonably and in bad faith throughout this matter. Defendant delayed and stonewalled every step of this process from even prior to the Complaint for Divorce, and all discovery in between. Defendant filed motion after motion as a *pro se* litigant without regard for Plaintiff's counsel fees. Pa2052-2500. Defendant refused to take reasonable positions throughout the litigation, including requesting counsel fees as a pro se litigant in multiple motions and at trial, despite being advised multiple times that he cannot seek counsel fees as a *pro se* litigant. Da82. It was not until during the trial, where Defendant finally admitted to taking a bad faith position. 1T:23-14 to 24.

Defendant, both during the course of the litigation and trial, took unsustainable and unreasonable positions regarding almost each and every aspect of this case:

a. Defendant continually took the position, through trial, that despite the parties' substantial marital lifestyle and Defendant's significant income during the last five (5) years of the marriage that averaged over $2,700,000, Plaintiff should only receive approximately $23,000 per month in alimony.

b. Defendant took the position that despite there being over $17,000,000 in real estate assets as part of this litigation, Plaintiff should walk away with virtually nothing.

c. Up until trial, Defendant took the position that his law practice was worth nothing. Da94. It was only at trial did that position change.

d. Up until trial, Defendant took the position that, in spite of the clear case law prohibiting attorneys fees as a *pro se* litigant, that he was entitled to fees.

Similarly, during the pendency of litigation, Defendant was held in violation of litigant's rights or ordered repeatedly to conduct himself and comply with Court Orders on countless occasions:

DEFENDANT'S VIOLATIONS (COURT ORDERS)	
ORDER	**VIOLATIONS**
April 2, 2018 Court Order (Pa32)	• Defendant shall pay all balances on all credit cards in Plaintiff's name as of 10/20/2017, such payments to be made no later than 4/30/2018 (Para 2)
June 4, 2018 Court Order (Pa54)	• The total balance of Plaintiff's credit card balances, as of the October 20, 2017 cut-off date, is $39,391.47. Defendant is hereby ordered to pay this balance, in full, by July 30, 2018 (Para 7) • Plaintiff's request for reimbursement of unreimbursed medical expenses is granted…. (Para 9)
July 26, 2018 Court Order (Pa104)	• Defendant testified that, no later than August 8, 2018, he will fully pay any and all monies due to Villanova University on behalf of the parties' daughter Claire Pisano for her attendance for the fall 2018 Semester. No later than August 8, 2018, Defendant shall serve and file with the Court his certification detailing compliance with the foregoing…. (Para 2)

August 22, 2018 Court Order (Pa108)	• Defendant is hereby found in violation of litigant's rights for failure to comply with this court's June 4, 2018 Order, specifically Paragraph 9 (Para 2) • Defendant shall make a payment of $13,372.67 within 10 days of the date of this Order (Para 3) • Plaintiff's request for counsel fees for the instant application is granted in part… (Para 4)
October 18, 2018 Court Order (Pa114)	• Defendant is hereby restrained from exercising self-help and from taking any deduction from any court ordered obligation including but not limited to pendente lite support barring an order of the court or express written consent of Plaintiff authorizing him to do so. (Para 12) • Defendant shall no later than 11/1/2018 reimburse Plaintiff $819 defendant unilaterally deducted from Plaintiff's September 2018 support net of a $420 credit he is due (Para 13) • Defendant is hereby found to be in violation of litigant's rights for his use of the marital residence tennis courts with guests in June 2018, in violation of the parties' consent order granting Plaintiff exclusive possession of the marital home. (Para 15) • Defendant is hereby found to be in violation of litigant's rights for his violation of the parties' civil restraining consent order by walking up to the door set back in the front of the marital residence, leaving a September 2018 pendente lite support check at that door. (Para 16) • Defendant is hereby found to be in violation of litigant's rights for his violation of litigant's rights for his violation of the parties' civil restraining consent order by

	virtue of his entry into the marital residence in June 2018 (Para 17) • Defendant is hereby found to be in violation of litigant's rights for his failure to comply with paragraphs 2 & 3 of the court's order dated July 26, 2018 in that he has, to date, failed to file a certification respecting college accounts for the benefit of the parties' daughter Claire consistent with these provisions of the July 26 Order and further he shall forthwith comply with said Orders. (Para 19)
July 18, 2019 Court Order (Pa139)	• Defendant's business account records shall be updated to include check images of both front and back. Said records shall be provided within 30 days of this Order (Para 2)
October 10, 2019 Court Order (Pa146)	• Plaintiff's request for business documents is hereby granted. Defendant is required to turn over his business accounting documents per the prior court orders. Business account numbers must also be provided so that they can be cross-referenced and evaluated by Plaintiff (Para 5)
June 8, 2021 Court Order (Pa146)	• Plaintiff's request to find Defendant in violation of litigant's rights for violation of the November 16, 2017 Order is granted (Para 3) • Plaintiff's request to find Defendant in violation of litigant's rights for failing to maintain pendente lite support is granted (Para 14) • The Court finds Defendant has engaged in self-help in regard to his support obligation. Defendant shall satisfy the balance of his pendente lite support obligation (Para 15) • Plaintiff's request to find Defendant in violation of litigant's rights for entering the marital home … without Plaintiff's express written permission is granted (Para 17)

	• Defendant shall ensure that the secondary education expenses of Claire are satisfied. Defendant shall also satisfy Claire's outstanding balance for her college tuition (Para 18) • Defendant shall satisfy Claire's college book expenses (Para 19) • Defendant shall continue to ensure Claire's rent and utility expenses are maintained (Para 20) • Defendant shall satisfy the gas expenses Plaintiff and Claire have incurred… (Para 21) • Defendant shall ensure Schedule B expenses are maintained and Plaintiff has access to said expenses (Para 22)
August 13, 2021 Court Order (Pa161)	• Defendant shall have 30 days to become compliant on his discovery obligations that has been ordered and are on-going (Para 14)
January 28, 2022 Court Order (Pa163)	• Defendant shall immediately provide monthly accounting statements of the Law Office of John J. Pisano, Esq. from December 2017 through the date of production (Para 9) • Defendant is hereby found in violation of litigant's rights for his failure to abide by the December 2017 Court Order by not paying for the maintenance / repair costs for the former marital residence (Para 10) • Defendant shall immediately make current any and all outstanding Schedule A maintenance/repair bills in the amount of $2,027.74 within 7 days herein (Para 11) • Defendant shall immediately pay the various Schedule A maintenance / repair expenses to fix the following broken appliances in the former marital residence… (Para 12) • Defendant shall repay Plaintiff the amount of $325.36 within 7 days herein (Para 16)

	• Defendant shall pay and or repay 100% of the unreimbursed medical expenses within 14 days herein (Para 18)
January 31, 2022 Court Order (Pa167)	• Defendant is directed to immediately pay Villanova University $16,354 for Claire's fall 2021-2022 semester (Para 4) • Defendant shall immediately reimburse Plaintiff $409.52 for books and utility bills paid on behalf of Claire (Para 7) • Defendant is hereby adjudicated in violation of litigant's rights for noncompliance of the Court's December 14, 2017 and June 8, 2021 Orders and directing Defendant pay all Schedule A&B expenses including all unreimbursed medical expenses (Para 8) • Defendant shall immediately fund the Plaintiff's Bank of America accounting ending x7812 for all outstanding medical expenses paid for by the Plaintiff on behalf of the Plaintiff and their daughter, Claire in the amount of $11,527.49. (Para 10) • Defendant is hereby found in violation of litigants rights for the fourth time for failure to comply with the Court Order dated December 14, 2017 relative to wiring the Plaintiff $10,000 by the first of every month (Para 15) • Defendant is hereby found in violation of litigant's rights for failure to comply with Order dated December 14, 2017 for not making timely payments for all unreimbursed medical expenses (Para 18) • Defendant is hereby directed to immediately reimburse the Plaintiff for home maintenance as required relative to maintaining Schedule A and Schedule B expenses in the amount of $2,954 for inside mold remediation (Para 19) • Defendant is hereby directed to immediately reimburse the Plaintiff for Court Ordered

	unreimbursed medical expenses in the amount of $5,437 (Para 20)
May 4, 2022 Court Order (Pa180)	• Plaintiff's request for an Order requiring Defendant to file a full and complete CIS in compliance with the Court Rule listing all of his assets, liabilities, income, and current budget, including the source of payment, is granted (Para 4) • Defendant is found in violation of litigant's rights for his failure to abide by the Court Order dated January 31, 2022 by not providing the requisite outstanding discovery as required (Para 5) • Defendant shall provide the outstanding updates to discovery as outlined herein within 7 days herein… (Para 6) • Plaintiff's requests to hold defendant in violation of litigant's rights and imposing sanctions… is granted in part. Defendant shall provide monthly accounting statements of the Law Office of John J. Pisano, Esq. from January 2022 through the date of production within 7 days of the date of this Order. (Para 7) • Plaintiff's request to require Defendant to reimburse Plaintiff the amount of $2,800 which has been previously paid by Plaintiff to Dr. Montgomery is granted (Para 12) • Plaintiff's request to require Defendant to reimburse Plaintiff the sum of $2,875.25, which are the unreimbursed medical expenses paid by Plaintiff is granted (Para 13) • Plaintiff's request to require defendant to pay plaintiff the $5,000 in past due unallocated support within 7 days is granted (para 17)

On all but one of these motions, Plaintiff was denied her application for counsel fees without prejudice. In the trial court's examination of the reasonableness

of the parties, the trial court correctly determined that Defendant acted unreasonable throughout the trial and even in the motion practice, wherein Defendant was found to have filed relief that the trial court deemed to by "anything but spurious, possibly brought for no reason other than to run up [Plaintiff's] attorneys' fees…." Da90. The trial court correctly went through the above referenced motion practice and determined that Defendant's bad faith actions throughout "simply scratched the surface" of his conduct during the ongoing litigation. Da91.

However, the trial court ultimately did not afford the sufficient weight to these actions nor award fees related thereto. Defendant should have been sanctioned, pursuant to both Rule 5:3-5(c) and Rule 1:10-3 for his bad faith actions and non-compliance with prior court orders and directives. The trial court addressed the protracted nature of the trial and the bad faith positions at trial in its Statement of Reasons, but an additional sum of attorneys' fees should have been awarded based upon Defendant's bad faith positions and actions during the litigation itself.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court affirm in part and reverse in part the trial court Judgment of Divorce and Statement of Reasons of August 16, 2023.

Respectfully submitted,

FOX ROTHSCHILD LLP

Attorneys for Plaintiff-Cross Appellant

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Eric S. Solotoff

/s/ Adam Wiseberg

Adam Wiseberg

Dated: March 15, 2024

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CLORINDA PISANO Plaintiff-Respondent/Cross-Appellant, v. JOHN PISANO Defendant-Appellant/Cross-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000242-23 Civil Action **On Appeal from:** In the Superior Court of New Jersey, Chancery Division, Family Part, Morris County Docket No.: FM-14-122-18 Sat below: Hon. James A. Farber, J.S.C.

CROSS-RESPONDENT BRIEF OF DEFENDANT-APPELLANT/CROSS-RESPONDENT JOHN PISANO

Of Counsel and On the brief:

Brian G. Paul, Esq.

Dated Submitted: 4/27/24

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PRELIMINARY STATEMENT

Plaintiff's cross-appeal argues that the trial court's inclusion of a $12,300 monthly "savings component" in the alimony award is justified by her need for future financial security, especially considering defendant's potential retirement. However, this assertion misinterprets the foundational principles of alimony in New Jersey and disregards the legislative intent behind the 2014 amendment to N.J.S.A. 2A:34-23, which mandates that retirement should be treated as a change in circumstances, with its impact on alimony determined based on real-time financial conditions at the time of retirement, not speculative forecasts years earlier. Alimony's purpose is to support a standard of living reasonably comparable to that enjoyed during the marriage, not to facilitate post-divorce wealth accumulation based on speculative projections. The trial court's addition of a savings component to allow plaintiff to accumulate $1,000,000 in 57 post-divorce months deviates from this intent, injecting a speculative element into alimony that has no basis in the marital lifestyle. This speculative approach represents an abuse of discretion, requiring reversal to maintain the integrity of New Jersey's alimony framework.

Plaintiff's argument that the trial court properly handled the equitable distribution of the marital residence's enhanced equity and the 2016 joint tax debt is equally flawed. The trial court's inconsistent treatment of these issues placed a disproportionate burden on defendant, assigning him the entire 2016

joint tax debt while equally dividing the enhanced equity in the marital residence, despite the fact that the equity was created by incurring the tax debt. This inconsistency misapplies equitable distribution principles, where liabilities must be considered alongside assets. Moreover, plaintiff's contention that the 2017 cut-off agreement validates the trial court's approach to the tax debt fails to recognize that the agreement was intended to mark the marriage's end date for equitable distribution purposes, not to redefine pre-existing debts incurred before that date.

The trial court's award of a $250,000 home devaluation credit to the plaintiff is another critical error requiring correction. This award is based on photographs taken years after the controlling November 16, 2017 Order, which clearly designated the plaintiff — and not defendant — responsible for landscaping maintenance. The trial court's reliance on these photographs to attribute disrepair to defendant lacks factual basis and disregards plaintiff's responsibility as established by the controlling order. Plaintiff's attempt to shift responsibility onto defendant contradicts the trial court's earlier directives and undermines the fairness of the equitable distribution process.

Regarding *pendente lite* support and plaintiff's request for a Mallamo credit, the trial court's findings, supported by substantial evidence, demonstrate that the *pendente lite* support paid by the defendant far exceeded the amount necessary for the plaintiff to maintain the marital lifestyle. Plaintiff's argument

for a Mallamo credit lacks merit, as no evidence indicates that the *pendente lite* support was "woefully inadequate" or "obviously unjust" as might otherwise warrant this court's intervention.

Finally, the trial court's award of $325,000 in counsel fees, covering nearly 40% of the plaintiff's total fees, was a well-reasoned exercise of judicial discretion. The trial court's thorough and detailed assessment of the parties' financial circumstances and litigation conduct supported this award. The plaintiff's request for the appellate court to increase the award by giving greater weight to two factors is a request to substitute the appellate court's judgment for that of the trial court, which is unwarranted and contrary to established appellate norms. Given that the trial court's decision was based on a sound evaluation of the record and aligned with the applicable legal standards, it does not meet the stringent “clear abuse of discretion” standard required for appellate intervention.

For these reasons and those that follow, it is respectfully submitted that plaintiff's cross-appeal arguments fail to undermine defendant's well-founded claims. The errors in the trial court's alimony and equitable distribution determinations require reversal, while plaintiff's other claims lack sufficient merit. This case requires corrective appellate action to ensure that alimony, equitable distribution and related matters are adjudicated in line with controlling legal principles and the legislative intent, thereby preventing speculative or inconsistent outcomes.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S INCLUSION OF A $12,300 PER MONTH SAVINGS COMPONENT IN THE ALIMONY AWARD FAILS TO COMPORT WITH CONTROLLING LEGAL PRINCIPLES AND WAS AN ABUSE OF DISCRETION GIVEN THAT IT BEARS NO RELATIONSHIP TO THE ACTUAL MARITAL LIFESTYLE. [Da41 to Da42].

A. As Plaintiff Concedes Throughout her Brief, the Legal Foundation of Alimony — Including a Savings Component — is Tied to the Marital Lifestyle, Not Post-Complaint Activities.

The foundational purpose of alimony, as underscored by New Jersey's statutory framework and seminal rulings such as Innes v. Innes, 117 N.J. 496, 503 (1990), "is the continuation of the standard of living enjoyed by the parties prior to their separation." Ibid. (citing Mahoney v. Mahoney, 91 N.J. 488, 501-02 (1982)). The Wife's brief acknowledges this fundamental principle, conceding that alimony aims to continue the standard of living experienced during the marriage. [See Pb27 (quoting Crews v. Crews, 164 N.J. 11, 16 (2000) (The goal in fixing an alimony award "is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."))].

Plaintiff further concedes, at Pb28, New Jersey's well settled rule of law that "The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited

themselves to their earned income", Glass v. Glass, 366 N.J. Super. 357, 371 (App. Div. 1994) 371(quoting Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998)), or if they chose to accumulate savings. Lombardi v. Lombardi, 447 N.J. Super. 26, 29 (App. Div. 2016), certif. denied, 228 N.J. 445 (2016)("The Family Part must in its assessment of marital lifestyle give due consideration to evidence of regular savings adhered to by the parties during the marriage.") See also S.W. v. G.M., 462 N.J. Super. 522, 531 (App. Div. 2020). Accordingly, the parties' shared understanding of these controlling legal principles establishes a legal baseline for alimony determinations that focuses on replicating the economic life intrinsic to the marital partnership by making the marital lifestyle the "touchstone" of the award. Crews v. Crews, 164 N.J. at 12; [Pb28 (Plaintiff quoting S.W. v. G.M., 462 N.J. Super. at 531 ("The importance of finding the marital lifestyle cannot be overstated. It is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award.))].

Here, the trial court's decision to include a $12,300 per month savings component significantly diverges from this baseline, representing a stark departure from the controlling legal principles that dictate alimony awards. By anchoring its savings component not in the lived reality of the marital lifestyle but in the post-complaint financial activities of defendant — specifically, his

decision to reduce his lifestyle and save following the cut-off date — the court ventured beyond the bounds of discretion into the realm of speculative financial planning. This decision, effectively untethered from the actual economic dynamics of the marriage, constitutes an abuse of discretion.

The trial court, fixated on the fact "Mr. Pisano saved a million dollars in retirement funds since the divorce complaint...", [Da41], explained the reason for its awarding this unique and unconventional savings component — bearing no relationship to the marital lifestyle — as follows:

> Mr. Pisano is 62 years old and reaches, under current law, full Social Security age at 67. **Though if alimony is awarded, this would be an open durational alimony case, presumptively Mr. Pisano could seek to retire at 67,** less than five years from now in approximately 57 months. **While no law states or implies there must be dollar-for-dollar savings equality, to obtain a future value of one million dollars in 57 months would require Ms. Pisano to save approximately $12,300 per month prospectively at 5%. Mr. Pisano argues there were no saving during the marriage.** The court finds they are entitled to a similar lifestyle as the marital lifestyle not just for the years until Mr. Pisano retires, which **might** be less than five years away, but to a lifestyle that can be sustained as much as possible into the retirement years. **Otherwise they have a thirty year marriage, they live well for almost five years post-judgement, and then he continues to live high off the hog while she relies on public assistance. That cannot possibly be what is intended by the state's alimony scheme.**
>
> [Da42]. (Emphasis added).

Alimony, fundamentally, is not designed as a mechanism for post-divorce wealth generation or for achieving financial parity in ways unconnected to the

marital lifestyle. The trial court's approach, by focusing on defendant's post-complaint savings rather than the established standard of living, shifts alimony from its intended purpose of support to an inappropriate strategy for equalizing future financial potential. Such a strategy not only misinterprets the intent of alimony within New Jersey family law but also introduces an unwarranted element of subjective financial speculation into the alimony calculation process.

In embracing this speculative approach, the trial court not only erred in its application of controlling legal principles but also overstepped the discretionary boundaries afforded by those principles. The decision to include a substantial and specific savings component, devoid of a factual basis in the marital lifestyle, and instead centered on ensuring plaintiff accumulates $1,000,000 in savings from defendant's post-divorce earnings in 57 months at a 5% interest rate, underscores a misapplication of judicial discretion that constrains its reversal. Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)(An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'")).

B. Savings Was Not A Component of the Parties' Marital Lifestyle.

Plaintiff's narrative and the trial court's rationale fundamentally misconstrue the nature of savings within the marital lifestyle, ascribing to the plaintiff a financial strategy post-divorce that never occurred during the marriage. The trial court's unprecedented decision to attribute a $12,300

monthly "savings component" based on defendant's post-divorce activities in choosing to save rather than spend post-cut-off date diverges from the lived realities of their marital lifestyle and the legal principles governing alimony.

Notably, the trial court did not render a finding that savings constituted a regular aspect of the family's marital lifestyle. Cf. Lombardi v. Lombardi, 447 N.J. Super. at 29. In fact, the trial court leaned towards the defendant's perspective, acknowledging the absence of regular savings as part of their marital standard of living. [Da42]. The trial court's stated rationale for providing a savings component — to create financial parity based on circumstances that emerged well after the marital cut-off date — lacks precedence in New Jersey law, as explicitly admitted by the trial court itself: "While no law states or implies there must be dollar-for-dollar savings equality...," [Da42]. The trial court's approach, by focusing on defendant's post-complaint savings rather than the established standard of living, shifts alimony from its intended purpose of support to an inappropriate strategy for equalizing future financial potential. Such a strategy not only misinterprets the intent of alimony within New Jersey family law but also introduces an unwarranted element of subjective financial speculation into the alimony calculation process. See Boardman v. Boardman, 314 N.J. Super. 340, 347 (App. Div. 1998) (Appellate Division admonishing against courts speculating about future circumstances, and expressly holding any

"modification should abide the event, especially here, where the supporting spouse is many years away from normal retirement age.")

Plaintiff, ignoring the trial court's clear and unambiguous findings, attempts to argue that "wealth accumulation through saving and investments was the parties' standard of living", [Pb33], and "the trial court did not err in awarding a savings component as the parties regularly and non-regularly accrued savings and investment throughout the marriage." [Pb35-36]. However, not only did the trial court never render any such finding, but plaintiff's narrative is not supported by the record and collapses under scrutiny.

Specifically, Wife's case information statement that she cites to at Pb33 [PCa195] in support of her false claim that there were $10,000,000 of marital assets saved during the marriage, lists $7,010,000 of marital assets consisting of a marital residence ($4.5 million), business ($1.5 million), vehicles ($250,000) and jewelry/collectibles ($750,000). [PCa204]. In addition, the record clearly establishes that at the time of the cut-off agreement, the parties had $3.5 million of marital debt consisting of a $1.5 million mortgage [PCa205], $195,000 of car loans [PCa205], and $1,631,282 of tax debt [Db10][1]. Therefore, the marital estate's net worth was $3.5 million, not $10 million.

[1] The existence of this $1,631,282 of 2016 tax debt was substantiated by J-55 in evidence which are the parties' 2016 joint income tax returns showing that as of the October 2017 tax return filing date the parties still owed $1,337,362 for 2016 joint Federal taxes, [DCa328; 7T214-13], and $293,920 for joint New

Moreover, of the $3.5 million marital estate, $1.5 million consisted of defendant's law practice which was valued on the basis of the income approach (not net asset value), with the remaining $2 million largely constituting the equity in the marital residence. Importantly, plaintiff's case information statement confirms that the parties had no significant bank, brokerage, retirement or other financial savings accounts when the cut-off agreement was signed. [PCa204].

Plaintiff's misrepresentation critically distorts the couple's actual financial behavior during the marriage by erroneously broadening the definition of "savings" beyond its legal and practical application in the alimony context. As elucidated in Lombardi v. Lombardi, 447 N.J. Super. at 41, genuine savings within the realm of alimony entails the parties' regular, deliberate effort to set aside funds during the marriage for future security. The stark absence of bank, brokerage, retirement, or any substantial financial savings accounts demonstrates a lack of such savings practices within this marriage. The plaintiff's attempt to reclassify expenditures on housing, vehicles, and jewelry as "savings", [Pb34], erroneously conflates asset accumulation and the management of marital expenses with the act of saving. Legitimate savings entail a systematic approach to accumulating liquid assets for future needs,

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Jersey 2016 state income taxes. [DCa361; DCa370; DCa388; DCa417]. See also Db11, Fn5 and Fn6 and citations cited therein.

distinctly separate from the acquisition, maintenance, and financing of tangible assets like homes and cars, which have already been directly accounted for in the trial court's $97,329 per month marital lifestyle spending finding. Lombardi v. Lombardi, 447 N.J. Super. at 41; [DCa65].[2]

In sum, the economic reality of this family's marital lifestyle, as confirmed by Wife's own Case Information Statement which shows the parties' had no significant bank, brokerage, retirement or other form of marital liquid savings, was that the family spent defendant's considerable income funding their high lifestyle. Their high spending marital lifestyle has already been captured in the trial court's finding that the intact family's marital lifestyle required $97,239 per month of after-tax dollars to fund, [DCa53], and its determination that plaintiff herself requires $43,223 per month of spending to live reasonably

[2] The trial court's adoption of the plaintiff's expert's report delineates specific expenditures totaling $97,239 per month that are integral to defining the marital lifestyle. This comprehensive figure includes monthly expenditures of $5,133 for mortgage payments, $4,840 for repairs to the marital residence, $3,938 for equipment and furnishings, and $5,635 for car payments, cumulatively amounting to $19,546 per month. [DCa65]. These expenses, representing significant investment in the acquisition and upkeep of the marital residence and vehicles, were duly considered in establishing the $97,239 per month marital lifestyle budget. Indeed, they represent 20% of the family's combined monthly expenditures. The plaintiff's attempt to classify these expenses again as part of a "savings" component attempts an unjustifiable double counting, contravening both the factual record and established principles of marital lifestyle analysis. Moreover, these expenditures do not represent a regular pattern of setting aside funds during the marriage as savings for financial security as envisioned in Lombardi.

comparable to that marital lifestyle. [Da43]. Plaintiff's assertion that "wealth accumulation through saving and investments was the parties' standard of living", [Pb33], is simply not supported by the record, **which is why the trial court never rendered any such finding**.

Irrespective, the trial court's approach — focusing on defendant's post-complaint savings rather than the established marital standard of living — not only fails to comport with controlling legal principles, but also introduces an unwarranted element of subjective financial speculation into the alimony calculation process expressly sought to prevent when promulgating N.J.S.A. 2A:34-23(j)(1). In short, the trial court's savings component decision fails to comport with controlling legal principles and was an abuse of discretion necessitating its reversal. Flagg v. Essex Cty. Prosecutor, 171 N.J. at 571.

C. The Trial Court's Imposition of a $12,300 Monthly "Savings Component" Contravenes the Legislative Intent of N.J.S.A. 2A:34-23(j)(1), Which Mandates Assessing the Impact of an Obligor's Retirement on Alimony Based on Actual Financial Conditions at Retirement, Not Speculative Conjectures Made at the Time of Divorce.

The 2014 amendments to N.J.S.A. 2A:34-23, specifically subsection (j)(1), reflect the Legislature's clear intent to anchor alimony decisions in the reality of present-day financial conditions at the time of an obligor's retirement, not in speculative forecasts made years prior to such an event. This legislative framework was designed to ensure alimony decisions are made with a clear eye

on the actual, existing financial circumstances, providing a stable foundation that respects the unpredictability of future financial landscapes. The trial court's decision to impose a $12,300 monthly "savings component" in anticipation of the defendant's retirement is a speculative leap that strays significantly from legislative guidance and intent.

This proactive imposition not only diverges from the legislative framework but also echoes the critical error identified in Boardman v. Boardman, 314 N.J. Super. 340, 347 (App. Div. 1998), where the Appellate Division explicitly warned against judicial assumptions regarding future financial circumstances such as retirement without concrete evidence. The court therein declared, "modification should abide the event," Boardman, 314 N.J. Super. at 347, emphasizing the inappropriateness of speculative judicial forecasts, especially when the obligor's retirement is distant. The legislature echoed this approach with its 2014 amendment, making it clear that such anticipatory measures disregard the Legislature's directive for real-time, evidence-based decision-making in alimony adjustments at the time of retirement.

By embedding a significant "savings component" based on hypothetical future scenarios, the trial court has not merely misinterpreted N.J.S.A. 2A:34-23(j)(1); it has fundamentally undermined the statute's purpose to secure equitable outcomes based on the parties' tangible financial conditions at the time

of retirement. The trial court's approach introduces unnecessary conjecture into the heart of alimony determinations, deviating from the Legislature's explicit directive for decisions grounded in the present, tangible financial realities.

Moreover, plaintiff's assertion that the trial court's speculative approach serves the legislative intent by aiming to preserve the marital lifestyle post-retirement fails to acknowledge the core principle of the statute: alimony adjustments in the context of retirement must be grounded in the actual circumstances and financial conditions at the time of retirement. The statute's provisions for assessing the rebuttable presumption against alimony termination emphasize the necessity of current, real-world evaluations over predictive adjustments, underscoring the Legislature's prioritization of present realities over future uncertainties.

The trial court's allocation of a speculative savings component, purportedly to balance future financial disparities, exceeds the bounds of N.J.S.A. 2A:34-23(j)(1)'s intentions. This approach not only misrepresents the legislative goal of a balanced and just framework for alimony modifications related to retirement, but also risks setting a precarious precedent that introduces undue speculation into initial alimony determinations — a practice firmly rejected in Boardman v. Boardman, 314 N.J. Super. at 347, and by our legislature when promulgating the 2014 amendment to N.J.S.A. 2A:34-23(j)(1).

In sum, the trial court's imposition of a $12,300 monthly savings component, divorced from the realities of the marital standard of living and instead predicated on defendant's post-complaint savings and speculative future events, represents a stark deviation from the established principles of New Jersey alimony law. This fundamental error underscores the necessity for a reversal, ensuring that alimony awards faithfully adhere to their original purpose: supporting a standard of living reasonably comparable to that enjoyed during the marriage. Crews, 164 N.J. at 17.

D. The Trial Court's Imposition of a "Savings Component" In its Alimony Award that is not Based on the Marital Lifestyle Erroneously Blurs the Distinction Between Equitable Distribution and Alimony, Contravening Established Legal Precedents and Legislative Intent.

Plaintiff cites to cases from the early 1970s, such as Khalaf v. Khalaf, 58 N.J. 63, 70 (1971) and Capadanno v. Capadanno, 58 N.J. 113 (1971), in support of her assertion that the trial court was authorized to award a savings component in order to safeguard against the day alimony might terminate as a result of death or changed circumstances, even if the savings component was in no way connected to the marital lifestyle. [Pb39]. While these earlier rulings from over fifty years ago acknowledged the inclusion of a savings component as a protective measure against the cessation of alimony, the evolution of jurisprudence and statutory law has changed over time, now emphasizing a strict alignment of alimony awards with the marital standard of living. This nuanced

understanding clarifies that alimony is designed to replicate the standard of living enjoyed during the marriage — to the extent financially possible — not to anticipate or safeguard against every potential future financial scenario.

The jurisprudential shift is most evident in the seminal case of Crews v. Crews, 164 N.J. at 7 and its progeny which evolve the alimony focus on maintaining a lifestyle reasonably comparable to the marital one, with the emphasis being on the parties' economic life during their marriage. Quinn v. Quinn, 225 N.J. 34, 48 (2016)(citing Mani v. Mani, 183 N.J. 70, 80 (2005)). Consequently, the marital standard of living has become the "touchstone" of an alimony award, Crews v. Crews, 164 N.J. at 12, with trial courts now being mandated to quantify the marital lifestyle numerically in all contested divorce cases. S.W. v. G.M., 462 N.J. Super. at 532. Indeed, the marital lifestyle finding is crucial — it "is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award." S.W. v. G.M., 462 N.J. Super. at 531.

The trial court's decision in the present case to inflate the alimony award with a substantial savings component aimed at addressing hypothetical post-retirement financial scenarios fails to consider the actual, present-day financial circumstances of the parties and the marital lifestyle, which together are the essence of the three-part alimony calculation process. Crews, 164 N.J. at 27. The

legislature, in its 2014 amendments, embraced this approach, codifying in N.J.S.A. 2A:34-23(j)(1) the requirement that changes in circumstances based upon retirement be determined on the basis of the parties' actual financial circumstances at the time of the event, as opposed to mere speculation years earlier at the time of divorce, and reaffirming the importance of the "standard of living established in the marriage" to the alimony calculus when amending N.J.S.A. 2A:34-23(b)(4) to indicate that "neither party ha[s] a greater entitlement to that standard of living than the other."

Moreover, plaintiff's argument in her subpoint D overlooks the critical distinction between alimony and equitable distribution underscored by our legal system. While alimony certainly serves as a support mechanism aimed at continuing the standard of living enjoyed by the parties prior to their separation, Quinn v. Quinn, 225 N.J. at 48 (citing Innes v. Innes, 117 N.J. 496, 503 (1990), it is not intended as a means of wealth accumulation or to compensate for future financial disparities that were not part of the marital lifestyle. Conversely, the primary purpose of the equitable distribution statute is "to achieve a fair distribution of what the parties 'lawfully and beneficially acquired' while they were together", Kikkert v. Kikkert, 88 N.J. 4, 9 (1981)(Pashman, J., concurring), "not to compensate for changes in the parties' fortunes after they have separated". Ibid. See also Stern v. Stern, 66 N.J. 340, 345 (1975); Mahoney v. Mahoney, 91 N.J. 488, 497 (1982). The trial court's inclusion of a "savings

component" predicated on the amount defendant had saved post-complaint filing diverges from the marital standard of living, effectively treating the defendant's future earning capacity as an asset for equitable distribution. This misapplication, transforming alimony into a form of deferred equitable distribution, blurs the lines between these two distinct but interrelated legal concepts. Steneken v. Steneken, 183 N.J. 290, 291 (2005). This approach not only contravenes the statutory framework set forth in N.J.S.A. 2A:34-23, but also departs from the precedent established by Stern v. Stern, 66 N.J. at 345, which explicitly states that an individual's earning capacity should not be treated as a divisible marital asset under equitable distribution. Ibid.

The trial court's intention to afford the plaintiff parity in retirement savings through a "savings component" derived from the defendant's post-divorce endeavors, although well-meaning, ventures beyond the scope of alimony's purpose into speculative territory. This misstep contradicts the guidance provided by Boardman v. Boardman, 314 N.J. Super. at 347, against basing judicial decisions on speculations pertaining to the parties' future financial circumstances, as well as the specific directives of the 2014 statutory amendments. Moreover, the notion that equitable distribution determinations should complement rather than substitute for alimony awards does not justify extending alimony to include speculative future earnings and savings, especially when such projections are untethered to the actual marital lifestyle.

In sum, the trial court's imposition of a $12,300 monthly "savings component" misinterprets alimony's essence, improperly conflating it with equitable distribution and introducing speculative elements at odds with New Jersey family law. It is respectfully submitted that the trial court's savings component decision diverges from established legal principles and legislative directives, necessitating corrective action by the appellate court to uphold the integrity of alimony as a support mechanism grounded in the marital standard of living.

E. The Allocation of Post-Emancipation Disposable Income Must Adhere to Established Controlling Legal Principles

The argument posited by the plaintiff regarding the allocation of post-emancipation disposable income is fundamentally flawed and inconsistent with well-established New Jersey family law principles. The amount of any alimony award, whether pendente lite, at final hearing or post-judgment, is determined by performing the three-part examination articulated by our Supreme Court in Lepis v. Lepis, 83 N.J. at 152, and subsequently reaffirmed by our Supreme Court in Crews v. Crews, 164 N.J. at 32-33, Miller v. Miller, 160 N.J. 408, 420 (1999) and other cases. That test requires the trial court to ascertain the: (1) Dependent spouse's reasonable needs in light of the marital lifestyle; (2) Dependent spouse's ability to contribute to their own expenses; and (3) The amount of alimony the payor spouse has the ability to pay towards the dependent

spouse's monthly shortfall, while recognizing the payor spouse's equal right to live reasonably comparable to the marital lifestyle. Crews v. Crews, 164 N.J. at 32-33; N.J.S.A. 2A:34-23b(4).

As Judge Mawla highlighted when writing for this court in S.W. v. G.M., 462 N.J. Super. at 532, when performing the first part of the examination, and determining the dependent spouse's post-divorce budget, it should be squarely based on what is required for them to individually maintain a standard of living reasonably comparable to the marital lifestyle, explicitly excluding expenses attributed to now-emancipated children. Ibid. This approach was meticulously applied by the trial court, finding that the wife alone requires $43,223 per month of spending to live in a manner reasonably comparable to the family's $97,239 per month marital lifestyle. After performing part two of the three-part examination and finding wife had the ability to contribute $5,070 net monthly towards her own individual needs, she was left with a $38,163 per month shortfall. That is the maximum alimony entitlement she has under our legal and statutory framework. See Crews v. Crews, 164 N.J. at 35 (A dependent spouse has no right to share in a former spouse's post-divorce income and post-divorce good fortune beyond the amount necessary for them to live reasonably comparable to the marital lifestyle); S.W. v. G.M., 462 N.J. Super. at 534 (The Legislature declined to adopt a formulaic or equalization approach in alimony cases when adopting the 2014 Amendment)(citing Assemb. 845, 216th Leg.,

2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage)).

Plaintiff's assertion that funds previously allocated for the children's expenses should now be allocated and distributed between the spouses, when the $38,163 per month alimony award would already permit plaintiff to live reasonably comparable to the marital lifestyle, directly contravenes the precedents set by Crews v. Crews, 164 N.J. at 35 and S.W. v. G.M., 462 N.J. Super. at 534. Plaintiff essentially seeks the impermissible equitable distribution of defendant's future earnings, a concept expressly precluded by Stern v. Stern, 66 N.J. at 345

Finally, plaintiff's reliance on Guglielmo v. Guglielmo, 253 N.J. Super 531 (App. Div. 1992) and Dudas v. Dudas, 423 N.J. Super. 69 (Ch. Div. 2011) in support of her assertion that under the "momentum of the marriage" theory once there is additional discretionary income available as a result of the children's emancipation that additional disposable income should be allocated between the parties is misplaced. Those cases simply stand for the proposition that when performing part three of the Lepis three part alimony examination — defendant's ability to pay — the payor spouse's ability to pay is calculated on the basis of their earning capacity, even if that earning capacity has increased significantly post-divorce to a level higher than enjoyed during the marriage. Nothing in those cases conflicts with the well settled law rule of law highlighted

in Crews v. Crews, 164 N.J. at 35, that a dependent spouse has no right to share in a former spouse's post-divorce income and post-divorce good fortune beyond the amount necessary for them to live reasonably comparable to the marital lifestyle. Ibid.

In conclusion, plaintiff's argument concerning the allocation of defendant's disposable income post-emancipation of the children not only misconstrues the nuanced balance established by New Jersey family law, but also seeks an expansion of alimony beyond its intended bounds. The legal framework, as delineated in Lepis, Crews, and S.W. v. G.M., prioritizes a standard of living reasonably comparable to what the spouse enjoyed during the marriage, explicitly excluding financial considerations related to now-emancipated children. Any departure from this carefully constructed balance, as proposed by the plaintiff, would not only contravene the principles set forth in Crews and S.W. v. G.M. but would also improperly venture into the equitable distribution of defendant's earning capacity, an outcome expressly precluded by Stern. Accordingly, plaintiff's attempt to expand alimony from a support mechanism based on the marital standard of living to a tool for wealth redistribution must be solidly rejected.

POINT II

THE TRIAL COURT'S INCONSISTENT TREATMENT OF THE MARITAL RESIDENCE'S ENHANCED EQUITY AND THE ACCRUED 2016 JOINT TAX DEBT DISREGARDS EQUITABLE DISTRIBUTION PRINCIPLES, RESULTING IN A DISPROPORTIONATE BURDEN ON THE DEFENDANT AND AN UNJUST WINDFALL TO THE PLAINTIFF. [Da64; Da76].

The trial court's allocation of the $1,758,885 of enhanced equity of the marital residence equally between the parties, while simultaneously placing the entire burden of the $1,631,282 accrued 2016 joint tax liabilities solely on the defendant, fundamentally misinterprets the essence of equitable distribution. Established precedent unequivocally dictates that "in dividing marital assets the court must take into account the liabilities as well as the assets of the parties" Slutsky v. Slutsky, 451 N.J. Super. 332, 348 (App. Div. 2017)(citing Monte v. Monte, 212 N.J. Super. 557, 567 (App. Div. 1986)); N.J.S.A. 2A:34-23.1(m) (mandating the consideration of "debts and liabilities of the parties" within the process of equitable distribution). This legal framework is designed to ensure that debts incurred to enhance asset value are distributed equitably, mirroring the division of assets and underscoring the shared nature of marital financial endeavors. In alignment with this principle, this court, in Pascarella v. Pascarella, 165 N.J. Super. 558, 563 (App. Div. 1979), specifically required the trial judge on remand to deduct debt incurred during the marriage from the total

value of the marital property in calculating the net value of assets subject to equitable distribution, reinforcing the notion that equitable distribution encompasses a holistic view of the marital estate's assets and debts.

Here, the trial court's division of the marital residence's proceeds equally, juxtaposed with the 100% allocation of the pre-complaint tax debt (incurred during the same period and contributing to the marital residence's enhanced value) to defendant, contradicts this legal framework. In the years preceding the divorce announcement, defendant's strategic financial management — specifically, the prioritization of mortgage debt reduction to secure a refinancing at a substantially lower interest rate — was a calculated effort aimed at preserving the marital estate's value. [Da61; 17T106-10; 11T71-3]. In her opposition brief, [Pb44], plaintiff does not dispute that fact, nor does she dispute the testimony from her own expert, Stacy Collins, confirming $1,758,885 of mortgage debt was paid off in 2015 and 2016, thereby enhancing the home's equity in that amount. [6T84-1; DCa58]. Nor, does plaintiff dispute the quantum of the substantial resultant joint tax liability of $1,631,282 for the year 2016, consisting of $1,337,362 in federal taxes and $293,920 in state taxes. This oversight by the trial court, failing to account for the intertwined nature of these financial decisions, unjustly burdens the defendant while inadvertently providing plaintiff an $800,000 plus windfall.

The trial court's error in this regard is magnified by the plaintiff's

arguments, which incorrectly portray the nature of the tax debt, the characterization of *pendente lite* support payments, and the significance of the 2017 cut-off agreement.

A. Marital Lifestyle and Its Irrelevance to the Character of Marital Debts

Plaintiff's assertion that the habitual late payment of taxes, framed as a lifestyle choice, should exempt the 2016 tax debt from equitable distribution is fundamentally flawed and legally unsound. Debts, as defined, represent obligations bound by one party to another, with their character established upon incurring the liability, not upon the timing of its settlement. Cameron v. Ewing, 424 396, 404 (App. Div. 2012) (Debts are defined as "that which one person is bound to pay to another under any form of obligation." (quoting Passaic Nat'l Bank & Trust Co. v. Eeelman, 116 N.J.L. 279, 281 (Sup. Ct. 1936)). General accounting principles, including those regarding contingent liabilities as outlined in Accounting Standards Codification § 450-20 and IAS 37 "Provisions, Contingent Liabilities and Contingent Assets," further dictate the inclusion of such obligations on a balance sheet, regardless of their payment date specification.

Consistent with these general accounting standards, the Case Information Statement requires litigants to list all liabilities or debts, and to categorize them as being either "1. Real Estate Mortgages", "2. Other Long Term Debts", "3.

Revolving Charges", "4. Other Short Term Debts" or "5. Contingent Liabilities" to ensure a comprehensive view of the marital estate's health. Pressler & Verniero, New Jersey Rules of Court, Appendix V, p. 9.

The inclusion of contingent liabilities on a balance sheet, as mandated by both general accounting principles and the family part case information statement, underscores the necessity of accounting for all debts within the marital estate, irrespective of their payment schedule. The $1,631,282 2016 Federal and State Tax obligations, undoubtedly incurred prior to the 2017 cut-off date and forming part of the marital liabilities, exemplify bona fide obligations that, by law and accounting standards, should have been considered in the marital estate's equitable distribution. Ibid. See also Slutsky v. Slutsky, 451 N.J. Super. at 348.

The trial court's oversight, influenced by plaintiff's misconstrued arguments, starkly violates these equitable distribution principles, necessitating reconsideration to ensure fairness and equity in the division of marital assets and liabilities.

B. Mischaracterization of *Pendente Lite* Support Payments as Plaintiff's Contribution to the 2016 Tax Debt Repayment.

The portrayal that plaintiff's receipt of reduced *pendente lite* support amounts to her contribution toward repaying the 2016 tax debt is significantly flawed. The trial court's assertion that "Ms. Pisano has already shared in the tax

burden," predicated on the inclusion of taxes in the *pendente lite* alimony calculations, [Da76], is not supported by the record and directly conflicts with the financial contributions documented and acknowledged by the trial court itself. Notably, the trial court recognized that defendant provided *pendente lite* support of between $46,000 to $51,000 per month from 2017 to 2023, [Da53], far surpassing the $38,163 monthly threshold the trial court determined necessary for plaintiff to maintain a standard of living comparable to the marital lifestyle. Moreover, this figure notably omits defendant's exclusive financial commitment of over $75,000 yearly towards their daughter, Claire's, educational and college expenses. [Da55].

This stark discrepancy between the court's portrayal of *pendente lite* support as a shared tax burden and the tangible financial support provided by the defendant lays bare a fundamental misinterpretation. The record incontrovertibly shows that not only did the *pendente lite* support payments exceed the plaintiff's necessitated living expenses, but they also bore no relation to addressing the joint tax obligation — the $1,631,282 owed for the 2016 tax year. This misalignment, viewed alongside defendant's sole responsibility for the tax debt contrasted with plaintiff's equitable participation in the marital residence's enhanced equity, unveils a patently inequitable financial imposition on defendant. This disproportionate allocation starkly diverges from the principles of fair and equitable distribution. Monte, 212 N.J. Super. at 567 (“if

the assets are to be divided between the parties, the debts incurred in obtaining [or enhancing the equity in] those assets should likewise be allocated between the parties.")

C. The Irrelevance of the 2017 Cut-Off Agreement to the Pre-Existing 2016 Joint Marital Tax Debt

Plaintiff's argument at Pb44-45 misinterprets the application and purpose of the 2017 cut-off agreement, particularly in relation to the 2016 joint marital tax debt. She contends, "Given the tax debt was not obligated to be paid, pursuant to the marital lifestyle, until after the May 1, 2017 date, the trial court correctly determined the tax debt should not have been incorporated into equitable distribution". [Pb45]. This assertion fundamentally misunderstands the nature of marital debts within the framework of equitable distribution. As delineated in subpoint A, the essence of a marital debt is anchored in its origination during the marriage, independent of its scheduled payment date. The imposition of a cut-off date, which marks the marriage end date for purposes of equitable distribution, does not alter the inherent nature or the obligations associated with assets or debts accrued prior to the cut-off date. Painter v. Painter, 65 N.J. 196, 218 (1974).

The 2016 tax debt, unequivocally incurred before the May 1, 2017 cut-off, is emblematic of a financial obligation emerging from the joint marital enterprise, thus classifying it as a marital liability. The assertion that this debt's

payment obligation was deferred until after the cut-off date and therefore should be excluded from equitable distribution misapplies the principles governing equitable distribution of marital assets and marital liabilities. The cut-off agreement's intention, consistent with Painter, was never to redefine the characterization of pre-existing debts but rather to establish a procedural demarcation for the division of assets and liabilities moving forward. Consequently, the plaintiff's reliance on this agreement to exclude the 2016 tax debt from the equitable distribution is legally unfounded and misaligned with the established precedents of equitable distribution.

D. Neutral Impact of Mortgage Debt Reduction Versus Tax Debt Reduction on the Marital Balance Sheet

The plaintiff's assertion that the decision to prioritize mortgage debt reduction over tax liabilities detrimentally impacted the overall value of the marital estate, or was intended to unjustly diminish her share of marital assets, fundamentally misunderstands the strategic nature and outcome of such financial management. Far from being a maneuver to deprive the plaintiff, this strategy was a deliberate and prudent measure to enhance the estate's financial health, notably by securing a lower interest rate from 4.375% to 2.5%, which yielded an annual interest savings of $18,750 [Da61; 1T35-19; 17T105-3 to 25; 17T106-10]. It is crucial to recognize that this financial decision neutrally affected the estate's balance sheet, merely transforming the composition of its

liabilities without reducing its overall value.

The decision to allocate funds towards mortgage debt reduction, consequently increasing the home's equity, was counterbalanced by the accrued tax liability. This equilibrium between the equity gained and the debt incurred ensured the marital estate's net value was preserved through this specific financial strategy. Had the same amount—$1,758,885—been applied to the 2016 tax liabilities, the estate would not have faced tax debt, yet the marital residence's equity would have been equivalently reduced. This demonstrates that choosing between debt payments does not impact the overall value of the marital balance sheet but signifies a judicious reallocation of the estate's resources [17T106-10; 11T71-3].

Viewing such financial strategies in the context of a marital estate under equitable distribution, it becomes evident that their cumulative effect on the estate's net value, rather than isolated benefits or burdens to one party, should guide assessments. The essence of equitable distribution, as affirmed in Slutsky v. Slutsky, 451 N.J. Super. at 348, is to evaluate the overall health and value of marital assets and liabilities, which ensures that decisions favoring one form of debt repayment over another are acknowledged as having no collective impact on the marital partnership's balance sheet. [17T106-10; 11T71-3].

E. Defendant had No Obligation to Use his Exempt Inheritance to Pay the Marital Joint 2016 Tax Liability

Plaintiff's insinuation at Pb44, which hints at defendant having access to over $2,000,000 that could have potentially been used to settle the 2016 taxes, misrepresents both the factual circumstances and the legal framework governing exempt assets. The testimony referred to, [17T193-17 to 17T196-12], does not specifically mention a $2,000,000 inheritance. Instead, it records a query from plaintiff's counsel during cross-examination about defendant's choice not to deploy his exempt inherited funds to pay the marital tax liabilities. [17T194-22]. Defendant's confirmation of keeping the inheritance segregated, [17T195-7], highlights its distinction from marital funds, underscoring its non-applicability and irrelevancy to the repayment of marital debts.

Importantly, N.J.S.A. 2A:34-23(h) explicitly states that property acquired through "intestate succession shall not be subject to equitable distribution." This legal provision ensures that inheritances, particularly those that are never commingled with marital assets, are exempt from being considered marital property for debt settlement purposes within a marital context. Wadlow v. Wadlow, 200 N.J. Super. 372, 380-81 (App. Div. 1985). Plaintiff's suggestion ignores this vital legal differentiation, mistakenly suggesting a duty on defendant's part to apply non-marital, exempt assets toward the repayment of marital debts.

By disregarding the legal protections afforded to inherited assets and suggesting their use for marital debt repayment, plaintiff not only misinterprets the nature of such funds but also overlooks established principles that safeguard exempt assets from equitable distribution claims. Wadlow, 200 N.J. Super. at 380-81. This legal and factual oversight reaffirms the baselessness of plaintiff's insinuation, further validating that defendant was under no obligation to utilize his inheritance for the settlement of joint marital liabilities.

In conclusion, the trial court's allocation decisions, heavily influenced by the plaintiff's arguments, constitute a significant deviation from equitable distribution principles, resulting in an undue burden on the defendant and an unjust windfall to the plaintiff. Importantly, the prudent financial decisions undertaken during the marriage, notably the management of mortgage and tax liabilities, had a neutral impact on the overall value of the marital balance sheet, contrary to the plaintiff's assertions. These decisions were aimed at maintaining the marital estate's health rather than unfairly benefiting one party at the expense of another. The misconceptions and legal misinterpretations put forth by the plaintiff, especially regarding *pendente lite* support, the relevance of the 2017 cut-off agreement, and the treatment of the defendant's exempt inheritance, starkly misalign with the established legal framework and principles of equitable distribution. Accordingly, this Court is respectfully urged to reverse the trial court's determinations, ensuring that the division of marital assets and liabilities

accurately reflects the conjoint nature of the marital partnership and adheres to the pillars of fairness and equity as mandated by New Jersey law.

POINT III

THE TRIAL COURT'S AWARD OF A $250,000 CREDIT TO PLAINTIFF FOR ALLEGED DEVALUATION OF THE MARITAL HOME IS CONTRARY TO AN EARLIER COURT ORDER AND LACKS SUBSTANTIAL CREDIBLE EVIDENCE, NECESSITATING REVERSAL. [Da63 to Da64].

The trial court's award of a $250,000 credit to plaintiff starkly misapplies the clear directives of an earlier court's November 16, 2017 Order and is unsupported by substantial credible evidence, demanding a thorough reevaluation and reversal. Specifically, Paragraph 6 of the November 16, 2017 Order unequivocally transferred the responsibility for landscaping related items to plaintiff beginning November 16, 2017 through entry of the August 16, 2023 Final Judgment of Divorce:

> Plaintiff SHALL directly arrange for all landscaping/snow removal services for the marital property. Plaintiff SHALL ensure that the landscaping/snow removal service providers have access to the landscaping/snow removal equipment at the marital home.
>
> [Da9].

This directive, clearly articulated in the November 16, 2017 Order, is directly contradicted by the trial court's final decision, which erroneously attributes the property's perceived devaluation to defendant's supposed negligence. This attribution is primarily based on the condition of the property's

landscaping as depicted in photographs taken four to five years after the issuance of the pivotal November 16, 2017 order, highlighting a critical oversight in the trial court's evaluation of the evidence.

The trial court's sole reliance on Exhibit P-144 for its findings — a series of photographs documenting the property's condition in the Summer of 2022, as confirmed by plaintiff's own testimony, [17T210-9] — is fundamentally flawed. The trial court exclusively relied upon these photographs when determining defendant was responsible for the disrepair to landscaping related items of the property:

> P-144 pictures vividly demonstrate what he has allowed and caused to undermine the appearance of the residence's exterior - a lawn no longer manicured but brown and ungroomed; untrimmed bushes; patches of dirt; broken and chipped masonry; weeds growing between steps; deteriorating stone and cement; leaf-filled gutters and plantings overhanging gutters; dying trees; dead insect carcasses; crumbling steps; unwashed tiles; broken and missing grout; damaged and rotting wood surfaces; and significant visible buckling in the tennis court.
>
> [Da64].

These photographs, unequivocally taken several years after the plaintiff was designated responsibility for the property's upkeep, invalidate the trial court's rationale for attributing the home's devaluation to the defendant. This significant oversight, paired with the plaintiff's acknowledgment of the property's superior condition in the Summer of 2021, [17T210-15], underscores the fallacy of the trial court's findings and the imperative for reversal.

Plaintiff's respondent brief fails to present a compelling defense, relying upon: (1) an outdated Consent Order dated October 24, 2017 that has been superseded by clear subsequent directives in the November 16, 2017 Order; (2) a misapplied and irrelevant doctrine of unclean hands given defendant was not seeking equitable relief; and (3) speculative expert estimates that exceed the scope of identified disrepairs and lack a direct link to the alleged devaluation the trial court attributed to defendant.

Given these considerations, the trial court's award, rooted in a misinterpretation of responsibilities and unsupported by substantial evidence, not only deviates from established legal standards but also imposes an unjust financial burden on the defendant, warranting a decisive reversal.

A. Relevance of the October 24, 2017 Order and Misapplication of Evidence.

In her defense, plaintiff improperly relies on the October 24, 2017 Order to attribute maintenance obligations to the defendant, a reliance that is fundamentally flawed given the November 16, 2017 Order's explicit reassignment of these landscaping responsibilities to plaintiff well before the documented condition of the property in the Summer of 2022. The issuance of the November 16, 2017 Order superseded any previous directives regarding landscaping responsibility for the property, clearly placing this responsibility in the hands of plaintiff well before the documented disrepair captured in the

Summer of 2022 photographs. The trial court's oversight in recognizing this shift, basing its conclusions on a misinterpretation of duties and an erroneous assessment of the evidence at hand, necessitates reversal. Lombardi v. Lombardi, 447 N.J. Super. 26, 32-33 (App. Div. 2016)(An equitable distribution award must be based upon substantial credible evidence); Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974). The P-144 photographs, rather than substantiating defendant's negligence, highlight plaintiff's failure to adhere to her assigned responsibilities during the critical period. [17T210-9].

B. Plaintiff's Misplaced Reliance on the Unclean Hands Doctrine.

Plaintiff's misapplication of the unclean hands doctrine distracts from the substantive issue at hand — the incorrect assignment of financial liability based on a fundamental misreading of the November 16, 2017 Order. This equitable defense is traditionally employed against a party seeking equitable relief. See Pelliteri v. Pelliteri, 266 N.J. Super. 56, 65 (App. Div. 1993) ("a court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit."). Here, it was plaintiff who was seeking such relief for the home's alleged devaluation, not defendant. The essence of defendant's appeal is to rectify the erroneous attribution of landscape maintenance responsibility and the speculative nature of the awarded damages, not to obtain equitable relief. Thus, the doctrine held no bearing on this issue below, nor does it on this appeal, considering that defendant's challenge centers on the trial

court's disregard for the explicit landscaping maintenance directives outlined in the November 16, 2017 Order, and the lack of evidence to support the $250,000 damages award.

C. The Speculative Nature of the $250,000 Damage Award and the Lack of Substantial Credible Evidence.

The speculative nature of the $250,000 credit award is evident in the trial court's own admission: "[There is] no way the court would be able to quantify the loss in marketability due to [defendant's] shenanigans which the court deems intentionally manipulative." [Da64]. This admission underscores the lack of substantial credible evidence required for the $250,000 equitable distribution award and highlights a clear departure from the judicial standard of basing decisions on substantial credible evidence. Lombardi v. Lombardi, 447 N.J. Super. 26, 32-33 (App. Div. 2016)(An equitable distribution award must be based upon substantial credible evidence); La Sala v. La Sala, 335 N.J. Super. 1, 4 (App. Div. 2000). Plaintiff's concession that the award was arbitrary and unsupported by evidence further underscores the necessity of this Court's intervention to ensure that decisions, particularly those with significant financial implications, are anchored in solid, credible evidence reflecting the true scope of each party's responsibilities.

In sum, the trial court's decision, which disregards an earlier judge's November 16, 2017 order and bases a significant financial award on speculative

findings, undermines the fundamental principles of equitable distribution. It is respectfully submitted that the reversal of this award is imperative not only to correct the misapplication of responsibility for landscaping as per the November 16, 2017 order, but also to uphold the integrity of the judicial process, ensuring significant financial decisions in the context of equitable distribution are firmly anchored in substantial credible evidence. Lombardi v. Lombardi, 447 at 32-33.

AS TO CROSS-APPEAL

POINT IV

THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S REQUEST FOR A MALLAMO CREDIT.

The general purpose of *pendente lite* support is to maintain the parties in the same or substantially similar situation they enjoyed prior to the inception of the divorce litigation by awarding temporary financial support pending a full investigation of the case. Mallamo v. Mallamo, 280 N.J. Super. 8, 11-12 (App. Div. 1995); Rose v. Csapo, 359 N.J. Super. 53, 60 (Ch. Div. 2002); Cameron v. Cameron, 440 N.J. Super. 158, 167 (Ch. Div. 2014). Maintenance of the status quo involves payment of the marital expenses and bills necessary to maintain the dependent spouse at the standard of living enjoyed during the course of the marriage. Rose v. Csapo, 359 N.J. Super. at 60; see also Lepis v. Lepis, 83 N.J. at 150. And, the standard of living during the marriage is the way the couple

actually lived. Tannen v. Tannen, 416 N.J. Super. 248, 275 (App. Div. 2010), aff'd 208 N.J. 409 (2011); S.W. v. G.M., 462 N.J. Super. at 531.

As this court highlighted in Mallamo v. Mallamo, 280 N.J. Super. 8, 12 (App. Div. 1995), "*pendente lite* support orders are subject to modification prior to entry of final judgment, and at the time of entry of final judgment." Id. at 12 (citations omitted). Mallamo authorizes a trial judge to adjust a pretrial award after trial because, after considering the evidence and credibility of the parties, the judge is in a better position to determine whether the initial award was proper. Id. at 16. Such retroactive modifications are left to the trial judge's sound discretion. Jacobitti v. Jacobitti, 263 N.J. Super. 608, 618 (App. Div. 1993). Importantly, Mallamo does not require courts to re-assess pretrial orders after trial; the decision only requires that a court **may** adjust a pretrial order without violating the prohibition against retroactive modification of child support, N.J.S.A. 2A:17-56.23a. Mallamo, 280 N.J. Super at 17.

While this court has emphasized that a Mallamo credit is discretionary and not necessary in every case, a retroactive increase of *pendente lite* support "should be considered when the amount initially awarded based on limited information at the inception of a matrimonial matter is later determined 'woefully inadequate' or 'obviously unjust' once all facts and circumstances are fleshed out at trial." Slutsky v. Slutsky, 451 N.J. Super. at 368-69; Jacobitti v. Jacobitti, 263 N.J. Super. at 617-18. In analyzing a request for a Mallamo

adjustment, the trial court must consider whether the amount of *pendente lite* support paid was consistent with the marital lifestyle. Slutsky, 451 N.J. Super. at 369; S.W. v. G.M., 462 N.J. Super. at 529-30, 532.

A. Plaintiff and the Trial Court Have Erroneously Used $55,500 per month (inclusive of the post-divorce savings component) as Representative of the Amount Plaintiff Needed to Live Reasonably Comparable to the Marital Lifestyle on a *Pendente Lite* Basis, Rather than the Trial Court's $38,163 per month Spending Finding.

The amount of any alimony award, whether *pendente lite,* at final hearing or post-judgment, is determined by performing the three-part examination articulated by our Supreme Court in Lepis v. Lepis, 83 N.J. at 152, and subsequently reaffirmed by our Supreme Court in Crews v. Crews, 164 N.J. at 32-33, Miller v. Miller, 160 N.J. 408, 420 (1999) and other cases. That test requires the trial court to ascertain the: (1) Dependent spouse's reasonable needs in light of the marital lifestyle; (2) Dependent spouse's ability to contribute to their own expenses; and (3) The amount of alimony the payor spouse has the ability to pay towards the dependent spouse's monthly shortfall, while recognizing the payor spouse's equal right to live reasonably comparable to the marital lifestyle. Crews v. Crews, 164 N.J. at 32-33; N.J.S.A. 2A:34-23b(4). See also Gross v. Gross, 22 N.J. Super. 407, (App. Div. 1952)(Applying three-part examination to a *pendente lite* alimony award); Miller v. Miller160 N.J. at 420 (Reaffirming the three-part examination articulated in Lepis as the proper analysis for post-judgment modification of an alimony award).

In this case, plaintiff's expert's marital lifestyle report, which the trial court adopted, showed the parties and their children spent an average of $97,239 per month in the 28 month period leading to the cut-off date, January 1, 2015 through April 30, 2017. [DCa53]. This spending was categorized into $27,713 per month for Schedule A shelter expenses, $12,915 per month for Schedule B transportation expenses and $56,610 per month for Schedule C personal expenses. Ibid. The trial court, applying the three-part examination and using the $97,239 per month marital lifestyle finding as the "touchstone" of its award, determined plaintiff requires individual spending of $43,223 monthly on Schedule A, B, C, and health insurance in order to live reasonably comparable to the marital lifestyle. [Da43]. Thus, after subtracting her imputed net monthly income of $5,070, the trial court concluded plaintiff needs $38,163 per month of alimony to meet her spending shortfall. Crews v. Crews, 164 N.J. at 12; S.W. v. G.M., 462 N.J. Super. at 531.

The trial court's decision to add a $12,300 per month **post-divorce** savings component to the $38,163 per month of alimony it otherwise found necessary for plaintiff to live reasonably comparable of the marital lifestyle centered on its desire for plaintiff to accumulate $1,000,000 in savings from defendant's post-divorce earnings in the 57 post-divorce months leading up to his reaching his normal social security retirement age. [Da42]. Because the savings component was calculated exclusively on the basis of the 57 post-

divorce months spanning entry of the Final Judgment of Divorce through defendant's normal social security retirement age, it has no relevance to plaintiff's spending needs during the *pendente lite* period. Thus, plaintiff's $38,163 per month spending shortfall, and not $55,500 inclusive of a $12,300 per month post-divorce savings component, was the proper starting point for the Mallamo analysis. Slutsky v. Slutsky, 451 N.J. Super. at 369; S.W. v. G.M., 462 N.J. Super. at 529-30 and 532.

Notably, the trial court recognized that defendant provided *pendente lite* support of between $46,000 to $51,000 per month from 2017 to 2023, [Da53], far surpassing the $38,163 monthly spending threshold the trial court determined necessary for plaintiff to individually maintain a standard of living comparable to the marital lifestyle. Accordingly, based upon the trial court's factual findings, which are well supported by the record, there was no evidentiary basis for a *Mallamo* credit, let alone evidence establishing that *pendente lite* support was so "woefully inadequate" or "obviously unjust" to mandate this court's intervention with the trial court's discretionary determination. Jacobitti v. Jacobitti, 263 N.J. Super. at 617-18; Slutsky v. Slutsky, 451 N.J. Super. at 369.

B. Even if the $12,300 Post-Divorce Savings Component is Erroneously Included When Quantifying Plaintiff's *Pendente Lite* Needs, the Trial Court's Denial of the Mallamo Credit was Still a Valid Exercise of Discretion that Must be Affirmed.

Even assuming the $12,300 per month post-divorce savings component — scheduled to be paid over 57 months from entry of the final judgment to defendant's normal social security retirement date — is mistakenly counted again in calculating plaintiff's *pendente lite* needs, the trial court's refusal to award a Mallamo credit remains justified and should be affirmed. The trial court meticulously reviewed the amount of support defendant paid on a *pendente lite* basis at Da49 to Da56 and concluded he paid plaintiff between $46,000 to $51,000 per month from 2017 to 2023, [Da53], over $75,000 yearly ($6,250 per month) towards their daughter, Claire's, educational and college expenses, [Da55], as well as additional amounts for her health insurance ($33,500), unreimbursed medical expenses ($81,606) and extracurricular activities ($33,000). [Da55]. These figures, well supported by the record, significantly exceed the asserted $55,500 monthly *pendente lite* support budget that includes the post-divorce savings component, [Da53 to Da56], thus effectively refuting any claims that *pendente lite* support was "woefully inadequate" or "obviously unjust." Jacobitti v. Jacobitti, 263 N.J. Super. at 617-18. Accordingly, the trial court's refusal to grant the Mallamo credit, which was a valid exercise of

discretion that is well supported by the record, should be affirmed. Slutsky v. Slutsky, 451 N.J. Super. at 369.

POINT V

THE TRIAL COURT'S COUNSEL FEE AWARD WAS A VALID EXERCISE OF DISCRETION THAT SHOULD BE AFFIRMED.

An award of counsel fees in a family action is discretionary, Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004), and trial courts "have wide latitude when resolving such applications." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 25 (2004); Williams v. Williams, 59 N.J. 229, 233 (1971) (recognizing the latitude given to trial judges in awarding counsel fees in matrimonial actions). Thus, a reviewing court "will disturb a trial court's determination on counsel fees only on the **'rarest occasion**,' and then only because of **clear abuse of discretion**." Slutsky v. Slutsky, 451 N.J. Super. at 365 (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)(citing Rendine v. Pantzer, 141 N.J. 292, 317 (1995))(New Jersey Supreme Court admonishing, "Our expectation is that future fee determinations by trial courts will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion.")

An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)

(internal citation omitted). Importantly, the Appellate Division will not substitute its own judgment for that of the trial court. Genovese v. Genovese, 392 N.J. Super. 215, 222 (App. Div. 2007) ("[I]n reviewing the exercise of discretion it is not the appellate function to decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court.") Accordingly, our appellate courts only intervene when a trial judge's determination of counsel fees is based on "irrelevant or inappropriate factors, or amounts to a clear error in judgment" and is "not premised upon consideration of all relevant factors." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

To that end, all applications for counsel fees in family actions must address the factors set forth in R.P.C. 1.5 and R. 4:42-9. J.E.V. v. K.V., 426 N.J. Super. 475, 492 (App. Div. 2012). Those factors require the court to consider "the reasonableness of the fees charged given the task and the skill level of the attorney." Id. Moreover, R. 5:3-5(c) requires the Court to consider additional specified factors when performing its counsel fee analysis.

Here, the trial court's decision to award plaintiff $325,000 in counsel fees, when she incurred adjusted net counsel fees of $816,702.16, represented a significant coverage of nearly 40% of her total counsel fee liability. [Da100]. This decision was not made in isolation but was a culmination of an extensive evaluation of the parties' financial resources, legal fee responsibilities, and

litigation conduct, following the directives outlined in R.P.C. 1.5 and R. 4:42-9. Moreover, the court's rigorous analysis extended to the reasonableness of the fees charged, [Da91-Da95], the complexity of the case, [Da93], and the need to ensure equitable financial responsibilities between the parties. [Da100].

In total, the trial court dedicated twenty pages of its written decision rendering the required factual findings regarding those and the R. 5:3-5(c) counsel fee factors. [Da80 to Da100]. Indeed, even plaintiff concedes, in her brief, that "the trial court correctly applied the vast majority of the factors." [Pb61]. Nevertheless, not satisfied with the significant $325,000 counsel fee award, plaintiff asks this Court to substitute its own judgment for that of the trial court by giving greater weight to factors 1, the parties' financial circumstances, and factor 3, the reasonableness of the good faith the positions advanced by the parties. Ibid. Plaintiff's approach is directly at odds with well settled controlling legal principles upholding a trial court's discretionary counsel fee award except on those rare occasions where a clear abuse of discretion is found. Slutsky v. Slutsky, 451 N.J. Super. at 365; Strahan v. Strahan, 402 N.J. Super. at 317.

A. Comprehensive Review of Financial Circumstances

The trial court undertook a meticulous and comprehensive assessment of the financial circumstances of the parties, which profoundly informed its decision on counsel fees. This detailed examination highlighted the significant financial capabilities and obligations of both parties, specifically noting that

plaintiff incurred total legal fees amounting to $1,209,362.76, of which, due to negotiations and settlements, her liability was reduced to $816,702.16, with defendant contributing $325,000 of the $475,799.04 plaintiff had paid. [Da100].

Critically, the trial court's findings reflect a deep understanding of both the need for legal representation and the financial capacity of each party to bear these costs. [Da81]. The trial court acknowledged plaintiff's considerable legal expenses but also noted that the $325,000 counsel fee contribution previously awarded to her, on top of prior settlements, substantially covered her counsel fee liabilities. It further balanced the remaining $340,000 of counsel fees she owed against her financial gains from the divorce, noting she would still be receiving post-divorce $865,750 of her $1,100,000 equitable share of defendant's illiquid business, [Da21], and more than 50% of the proceeds from the sale of the marital residence. [Da211]. The trial court's finding that plaintiff had the ability to pay the $340,000 of counsel fees she continued to owe — as well as defendant's legal fees if the facts had warranted it — are well supported by the record. [Da81].

B. Evaluation of Reasonableness and Good Faith.

Despite plaintiff's claim, the trial court did not ignore the defendant's litigation conduct. To the contrary, the trial court pointed out, and considered, that defendant engaged in behavior that protracted the litigation, including his contentious demeanor and non-compliance with court orders. [Da97]. However,

the trial court was also careful to balance its criticism of defendant's actions with an objective assessment of plaintiff's own contentious actions.

To that end, the trial court highlighted significant blemishes in plaintiff's litigation conduct:

- Judge Amirato, after seven days of trial during the "ring" hearing over allegedly missing jewelry, rendered a "significant finding adverse to Plaintiff based on her lack of credibility." [Da84];

- The trial court found that, "Mr. Pisano must be given ample consideration for the "ring" hearing where he was billed by $27,500 by [his counsel]. . .the judge found it was Plaintiff's lack of credibility on which the ruling turned." [Da97].

- Plaintiff was found to have dissipated assets by improperly withdrawing funds from the Wells Fargo account in 2017; [Da97]

- Plaintiff filed an Order To Show Cause (J-9) that was found to be unwarranted; [Da98].

- Plaintiff issued a subpoena to a Ms. Hunt that was quashed by the court; [Da98];

- Plaintiff sought reconsideration of a denial without prejudice of counsel fees; [Da98]

- Plaintiff made an improvident attempt to move for a mistrial of the "ring" trial; [Da98]

- Plaintiff even sought to reconsider her own attorney's withdrawal from the case that the court had granted. [Da98].

These findings underscore the trial court's conclusion that both parties contributed to the contentious nature of the proceedings, which was carefully considered in its counsel fee determination. Plaintiff contends that the trial court

did not sufficiently weigh defendant's bad faith as compared to plaintiff's when arriving at the $325,000 counsel fee award. [Db69]. However, appellate review is not an avenue for re-evaluating the trial court's balanced discretion. Gillman v. Gally Mfg. Corp., 286 N.J. Super. 523, 528 (App. Div. 1996) ("[I]n reviewing the exercise of discretion it is not the appellate function to decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court."); Genovese v. Genovese, 392 N.J. Super. at 222.

In summary, the trial court's award of $325,000 in counsel fees, covering nearly 40% of the plaintiff's total fees, was a well-reasoned exercise of judicial discretion, determined after a comprehensive review of all relevant factors. The plaintiff's request for this Court to increase the award fundamentally seeks to substitute its judgment for that of the trial court, which is unwarranted and contrary to established appellate norms. Genovese v. Genovese, 392 N.J. Super. at 222. Given the trial court's decision was grounded in a sound assessment of the extensive record and adhered closely to both the spirit and the letter of the applicable legal standards, this case does not meet the stringent "clear abuse of discretion" standard required for appellate intervention. Slutsky v. Slutsky, 451 N.J. Super. at 365. Accordingly, we respectfully submit the counsel fee decision should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Paragraphs C, E(1) and E(15) of the Final Judgment of Divorce should be reversed and vacated, where as plaintiff's challenge to the denial of the Mallamo credit and $325,000 counsel fee award should be affirmed. On remand, the trial court should be instructed to:

1. Revise Paragraph C so that plaintiff is awarded the $38,163 per month of open durational alimony the trial court found she needs to live reasonably comparable to the marital lifestyle, while excluding the additional $12,300 per month savings component which was not reflective of the marital lifestyle.

2. Revise Paragraph E(1) to remove the unwarranted $250,000 credit granted to plaintiff from defendant's portion of the proceeds from the sale of the marital residence for its alleged devaluation due to landscaping issues.

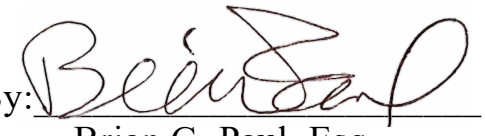
3. Revise Paragraph E(15) to mandate an equitable 50/50 distribution of the 2016 pre-complaint joint Federal and State tax liability of approximately $1,631,382. This marital debt was incurred when defendant diligently paid down, to the parties' equal benefit, their mortgage balances by $1,758,885 in the two years leading up to plaintiff's divorce announcement.

These amendments are essential to remedy the trial court's departure from established legal principles, thereby ensuring a fit, reasonable and just dissolution of this long term marital partnership.

Respectfully submitted,

SZAFERMAN, LAKIND,
BLUMSTEIN & BLADER, P.C.

Dated: 4/27/24

By: 
Brian G. Paul, Esq.

CLORINDA PISANO,

Plaintiff-Respondent,

vs.

JOHN PISANO,

Defendant-Appellant.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

DOCKET NO. : A-00242-23T2

On Appeal From:
Superior Court of New Jersey
Chancery Division: Family Part
Morris County

Below: Hon. James A. Farber, J.S.C.
Docket No. FM-14-122-18

CROSS APPELLATE REPLY BRIEF OF PLAINTIFF-RESPONDENT CLORINDA PISANO

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PRELIMINARY STATEMENT

Defendant's Reply Brief acknowledges and admits that the marital lifestyle is not merely about "savings" in the traditional sense, but rather the substantial investments during the marriage are equally included in the overall marital lifestyle. Defendant does not deny that the parties continually invested in and improved their multi-million dollar former marital residence, which is, by definition, part of their overall lifestyle. Defendant agreed that the goal in fixing an alimony award is to "assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."

Defendant's central premise regarding the savings component of the alimony award is fundamentally flawed. It presumes that the parties had no savings and investment for the entirety of their marriage, yet does not explain how that amassed approximately $15 million in assets, nor how defendant saved and invested more than $4 million merely during the pendency of the action that allowed him to secretly buy an almost $8 million house in Palm Beach. Defendant's premise also ignores the fundamental requirement of the 2014 amendment that neither party is entitled to a greater lifestyle than the other and in fact advocates that he should have a substantially greater lifestyle than Plaintiff. Moreover, nowhere in the statute does it say that the new retirement provisions overturn or vacate the law regarding savings. In fact, defendant's premise ignores Lombardi which is post-amendment.

The Trial Court was not formulaic about the determination of alimony and addressed prospective savings for Plaintiff. It was not speculative whatsoever as to how the parties operated during the marriage, but was grounded in the testimony of both parties. If, as Defendant claimed, the Trial Court utilized the post-complaint financial machinations of Defendant in determining the savings component, then the savings figure would have actually been significantly higher considering it is undisputed that he *actually* saved upwards of $3,500,000 post-Complaint.

Defendant likewise does not dispute or contradict that Defendant's *own* expert minimally valued the damage to the household at $1,000,000 and that the Trial Court determined Defendant to be the bad faith actor and liable for the damage incurred. Given that the factual findings of the Trial Court may not generally be disturbed, Defendant's arguments regarding the damage to the home falls flat.

Similarly, Defendant does not deny that the Trial Court has the discretion to allocate debts as part of the overall equitable distribution determination. As such, the Defendant's arguments surrounding the tax debt fails under the standard of review for the Trial Court.

Defendant does not refute the factual underpinnings surrounding the Mallamo arguments as well. In fact, given the overall alimony award, which was properly decided by the Trial Court, the Mallamo arguments presented by Plaintiff holds merit and should be awarded. It is undisputed that given the quantification of the marital lifestyle, Defendant drastically underpaid support during the pendency of the

matter, particularly once the tax debt that caused the reduction of the pendente lite award was paid off four years before trial and complete Mallamo credits should have been awarded.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY INCLUDED A SAVINGS AND INVESTMENT COMPONENT TO THE OPEN DURATIONAL ALIMONY AS THE PARTIES' MARITAL LIFESTYLE INCLUDED SIGNIFICANT INVESTMENT SAVINGS. [Da48].

Throughout Defendant's Reply Brief, Defendant incorrectly makes the claim that alimony, and more specifically, the savings component, was based upon Defendant's post-complaint lifestyle. However, at no point in the Statement of Reasons did the Trial Court ever directly or indirectly link the dollar figure for the savings component to Defendant's post-complaint savings. In fact, quite the opposite occurred, as Defendant's post-complaint accumulation of savings were almost four (4) times the amount that the Court accounted for Plaintiff as part of alimony.

The alimony was not based on post complaint activities, but rather, Defendant's marital income and the parties' marital lifestyle. Savings and investment *was* part of their marital lifestyle, despite Defendant's assertions that there was no savings and investment during the marriage. Accumulation of assets was their "actual lifestyle," which is what actually matters. If anything, the savings component inadequately reflects their actual lifestyle. Defendant's post complaint

activities simply proves his undisputed ability to pay. In fact, Defendant does not argue that he cannot pay the support as ordered.

In determining the marital lifestyle, the trial court looks at various elements including "the marital residence, vacation home, cars owned or leased, typical travel and vacations each year, schools, special lessons, and camps for [the] children, entertainment (such as theater, concerts, dining out), household help, and other personal services." Weishaus v. Weishaus, 180 N.J. 131 (2004) . The ultimate determination must be based not only on the amounts expended, but also what is equitable. Glass v. Glass, 366 N.J. Super. 357 (App. Div. 1998), certif. denied, 180 N.J. 354 (2004). In a contested case, a trial judge may calculate the marital lifestyle utilizing the testimony, the CISs required by Rule 5:5-2, expert analysis, if it is available, and other evidence in the record. The judge is free to accept or reject any portion of the marital lifestyle presented by a party or an expert, or calculate the lifestyle utilizing any combination of the presentations. S.W. v. G.M., 462 N.J. Super. 522 (App. Div. 2020) . Similarly, the Supreme Court in Mani v. Mani, 183 N.J. 70 (2005), held that in cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony.

"[A]n appropriate rate of savings ... can, and in the appropriate case should, be considered as a living expense when considering an award of ... maintenance." Lombardi, *supra*, at 26 (App. Div. 2016), (*citing*, Glass, *supra*, at 378 (second alteration in original)) (*quoting* In re Marriage of Weibel, 965 P.2d 126, 129–30

(Colo. App. 1998)). Thus, the court can take into account the marital standard of living and allow the supported spouse to save for the future. Lombardi, *supra*, at 26 (App. Div. 2016). This is particularly true when the supporting spouse can afford any amount paid to the supported spouse. Glass, *supra*, 366 N.J. Super. at 379. In short, savings has been a relevant and appropriate factor to be considered in the establishment of a reasonable and equitable alimony award because the amount of support awarded is subject to review and modification upon a showing of a change of circumstances, which could result in the supported spouse being incapable of supporting himself or herself. Lombardi, *supra*, 447 N.J. Super. at 38.

More specifically, the Lombardi Court, which is a post-amendment case, specifically dictated that the trial court need not find "regular savings," but rather that "there is no demonstrable difference between one family's habitual use of its income to fund savings and another family's use of its income to regularly purchase luxury cars or enjoy extravagant vacations." Id. at 39. The use of family income for either purpose over the course of a long-term marriage requires the court to consider how the money is used in determining the parties' lifestyle, regardless of whether it was saved, invested or spent on expensive purchases. Id. The fact that the payment of the support ultimately is protected by life insurance or other financial tools, does not make the consideration of the savings component any less appropriate. Id.

In response to Defendant's claim that the court fixated on Defendant "saving a million dollars since the complaint" – that evidenced both an ability to pay and that

continued savings and investment was the lifestyle that only he was able to enjoy despite the fact that the statute requires that neither have a superior lifestyle than the other. Defendant essentially accused the Trial Court of inappropriately addressing post-complaint savings, but the fact remains that the evidence presented in the Trial Court showed that just as he is able to save during the period of alimony, so too should Plaintiff be able to save per Lombardi, as outlined above (and if he was saving pendente lite that is even a greater justification for a Mallamo adjustment.) Even if not specifically stated, savings and investment can be inferred based upon the parties' activities during that marriage that were in the testimony and evidence, including the accumulation of $15 million in assets, which the Trial Court addresses in the Statement of Reasons in detail.

Moreover, pursuant to the testimony of Plaintiff's forensic expert, which for purposes of this appeal Defendant is not contesting, the marital lifestyle totaled $97,239 per month in the 28 month period preceding the Cut-Off Agreement. DCa171. Without incorporating the savings component, the trial court determined that Plaintiff's individual spending required $43,223 in monthly income for herself. Da43. After subtracting her imputed income, the trial court concluded Plaintiff needed $38,150 before any savings/investment. Id. Defendant's position that the excess $54,016 per month in marital lifestyle should completely be left for his discretionary use is not settled in the law and goes firmly against the intent of N.J.S.A. 2A:34-23(b)(4). While of course some of the remaining lifestyle is

Defendants, there is a significant portion of the remaining lifestyle that was previously accounted for by the children that both parties should be permitted to reap the benefits of, not just Defendant. Moreover, there are hundreds of thousands in net income each year that were omitted from the lifestyle analysis as non-recurring, but was money that was actually spent.

While Defendant, in his Reply Brief, discusses the alleged legislative intent, Defendant actually cites nothing as to what the legislative intent was. Defendant repeatedly cites Boardman v. Boardman, 314 N.J. Super. 340, 347 (App. Div. 1998), but Defendant fails to address any of the pre-amendment savings cases cited in Plaintiff's Cross-Appeal. Moreover, Defendant's reliance on Boardman is misguided, as the Court did not base the savings component on a prospective retirement date by Defendant, but is rather specifically predicated the inclusion of a savings component on the marital lifestyle of the parties during the marriage. There was nothing speculative about the figure of $12,300 per month, but rather it was entrenched in the foundation of the parties' respective Case Information Statements and the testimony of Plaintiff's unrebutted forensic expert.

POINT II

THE TRIAL COURT'S EXCLUSION OF THE 2016 AND 2017 TAX DEBT FROM THE EQUITABLE DISTRIBUTION EQUATION WAS CORRECT AS IT WAS PART AND PARCEL OF THE MARITAL LIFESTYLE FOR THE PARTIES TO PAY TAXES WELL AFTER THE FILING DEADLINE. [Da75-77].

Defendant's Reply Brief once again still attempts to once again recreate a revisionist version of the marital lifestyle. The trial court heard the testimony as to the taxes and correctly determined, for a variety of reasons, that the taxes for 2016 and 2017 were not marital debt as typically defined. "It cannot be denied the parties' practice when married, all driven by [Defendant] with [Plaintiff] the acquiescent party, was to pay each year's taxes late, even beyond the typical October extension, incurring late fees and penalties as a regular course." Da75.

After hearing all the relevant testimony, the trial court correctly determined that "[Defendant's] gambit to pay taxes in the spring of 2017 was for no purpose other than to beat his own cut-off date by drawing from the HELOC to deprive [Plaintiff] of as much equitable distribution as he could." Da75. Parenthetically, the increased equity in the former marital residence is already accounted for in the increased equitable distribution award each party is entitled to receive pursuant to the Judgment of Divorce. Da27-101.

Moreover, as evidenced during Defendant's cross examination, even after paying all business expenses and the entirety of the marital lifestyle, Defendant had in excess of $2,000,000 to pay the entirety of the 2016 taxes. 17T:193-17 to 17T:196-12. Defendant had access to those monies and could have paid the debt, but intentionally chose not to as it was customary for the parties to pay the debt well after the taxes were originally due as the evidenced at trial proved.

Defendant continues to ignore the well settled law that debt, for purposes of equitable distribution, does not have to be divided equally (*see, e.g.*, N.J.S.A. 2A:34-23.1, Pascale v. Pascale, 140 N.J. 583 (1995), Rothman v. Rothman, 65 N.J. 219, 220 (1974)). Specifically, if the assets are to be divided between the parties, the debts incurred in obtaining those assets should likewise be allocated between the parties. Monte v. Monte, 212 N.J. Super. 557, 567 (App. Div. 1986), *citing* Hansen v. Hansen, 302 N.W.2d 801 (S.D. 1981). However, it may not be an abuse of judicial discretion to divide the assets of the parties equally without requiring them to share the debts. Id., *citing* Levy v. Levy, 277 S.C. 576, 291 S.E.2d 201 (1986).

Defendant likewise continues to misapply the holding in Monte within his brief. Once again, as noted above, the tax debts were considered by the trial court, but the trial court found this to be a lifestyle issue, not debt. The trial court did not ignore it, but rather did not divide it equally.

Similarly, Defendant continues to ignore that once the alleged marital tax debt was paid off in full, which occurred prior to 2019, Defendant had an affirmative obligation to advise Plaintiff and the trial court of same, through at a minimum an updated Case Information Statement, and the *pendente lite* support award would have increased. The trial court "sensed" a combination of Defendant being "careless and find[ing] that the CIS requirement a nuisance not worth his attention" and Defendant being "intentionally and willfully concealing important, relevant and material information." Da68. Defendant's goal throughout was to "minimize his

assets and income to cheat [Plaintiff] out of an appropriate alimony award and an equitable distribution of property." Id.

Given all of the above, the Trial Court's determination to not assign any equitable distribution of the aforementioned tax debt should not be disturbed.

POINT III

THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF A CREDIT UNDER *MALLAMO v. MALLAMO*, FOR DEFENDANT'S UNDER-PAYMENT OF PENDENTE LITE SUPPORT DURING THE PENDENCY OF THE MATTER. [Da50].

While addressing Mallamo v Mallamo, 280 N.J. Super. 8 (App. Div. 1995) and the resulting requested credits associated with the relevant case law, the trial court failed to take into account that unallocated *pendente lite* support should have immediately been restored to the original figure of $25,000 per month at the time the 2016 and 2017 taxes were paid in full by July 2019. For purposes of this appeal, the trial court correctly determined that during the pendency of this matter Plaintiff needed approximately $55,500 in *pendente lite* support per month for herself. By the trial court's own calculation, there was $451,429 in underpaid support by Defendant.

As noted above, the Trial Court did not base the $12,300 savings component on a "post-divorce" lifestyle, but rather the parties accumulated $15,000,000 in assets over the course of the marriage and were continually improving and investing in those assets. This was not the circumstance where it was a passive increase in the

marital assets unrelated to savings/investment, but rather was the active financial investment in, most predominantly, the former marital residence through constant improvements, that increased the parties' overall financial status.

During the same time that Defendant was saving upwards of $300,000 to $500,000 per year into a retirement account, not to mention his investment of hundreds of thousands through his business into his Westfield home, Plaintiff was left in a relatively distraught financial position, which was further emphasized by Plaintiff's growing debt as to this litigation while Defendant continued to ignore Court Orders and failed to produce relevant discovery. Although Defendant, earlier in his Reply Brief, latched on to the fact that the Trial Court determined Defendant was living "high on the hog," the analogy was correct – Defendant continued to live the marital lifestyle in full, utilizing income to continue to improve upon his Westfield property, for example, while intentionally ignoring the former marital residence.

Moreover, as noted above, given that statute provides that neither is entitled to a greater lifestyle and the fact that defendant saved millions during the pendente lite period, plaintiff too should have been afforded the ability to save, and earn interest and dividends on her savings, just as defendant did.

In a very recent Appellate Decision, one that was argued by Defendant's present counsel, this Court addressed Mallamo credits directly. S.W. v. G.M., A-3008-21 (App Div. 2024) (**Exhibit A**). In this decision, Defendant's counsel

successfully argued exactly Plaintiff's position in this matter. This Court correctly determined that Mallamo credits should be calculated and a retroactive increase of pendente lite support to be appropriate "where the original amount awarded was 'woefully inadequate' or 'obviously unjust.'" Id. This Court thereafter simply addressed the mathematics, which are uncomplicated and addressed in Plaintiff's Cross-Appeal substantively.

It is for these reasons, as well as those laid out in Plaintiff's Cross-Appeal, that the Trial Court's determination that Plaintiff is not entitled to a Mallamo credit must be reversed.

POINT IV

THE TRIAL COURT SHOULD HAVE AWARDED ADDITIONAL ATTORNEYS FEES TO PLAINTIFF, FROM DEFENDANT, AS THE EXTREME AND BAD FAITH LITIGATION THAT OCCURRED DURING THE PENDENCY OF THE MATTER WAS NOT PROPERLY TAKEN INTO ACCOUNT. [Da80].

Defendant, in his Reply Brief, does not address what is considered one of the most important aspects of the entire fee discussion – which is the reasoning behind the litigation costs. Various factors outlined in Rule 5:3-5(c) all address this very idea, that the reasoning behind the spending of fees is paramount. In the instant matter, Defendant intentionally ignores his horrific bad faith. The Court's award of $325,000 in counsel fees did not take into account the more than 20 times Defendant was found in violation of litigant's rights and to compel discovery (over the course

of various Court Orders), nor substantial bad faith positions that Defendant took throughout the litigation that lead to trial. Simply put, the trial court did not take into account and award fees to plaintiff for all of the times that fees were deferred to trial by the motion judges.

As noted in Plaintiff's Cross Appeal, the trial court did not place appropriate weight on Factor 3, the reasonableness and good faith of the positions advanced by the parties, including the bad faith actions and positions of Defendant throughout the litigation. Defendant has acted unreasonably and in bad faith throughout this matter. Defendant delayed and stonewalled every step of this process from even prior to the Complaint for Divorce, and all discovery in between. Defendant filed motion after motion as a *pro se* litigant without regard for Plaintiff's counsel fees. Pa2052-2500.

Defendant was held in violation of litigant's rights on countless occasions, as outlined in Plaintiff's Cross-Appeal, yet on all but one of these motions, Plaintiff was denied her application for counsel fees without prejudice. In each of these motions, the Trial Court indicated that Counsel Fees would be addressed at trial. In the trial court's examination of the reasonableness of the parties, the trial court correctly determined that Defendant acted unreasonable throughout the trial and even in the motion practice, wherein Defendant was found to have filed relief that the trial court deemed to by "anything but spurious, possibly brought for no reason other than to run up [Plaintiff's] attorneys' fees…." Da90. The trial court correctly went through the above referenced motion practice and determined that Defendant's

bad faith actions throughout "simply scratched the surface" of his conduct during the ongoing litigation. Da91.

However, the trial court ultimately remedy those actions with an award fees related thereto. Defendant should have been sanctioned, pursuant to both Rule 5:3-5(c) and Rule 1:10-3 for his bad faith actions and non-compliance with prior court orders and directives. The trial court addressed the protracted nature of the trial and the bad faith positions at trial in its Statement of Reasons, but an additional sum of attorneys' fees should have been awarded based upon Defendant's bad faith positions and actions during the litigation itself.

Plaintiff should not have had to expend any counsel fees due to Defendant's bad faith, failure to produce relevant discovery, and failure to abide by Court Orders.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court affirm in part and reverse in part the trial court Judgment of Divorce and Statement of Reasons of August 16, 2023.

Respectfully submitted,
FOX ROTHSCHILD LLP
Attorneys for Plaintiff-Cross Appellant

Dated: June 7, 2024

/s/ Eric S. Solotoff
Eric S. Solotoff

/s/ Adam Wiseberg
Adam Wiseberg