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**KARL HALLIGAN,**  
**Plaintiff/Appellant,**

**vs.**

**BEDERSON, LLP, SEAN  
RAQUET, JOHN O'CONNOR  
AND HARRY HODKINSON,**  
**Defendants/Respondents.**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO: A-000793-24**

**Civil Action**

**ON APPEAL FROM:  
SUPERIOR COURT OF NEW JERSEY  
CIVIL DIVISION: HUDSON COUNTY  
DOCKET NO. HUD-L-1494-19**

**SAT BELOW:  
HON. JOSEPH A. TURULA, P.J.Cv.**

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**BRIEF ON BEHALF OF PLAINTIFF/APPELLANT KARL HALLIGAN**

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## PRELIMINARY STATEMENT

This lawsuit originates from the ‘whistle-blowing’ activity of Harry Hodkinson (“Hodkinson”), a former business partner of Plaintiff/Appellant Karl Halligan (“Plaintiff”).

In the original lawsuit between Plaintiff, Hodkinson and John O’Connor (“O’Connor”), their third partner, Plaintiff was awarded a money judgment against the partnership’s businesses—Park Avenue Bar & Grill, LLC (“Park Avenue”), a restaurant and tavern in Union City, New Jersey, and H&H Real Estate Enterprises, LLC (“H&H”), an entity which owned the property from which Park Avenue operated.

In a second lawsuit between the partners and H&H, Hodkinson revealed that he and O’Connor—in an effort to defeat Plaintiff’s Halligan’s judgment against Park Avenue—compiled a list of expenses which they claimed proved that Halligan converted corporate funds and then retained Defendants/Respondents Sean Raquet (“Raquet”) an accountant employed by Bederson, LLP (“Bederson”)(collectively “Defendants”), to professionally format their compilation, ‘rubber stamp’ its conclusion as a forensic analysis, and burnish the product with Bederson’s good reputation in the accounting and legal communities.

The resulting “Bederson Report” was first used by Hodkinson and O’Connor in the United States Bankruptcy Court to defeat Plaintiff’s creditor’s claim against Park Avenue, was next used by the Bankruptcy Trustee to support an Adversary Complaint asserting conversion by Plaintiff, was then used by Hodkinson and O’Connor to vacate Plaintiff’s Superior Court judgment against Park Avenue and H&H, and was finally used to support their counterclaims in Halligan 2.

After Hodkinson’s disclosure, Plaintiff filed this lawsuit against O’Connor, Hodkinson and Defendants (“Halligan 3”). Defendants filed an Answer which asserted, without elaboration, “qualified privilege” as an affirmative defense. For the next four and one half years, Defendants vigorously defended the lawsuit. Then, just days before the eighth scheduled trial date, Defendants moved for summary judgment and argued for the first time that the litigation privilege conferred them with absolute immunity from suit. Their motion was denied because the trial court found that a factual dispute existed.

Defendants moved for reconsideration, and on April 26, 2024, the trial court stated it made a mistake in its earlier ruling, granted Defendants’ motion for summary judgment, and held that Defendants had absolute immunity from suit, had not waived that defense, and that the crime-fraud exception did not apply to the case.

Plaintiff's motion for reconsideration of the Order dismissing his complaint was denied on September 4, 2024, and this appeal—following the entry of final judgment by default against O'Connor and a stipulation of dismissal against Hodkinson—timely followed.

Both of the trial court's rulings on reconsideration were palpably incorrect and irrational. This court should now reverse the dismissal of the Complaint and remand the case for trial.

## FACTUAL AND PROCEDURAL HISTORY<sup>1</sup>

### a. The Original Lawsuit (Halligan 1)

In 2004, Plaintiff, O'Connor and Hodkinson formed Park Avenue and H&H. (Pa196) In 2012, Plaintiff sued O'Connor and Hodkinson and sought payment of equity compensation, his manager's salary and reimbursement of taxes which he advanced on behalf of H&H. (Pa214)

O'Connor and Hodkinson, represented by Andrew Turner, Esq. ("Turner"), filed an Answer and Counterclaim seeking damages and Plaintiff's dissociation from the businesses. (Pa233)

Following a multi-day trial before the Honorable Hector R. Velazquez, P.J.Ch., the court entered its decision awarding Plaintiff a money judgment against Park Avenue and H&H, and dissociating him from the companies. (Pa251)

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<sup>1</sup> The procedural and factual histories are inarguably intertwined and are combined for the Court's convenience.

The court later entered a modified judgment awarding Halligan \$793,772.50. (Pa255) On March 21, 2014, O'Connor and Hodkinson succeeded to the management of the businesses. (*Ibid.*)

### b. The Bankruptcy Proceeding

Two weeks after O'Connor and Hodkinson took control of the businesses, Park Avenue filed a petition in the United States Bankruptcy Court for the District of New Jersey for Chapter 11 reorganization. (Pa222) Plaintiff was the company's largest creditor (Pa225); O'Connor, Hodkinson and H&H were also named as creditors. (Pa 227-228)

On October 3, 2014, Turner—who was not Park Avenue's bankruptcy counsel—wrote to O'Connor and Hodkinson to introduce them to Defendants and suggested that:

Sean and his firm are extremely well known in New Jersey, and particularly in the bankruptcy courts.

\* \* \*

I think Sean's firm would be an excellent fit for the services needed by Park Avenue, both immediately and longer term. The immediate needs are successful completion of the monthly operating reports along with an analysis of future business prospects. The **longer-term issues involve a forensic trail of monies** funneled through the business under Mr. Halligan's term of operation. (Pa745) (Emphasis added)

On November 3, 2014, O'Connor wrote to Raquet to inform him that he and Hodkinson:

have been piling through cheque<sup>2</sup> and debit card payments for 7 years and are compiling the offending unauthorized payments. Inputting continues and then we need to format into what could be as many as 20 offending headings. (Pa747)

That same day, O'Connor wrote to Hodkinson and advised:

I spoke to Shaun to day and gave him a very detailed background to all of this mess.

**The way we are going about this is exactly what he needs- ie categorizing the offending payments into as many headings as possible totaling each and which tie into a grant total. Supporting cheques or statements for each entry, which he needs to see and will then work his report of [sic] that.** (Pa749)(emphasis added)

On November 11, 2014, O'Connor asked Raquet how the report he was preparing for the bankruptcy court would impact the state court action. (Pa752)

Raquet immediately responded:

John you get twice the use for the one report. Unless Andy Turner disagrees, I am sure you can use my report in both the Bankruptcy Process and the State Court litigation. (Pa754)

Also on November 11, O'Connor sent Raquet 19 pages of credit-line statements (Pa756) and Hodkinson sent Raquet Quick Book records which he claimed demonstrated Halligan's conversion of business funds. (Pa783)

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<sup>2</sup> This and all other emails authored by O'Connor and Hodkinson are reproduced with their spelling and grammar as originally written.

Hodkinson later explained<sup>3</sup> his role in creating the Bederson Report:

It was then suggested by Andrew Turner and O'Connor in Oct 2014 to hire a forensic accountant to do an analysis of the books during Halligan tenure. Andrew Turner recommended Sean Raquet to us in October 2014 and suggested we move quickly as feared Halligan's case was prevailing and he wished to submit and certify a report this to the courts before Thanksgiving 2014 to stop plaintiff's opposition. . .

We told Bederson that we didn't want a large bill like from the first trial (100K plus) so we indicated to Andrew Turner and Bederson (Sean Raquet) that we would do all the work and research and simply supply what we felt was damning and selective evidence against Halligan and use the Bederson company name as an official seal of the report in order to give it credibility within the court system. Andrew Turner had state Bederson LLC was well know firm within the forensic accounting work and even the 10K was worth the money.

\* \* \*

So we engaged Bederson LLC in early November. I supplied everything and effectively wrote the entire report 100% and gave it to Bederson LLC to present it the way he would for the courts. The report was compiled by me over ten weeks based on 100% of my work. We engaged Bederson for a token fee of 10K – Bederson never visited the location and simply took my report and spreadsheets and revamped the numbers and then Andrew Turner certified it was true and accurate despite knowing it wasn't a forensic report and basically compiled by me. **(Pa1191)**

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<sup>3</sup> Hodkinson's Certification was submitted to the Appellate Division in response to an appeal by Andrew Turner and Gwyneth Murray-Nolan, H&H's attorney, from an order disqualifying them. **(Pa1114)**

In deposition testimony, Raquet claimed he reviewed years of Park Avenue bank statements, general ledgers, tax returns, sales tax returns, a deposition transcript of Frank Canzona (Park Avenue's accountant) and a transactional journal from Metropolitan Capital (Park Avenue's bookkeeper) during a visit to Turner's office on November 12, 2014. (Pa446) Raquet said he read through the documents, took no notes, and simply carried that information in his memory back to his office. (Pa449) Raquet acknowledged receiving a list of "suspicious" disbursements from Hodkinson (Pa411) and explained what he did with that list:

I explained to her [his associate Meghan Boivin] that Mr. Hodkinson and Mr. O'Connor prepared - - suspected that there were questionable transactions that occurred during Mr. Halligan's operating the debtor and that she was to review the bank statements to confirm that the transfers, the questionable transfers, cleared the account and was to look for any other questionable transactions that were not included in Mr. Hodkinson's spreadsheet. (Pa422)

According to Raquet's time sheets, he began drafting his report by "reviewing the disbursements allegedly made to or for the benefit of Karl Halligan" on November 16, 2014, prepared the report exhibits, and finalized the report the next day (Pa833). Raquet acknowledged that he never questioned O'Connor or Hodkinson about the expenditures they claimed to be personal to Plaintiff (Pa412-413), never spoke with the bookkeeper who entered Park Avenue's expenditures into QuickBooks (Pa481), never communicated with the Park Avenue accountant (*Ibid.*), and never questioned Halligan about the

expenditures. (*Ibid.*) Raquet also never asked O'Connor or Hodkinson why charges for utilities (such as PSE&G, Verizon, and Cablevision) or from stores which sold food, kitchen and office supplies (such as ShopRite, Pier 1, and Staples) were on the lists compiled by O'Connor and Hodkinson, or which utility companies and food, kitchen and office supply vendors they used when they operated Park Avenue. (**Pa481-486**) Finally, Raquet said he "read in passing" but couldn't remember the specifics of a forensic report prepared by Alan Winters, CPA of Marcum LLP who testified as Plaintiff's forensic accountant in the original state court trial (**Pa1143**), and swore that he never received a copy of Judge Velazquez's trial decision which found that:

In any event, it is undisputed that Halligan received compensation from Park Avenue by way of salary checks processed by ADP, checks drawn from the business account, and by use of the corporate credit card for personal purchases [for] a total of \$212,689. (**Pa202**)

Raquet, who was retained by O'Connor and Hodkinson on or about November 12, 2014 (**Pa752**), completed the Bederson Report on November 17, 2014, and sent it to Bruce Levitt, Esq., Park Avenue's bankruptcy counsel. (**Pa493**) The Bederson Report asserted that Plaintiff embezzled or misused between \$1,490,000 and \$1,820,000 of Park Avenue funds. (**Pa496**)

Hodkinson later testified that he compared the schedule of expenses he sent to Raquet with the schedule included in the Bederson Report and found that:

The guy didn't even change anything around, he just produced the exact same report that I did, that I compiled . . . So its my report with different columns. So, if you go through it, the data is a hundred percent... (Pa820)

Hodkinson said that in addition to compiling data he manipulated the data:

I effectively wrote the reports, and it was decided with Andrew and John that I needed to come up with at least a hundred \$50,000 a year of data that would - - you know, data that would or could be suggested as being dodgy, so to speak. So when I did 2008 the first time, I came up with \$35,000; and I was told in no uncertain terms by John and Andrew You need to get to 150,000. So I just manipulated the date the way I wanted it.

\* \* \*

John thought a million dollars would be a number, given we had \$800,000 award. So he was happy when I cam up with 1.2 million. I exceeded his expectations. (Pa819)

After receiving the report, Levitt moved the bankruptcy court on November 24, 2014, to appoint Raquet to assist in a forensic review of the Park Avenue books and records retroactive to November 1, 2014. (Pa266) In his Certification in support of Levitt's motion, Raquet stated that he had no "connection with the . . . creditors, any other party in interest, [or] their respective attorneys." (Pa271) Raquet failed to disclose to the Bankruptcy Court that: he had a long and close relationship with Turner; they met several times a year for lunch; both were involved in the Bankruptcy Inn of Court where Turner was the Executive Director and where Raquet volunteered as the Treasurer; they both attended the annual

bankruptcy judges conference where the two socialized; and that Bederson referred business to Turner. **(Pa368 – Pa375)**

On December 9, 2014—two weeks after Levitt moved to retain Defendants—the bankruptcy proceeding was converted from a Chapter 11 reorganization to a Chapter 7 liquidation. **(Pa262)** Jay Lubetkin, Esq. (“Lubetkin”) was appointed Bankruptcy Trustee and he, like Levitt before him, asked the court to appoint Defendants to conduct a “forensic review” of the books and records. **(Pa277)** Lubetkin informed the court that:

According to Bederson, it [sic] **minimal conversations and meetings with two of the principals, John O’Connor and Harry Hodkinson . . .** [and] Bederson’s services during the Chapter 11 period was limited to analyzing Mr. Halligan’s prepetition claim. **(Pa279)** (Emphasis added)<sup>4</sup>

According to Raquet’s Certification submitted in support of Lubetkin’s application:

We [Defendants] had minimal conversations and meetings with two of the principals, John O’Connor and Harry Hodkinson and no communications with the third principal, Karl Halligan. We received a \$10,000 retainer from Mr. O’Connor and Mr. Hodkinson. Our service during the Chapter 11 period was limited to analyzing Mr. Halligan’s pre-petition claim. **(Pa282-283)**

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<sup>4</sup> According to Raquet’s time records, he spoke or met with Turner for a total of 4.90 hours and spoke and corresponded with O’Connor and Hodkinson for a total of 3.40 hours. **(Pa832-833)**

For the second time, Raquet failed to inform the Bankruptcy Court that he was retained to prepare the Bederson Report to defeat Plaintiff's bankruptcy claim and vacate Plaintiff's state court judgment, that he created his report in just two days for a modest sum of money, and that he had a close and long-standing personal and professional association with Turner, O'Connor and Hodkinson's personal attorney.

Later, Lubetkin, specifically citing the Bederson Report, filed an Adversary Complaint against Plaintiff seeking recovery of \$519,612.21. **(Pa653)** After Plaintiff's bankruptcy attorney demonstrated the flaws and deficiencies in the Bederson Report—which included the failure to account for charges which the state court found to be “modest salary” draws and the use of a company credit card which was charged as income to him—the Trustee agreed to settle his claim. **(Pa684)** The Adversary Complaint seeking more than one half million dollars was dismissed without a trial on April 5, 2016, after Plaintiff agreed to pay the Trustee \$25,000.00. **(Pa1110)**

**c. The Second Lawsuit (Halligan 2)**

Three days after Raquet completed the Bederson Report, Turner attached a copy of it to his motion to vacate the judgment in Halligan 1. **(Pa550)** Judge Velazquez granted the motion, held that he erred in entering judgment against the companies **(Pa618)**, vacated Halligan's judgment, and permitted him to refile his

lawsuit against Park Avenue and H&H. (*Ibid.*) Because Park Avenue was dissolved by that time, the litigation continued against H&H and, at Turner's insistence, against O'Connor and Hodkinson despite the absence of any claims against them.

Plaintiff filed a Revised First Amended Complaint on August 25, 2015. (**Pa622**) Turner filed an Answer and Counterclaim which asserted that Plaintiff Halligan "utilized Park Avenue as a "piggy bank" for payment of personal activities which were detailed in an **audit report conducted by Bederson & Company** filed with the United States Bankruptcy Court for the District of New Jersey, and specifically incorporated herein by reference." (**Pa1088**)(Emphasis added) H&H retained Murray-Nolan, who also filed a counterclaim that alleged that Plaintiff "improperly looted from both LLCs 's for a significant period of time, taking significant sums of money for personal use and payment of personal expenses." (**Pa1102**) During the course of Halligan 2, H&H's real estate was sold and, after the sale, Murray-Nolan moved for the award of attorney's fees. Hodkinson opposed the motion and in his opposition informed the court that Murray-Nolan and Turner, both of whom had been favoring O'Connor over him, were conflicted (**Pa1130; Pa1132**). Following that revelation, the trial court disqualified Turner and Murray-Nolan (**Pa630**) whose appeal of that order was denied by the Appellate Division. (**Pa1114**)

**d. The Current Lawsuit (Halligan 3)**

Plaintiff filed the current lawsuit against Defendants, O'Connor and Hodkinson on April 11, 2019 (**Pa36**). He alleged that Defendants violated the New Jersey Accountants Act and that they conspired with O'Connor and Hodkinson to commit fraud upon the Bankruptcy Court and the Superior Court by presenting what appeared to be a forensic accounting but which was, in reality, a contrived and manipulated compilation created by O'Connor and Hodkinson. (**Pa40-42**) The Complaint summarized the fraud in these words:

¶59. The defendants, Raquet, Bederson, O'Connor and Hodkinson conspired to and carried out a plan to provide inaccurate information and fraudulently author the report and have defendants Raquet and Bederson execute the report to misrepresent that it was, in fact authored by defendants, Raquet and Bederson. (**Pa45-46**)

Defendants filed their Answer on July 31, 2019 (**Pa731**), and asserted, without elaboration, "qualified immunity" as their Tenth Affirmative Defense. (**Pa737**) Hodkinson filed a *pro se* Answer on November 15, 2019. (**Pa1135**) O'Connor was served, failed to file an Answer and default was entered against him on September 27, 2019. (**Pa118**)<sup>5</sup>

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<sup>5</sup> On November 4, 2022, following a proof hearing before the Honorable Joseph A. Turula, P.J.Cv. judgment of liability was entered against O'Connor (**Pa148**). On November 7, 2024, following a second proof hearing, final judgment by default for \$107,752.71 and \$250,000.00 in punitive damages was entered by Judge Turula. (**Pa1069**)

On January 12, 2024, Defendants asked the court to postpone the eighth scheduled trial date (then scheduled for January 22, 2024)(**Pa1128**) and simultaneously moved for summary judgment asserting, for the first time in the lawsuit, that the litigation privilege gave them absolute immunity from suit. (**Pa1**)

Between filing their Answer on July 31, 2019, and their moving for summary judgment on January 12, 2024, Defendants actively defended the lawsuit and:

- propounded (**Pa535**) and answered interrogatories (**Pa906**);
- propounded (**Pa932**) and responded to requests for production (**Pa946**) of documents (comprising over 3,700 pages);
- conducted and defended seven party and fact witness depositions (Raquet [2 days](**Pa969**), Hodkinson [2 days](**Pa958**), Turner<sup>6</sup> (**Pa977**), Levitt (**Pa983**), and Lubetkin [2 days](**Pa988**));
- opposed Plaintiff's motion to compel discovery (**Pa999; Pa1001**);
- participated in court-ordered mediation (**Pa1009**);
- filed a 100 page *in limine* motion seeking to bar or limit Plaintiff's damage claims (**Pa1012**);
- observed and sought to participate in the September 7, 2022 proof hearing against O'Connor (**4T**); and,

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<sup>6</sup> Turner, who moved to quash a subpoena to compel his deposition, unsuccessfully appealed the trial court's order requiring him to answer questions about communications with Hodkinson (who waived the attorney-client privilege) and communications with O'Connor which were made in the presence of third persons. (**Pa1146**)

- on January 15, 2024, served their Pretrial Information Exchange which included a list containing 94 Exhibits and four *in limine* motions (Pa1158)

On April 26, 2024, Defendants' motion for summary judgment was denied.

(Pa880) The court explained its decision as follows:

In this case, it's undisputed that Mr. Raquet as a CPA was authorized by law to draft this report as an expert witness. And the Defendants argue that he's immune, he's got immunity. He receives immunity because of this was in litigation. Okay. There's no question about that.

That he's an accountant who did this and - - regarding litigation. But the facts in this case demonstrate - - or at least have to be - - I think these facts are disputed by O'Connor and Hodkinson created a list of expenditures that some would say were falsely claimed or not made by Halligan for his personae [sic] benefit.

So the Hodkinson and O'Connor gentlemen allegedly created a list that would show Mr. Halligan was doing - - creating false claims. They provided, and I think there's no question they provided that information to Raquet.

And then as it's stated in discovery and the submissions, he merely - - according to I think what either Halligan [sic] or Hodkinson just merely copied that and made the report, which is problematic. Now, is that fraud? I'm not going to make that determination.

But - - and who was responsible for misleading the Court? Is it Hodkinson or O'Connell or the Bederson Defendants?

**So that is something that a jury would have to decide if there was a fraud by the creation of a report that was merely not an analysis, but just something that was photocopied from a layman, a bar owner at the**

**time and made into a report. So for those reasons, I find that the - - this matter has disputes of material fact that will allow the case to proceed to trial. (1T<sup>7</sup>, 10:16-11:22) (emphasis added)**

Defendants moved for reconsideration of the order denying summary judgment (**Pa882**), and argued that Plaintiff failed to prove the elements of common law fraud—namely, that Defendants intended Plaintiff to rely on the Bederson Report, or that he relied upon it—and that Plaintiff’s argument that case law which established that other “absolute defenses” such as the statute of limitations and mandatory arbitration could be waived by untimely assertion was unavailing because there was no case law holding that the litigation privilege could be waived.

On July 12, 2024, the court granted Defendants’ motion for reconsideration and dismissed Plaintiff’s Complaint. (**Pa894**) After noting that Plaintiff’s

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<sup>7</sup> 1T refers to the transcript of the April 26, 2024 decision denying summary judgment.

2T refers to the transcript of the July 12, 2024 decision granting Defendants’ motion for reconsideration.

3T refers to the transcript of the September 4, 2024 decision denying Plaintiff’s motion for reconsideration.

4T refers to the transcript of the September 7, 2022 O’Connor proof hearing.

5T refers to the transcript of the March 20, 2015 motion to vacate monetary judgment.

6T refers to the September 29, 2017 decision denying Halligan’s motion for summary judgment.

7T refers to the February 16, 2024 transcript of oral argument of Defendant’s motion for summary judgment.

argument that the litigation privilege was waived was first raised in opposition to the motion for reconsideration, the court stated:

And I agree that these new arguments should not and cannot be raised. But, nonetheless, so I think that's, I don't want to say improper, but it's not anything I'm going to find persuasive. **But, nonetheless, I will address those issues, okay.** So, to be clear, new arguments should not be raised. And that's again, layman's terms, a no, no, and I should not consider it. But, if I'm even considered to be wrong on that decision, **I'm going to address them anyway.**  
(2T, 11:24-12:8)(Emphasis added)

In its decision, the court first stated that “The litigation privilege is absolute, despite the fact that plaintiff’s counsel argues that the Benderson [sic] report was a fraud on the Court and defendants waived the privilege.” (2T, 12:9-12) The court next analyzed the elements of common law fraud and found that the Plaintiff failed to establish that he relied upon the information in the Bederson Report and held that: “Only when the five common law elements of fraud are met, does that exception of litigation privilege come to life . . . The Court does not need to go into the crime, fraud exception, because the five elements of [common law] fraud are not met.” (2T,13:13-21). Finally, the court agreed with Defendants’ argument that “there is no case law or statutory law on a waiver of the litigation privilege” and that the cases cited by the Plaintiff of waiver on the statute of limitations and arbitration were inapplicable. (2T,13:22-14:7) On July 12, 2024, Defendants

motion for reconsideration was granted and the court dismissed Plaintiff's Complaint. (Pa894)

Plaintiff moved for reconsideration of the court's July 12, 2024 Order. He argued that there was specific authority holding that the litigation privilege could be waived, which was consistent with the case law holding that the statute of limitations and arbitration defenses required timely assertion. He also argued that the court misinterpreted his conspiracy claim which asserted that the presentation of the Bederson Report to the Bankruptcy and Superior Courts was a fraud upon the court and not—as asserted by Defendants and as found by the court in granting reconsideration and dismissing the Complaint—a common law fraud upon Plaintiff. Finally, Plaintiff argued that Defendants waived the privilege by their litigation conduct and their untimely assertion of the privilege. The court denied Plaintiff's motion on September 4, 2024 (Pa1060) and stated:

So, the Court finds a number of things . . . that the litigation privilege applies to the suit, because there was no waiver to deliberately relinquish the privilege. And that the Benderson [sic] report in this matter does not satisfy the element of fraud required to implicate the crime fraud exception.

\* \* \*

I do find that - - that the fraud, if there is a fraud, it would have been as [Plaintiff's counsel] says, on the courts, whether it's the bankruptcy court or Judge Velazquez. And the relief would have been basically to go back to those courts.

I accept that argument that - - that- - it was discovered later when they have a right to go back and try to change that. I don't find that there was a waiver. The waiver argument, which was argued prior, cites to some other type of arguments about statute of limitations and arbitrations that are waived. And I don't find that is controlling on this case.

The fraud arguments made previously, whether the Court is wrong that the fraud - - if I interpreted the fraud to be on the plaintiff or the Court, I think at the end of the day, it doesn't make any difference. It wasn't on the plaintiff; it was on the Court. And if it was on the Court, the plaintiff's recourse would have been to go back to those courts.

\* \* \*

So, the Court concludes that it did not error [sic] in the two areas in which plaintiff's counsel has indicated, that - - that there was a waiver of the privilege. And that I had mistaken that the fraud was upon the plaintiff, where in fact, the fraud was on the bankruptcy court. I don't think at the end of the day that makes any difference in what we're doing here, and that there was no waiver. (3T, 18:18-20:10)

After his Complaint against the Defendants was dismissed, Plaintiff finalized his claim against O'Connor (Pa1069) and voluntarily dismissed his claim against Hodkinson. (Pa1068)

### Legal Standard

The Appellate Division reviews a trial court's decision on a motion for reconsideration under Rule 4:49-2 under an abuse of discretion standard. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "A court abuses its discretion

when its ‘decision is made without a rational explanation, inexplicably departed from established policies or rested on an impermissible basis.’” State v. Chavies, 247 N.J. 245, 257 (2021)(quoting State v. R.Y., 242 N.J. 48, 65 (2020). The trial court’s legal conclusions are reviewed *de novo*. State v. Erazo, 254 N.J. 277, 297 (2023).

## Legal Argument

### Point I

#### a. Defendants’ Motion for Reconsideration Should Have Been Denied

Rule 4:49-2 grants a trial court the power, to be exercised in its sound discretion, to review, revise, reconsider or modify an interlocutory order before entry of final judgment. “The rule applies when the court’s decision represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence or a good reason for the court to reconsider new information.” Pressler & Verniero, Current N.J. Court Rules, Comment 2, to R. 4:49-2. The Supreme Court in Guido v. Duane Morris, LP, 262 N.J. 79, 87-88 (2010) informed the bar that a motion for reconsideration:

is not properly brought simply because a litigant is dissatisfied with a judge's decision, nor is it an appropriate vehicle to supplement an inadequate record. . . . a reconsideration motion “is primarily an opportunity to seek to convince the court that either 1) it has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence.

*(citations, internal quotation marks and editing marks omitted).*

While reconsideration is a matter left to the sound discretion of the court, relief is appropriate only in extremely limited circumstances. As stated in D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990):

A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court. Rather, the preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal, or, if the Order is final, by a notice of appeal. Reconsideration should be utilized only for those cases which fall into that **narrow corridor** in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. . .

*(emphasis added)*

It is clear from its decision that the trial court properly considered all of Defendants' arguments for summary judgment, accepted that they had immunity because the dispute was in litigation, but denied dismissal because at least one critical material fact—"who was responsible for misleading the Court"—was disputed. (1T, 11:13-20)

In their motion for reconsideration, Defendants failed to demonstrate that the court's decision was an abuse of discretion and their motion should properly have been denied.

**b. Plaintiff's Motion for Reconsideration Should Have Been Granted**

In denying Plaintiff's motion for reconsideration, the court acknowledged that when it granted Defendants' motion for reconsideration, it misinterpreted Plaintiff's fraud claim to be an unproven claim of common law fraud instead of correctly recognizing it to be a claim of fraud upon the court. (3T, 19:17-19). The court then rationalized that its mistake had no significance:

I think at the end of the day, it doesn't make any difference. It wasn't on the plaintiff; it was on the Court. And if it was on the Court, the plaintiff's recourse would have been to go back to those courts. (3T, 19:19-23)

The court cited no authority and offered no explanation for why the fraud upon the court required recourse to the Bankruptcy and Superior Courts in the underlying cases - each of which had long since concluded - and could not support Plaintiff's Complaint in this case. The court also ignored the specific authority of Hill v. New Jersey Dept. of Corrections, 342 N.J. Super. 273 (App. Div. 2001) and Lighting Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) and the analogous case law under statutes of limitations and arbitration agreements, that the litigation privilege can be waived if not timely raised during a protracted litigation.

The decision denying Plaintiff's motion for reconsideration lacked rational explanation, departed from established case law, and rested on an impermissible basis. It constituted an abuse of discretion and should be reversed.

## Point II

### Defendants Waived the Litigation Privilege (Raised Below, 2T, 7:24-8:13)

“While the rule does not expressly so state, it is clear that ordinarily an affirmative defense that is not pleaded or otherwise timely raised is deemed to have been waived.” Pressler & Verniero, Current N.J. Court Rules, Comment 1.2.1 to R. 4:5-4 (GANN). “Pleading an affirmative defense in an answer does not insure its preservation; it may be deemed waived if not again adverted to during a protracted and complex discovery period, pretrial motions, and trial itself or if the defendant’s litigation conduct is inconsistent with reliance on the defense.” *Id.*

Waiver, which may be inferred from a party’s conduct, requires that:

[t]he party charged with the waiver knew of [its] legal rights and deliberately intended to relinquish them . . . [W]aiver implies an election by the party to dispense with something of value, or to forego some advantage which [one] might at [one’s] option have demanded and insisted on.

[Knorr v. Smeal, 178 N.J. 169, 177 (2003)]

Authority, while minimal, establishes that the defense of litigation privilege can be waived. In Hill the court addressed defendants’ contention—raised for the first time on appeal—that their actions in filing alleged false disciplinary proceedings against the plaintiff were protected by the litigation privilege. Despite recognizing that an appellate court ordinarily will not consider an issue

belatedly raised on appeal and notwithstanding its respect for the importance of the litigation privilege in the judicial system, it went on to address the issue. Hill 342 N.J. Super. at 293-94. It unequivocally recognized that “The litigation privilege may be waived if not raised at trial.” Id. at 294 (*citing*, Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1197 (3d Cir. 1993)).

In Lightning Lube, the defendant claimed on appeal that the allegations made in its counterclaim were absolutely privileged. The Third Circuit held that the defendant waived the litigation privilege by not asserting it at trial and by failing to assert it in its final pretrial order.<sup>8</sup>

Witco's second argument is that under New Jersey law evidence of an allegedly false judicial pleading is inadmissible to establish willfulness for purposes of tortious interference in a subsequent judicial proceeding. *See Rainer's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 117 A.2d 889 (1955) (allegations made in judicial proceeding cannot form predicate for action in defamation or tortious interference because such allegations are absolutely privileged). Thus, **Witco maintains that the counterclaim is absolutely privileged** and cannot be used as evidence of corporate malice. However, we agree with Lightning Lube that **if such a privilege existed in the circumstances of this case, Witco has waived it.** Although Witco objected to the introduction of evidence of the statements by its attorneys, it never objected to testimony regarding the counterclaim itself. Furthermore, **Witco did not assert the claim of privilege as an affirmative defense in its**

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<sup>8</sup> Under FRCP 16(e), a final pretrial conference “must be held as close to the start of trial as is reasonably possible. . . The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.”

**answer or joint pretrial order.** (Id., 1197) (Emphasis added)

Hill and Lightning Lube recognized that the litigation privilege can be waived if not timely asserted. Hill’s assertion of the privilege after trial was untimely; Witco’s failure to assert the privilege immediately before trial in the FRCP 16(e) final pretrial order was untimely. These cases, as Plaintiff argued to the trial court, are consistent with the greater body of decisional law that other absolute defenses—statute of limitations and arbitration—are subject to waiver if not timely asserted or if first raised, as Pressler and Verniero noted, only after a period of protracted or complex discovery.

**a. Statutes of Limitation**

The primary purpose behind statutes of limitation: “is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; another is to stimulate litigants to pursue their causes of action diligently and to prevent the litigation of stale claims.” Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329, 337 (1978). Here—like the defendants in Williams v. Bell Telephone Laboratories, Inc., 132 N.J. 109, 118(1993)(holding that defendant, which first filed a motion to dismiss on limitations grounds after a jury trial “waived the statute-of-limitations defense by failing to assert that defense at any stage of the proceedings after pleading the statute in its answer.”), Zaccardi v. Becker, 88 N.J. 245, 256-60 (1982)(limitations

defense denied where case remained on the trial calendar for 17 months and adjourned 10 times for discovery without defendants taking any steps to dismiss); and White v. Karlson, 354 N.J. Super. 284, 292 (App. Div. 2002)(statute of limitations waived by defendant who filed motion to dismiss eleven months after filing answer and after participating in court-ordered arbitration, and participating in discovery).

Statutes of limitation are not self-executing. Zaccardi, 88 N.J. at 256. They require that the alleged right be timely asserted. State v. United States Steel Corp., 22 N.J. 341, 358 (1956).

In each of these cases, the courts barred the defense and found that no unforeseen or insurmountable developments prevented the defendants from pursuing the limitations defense. As noted in Williams, 132 N.J. at 120:

The statute is designed to order the business of litigants and the courts. In the circumstances of this appeal—in which a failure to find waiver would only frustrate those objectives—we refuse to apply the statute to render void an otherwise legitimate claim.

**b. Arbitration Agreements**

In Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), the Court determined that an employer waived its right to arbitrate its employee's wrongful termination lawsuit by waiting 21 months and actively participating in the

litigation before moving to compel arbitration. In explaining its decision, the Court stated:

In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive.

[Id. at 280-281]

Here, Defendants asserted in their motion for summary judgment that it was only after reviewing the unreported decision in Coull v. EisnerAmper, LLP, 2023 WL 8365688 (Dec. 4, 2023)(**Pa844**) that they reasonably could have believed that summary judgment would have been successful when litigation privilege was at issue. But, as the court appropriately noted in its April 26, 2024 decision, Coull as an unpublished opinion did not constitute binding precedent on the court (**1T, 6:18-23**). And Coull itself announced no new rule but simply recognized that litigation immunity was an established doctrine:

“It is well-settled that a witness in a judicial or quasi-judicial proceeding enjoys an absolute immunity from civil suit for his words and actions relevant to the judicial proceedings.” [quoting Durand Equipment Co., Inc. v. Superior Carbon Prods., Inc., 248 N.J. Super. 581, 583 (App. Div. 1991)(Pa845)

See Hawkins v. Harris, 141 N.J. 207, 214 (1995)(“Our doctrine derives from the English rule of immunity.”); see also, Loigman v. Township Committee of Township of Middletown, 185 N.J. 566, 579 (2005)(“We are persuaded that the litigation privilege was firmly rooted in the common law as of 1871 . . .”).

Nor can Defendants find support, as they argued below, that Cipriani Builders, Inc. v. Madden, 389 N.J. Super. 154, 173-74 (App. Div. 2006) supported their delayed assertion of the privilege. Cipriani involved the wrongful expulsion and defamation of a member from a trade association. The court found that “the discovery required to determine the availability of a limitations defense. . . were the depositions of persons who heard the alleged defamatory statements . . . [and] this was not the kind of case in which it would have made sense to undertake limited discovery relevant to the limitations defense, while deferring discovery on the merits.” Id. at 173-74

Defendants’ decision, whether strategic or ill-advised, to conduct prolonged litigation for more than four years and to expose both the Plaintiff and the judicial system to the time, effort and expense of litigation is inconsistent with their

contention that the litigation privilege conferred them with immediate and absolute immunity.

A trial court's decision on the legal issue of waiver is reviewable de novo. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020) Applying the Cole factors to this case, this court should find that Defendants waived their right to dismissal under the litigation privilege: first, they never asserted litigation privilege as an affirmative defense in their Answer; next, they robustly participated in the defense of Plaintiff's claim by propounding and answering interrogatories; propounding requests for, and producing documents; taking and attending eight depositions; and actually preparing the case for trial by filing a 100 page in limine motion and creating a Rule 4:25-3 Pretrial Memoranda; and finally, they waited four and one half years—more than twice the twenty-one month delay the Cole court found supported waiver of the right to arbitration—until the eve of the eighth scheduled trial date.

While Cole mentions “the resulting prejudice suffered by the other party” as one factor to consider, it also noted that prejudice is not an indispensable factor in a waiver analysis: “If we define prejudice as “the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—[then prejudice] occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.” Cole, 215 N.J. at 282.

Nothing prevented or inhibited Defendants from filing a motion to dismiss in lieu of an Answer and their failure to do so and their delay in raising the defense for years and after numerous trial dates were scheduled requires this Court to conclude that Defendants' conduct is inconsistent with their belatedly asserted claim of absolute immunity, and that they waived the litigation privilege.

### **Point III**

#### **The Purpose Of The Litigation Privilege Would Not Be Served When There Is A Fraud Upon The Court (Raised Below, 3T, 12:23-13:2)**

Logic and policies underlying the litigation privilege support application of fraud upon the court as an exception to the privilege.

##### **a. The Litigation Privilege**

The common law litigation privilege is designed to protect the policy interest in having a well-informed legal system. The privilege is grounded “on the need for unfettered expression critical to advancing the underlying government interest at stake in those settings.” Hawkins v. Harris, 141 N.J. 207, 213 (1995) (citation omitted). “The privilege grows out of the strong public policy ‘that persons in such circumstances be permitted to speak and write freely without the restraint of fear of an ensuing defamation action, this sense of freedom being indispensable to the due administration of justice.’” Durand Equipment Co., Inc. v. Superior Carbon

Products, Inc., 248 N.J. Super. 581, 584)(App. Div. 1991)(quoting Fenning v. S.G. Holding. Corp., 47 N.J. Super. 110, 117 (App. Div. 1957).

**b. The Crime Fraud Exception**

By analogy, the crime fraud exception to many privileges which recognize the same salutary policy considerations as the litigation privilege, supports application of the fraud upon the court as an exception.

In Fellerman v. Bradley, 99 N.J. 493 (1985), an attorney, who claimed privilege, was ordered to disclose his client's address to the trial court. In affirming the order based upon the crime fraud exception, the Court said:

The "crime or fraud" exception to the privilege represents a statutory recognition of a situation in which the purpose of the privilege would not be served by its enforcement. The exception encompasses a type of communication that is alien to the fundamental reasons that underlie the privilege . . . Thus, when a client seeks the aid of an attorney for the purpose of committing a fraud, a communication in furtherance of that design is not privileged.

[Fellerman, 99 N.J. at 503]

The crime fraud exception also reflects a recognition that the privilege should give way when confronted with concerns relating to the proper and effective administration of justice. This rationale pervades many of the statutory

privileges which strip persons (clients, patients, spouses, penitents, etc.<sup>9</sup>) of their use of their attorneys (physicians, spouses, clergy, etc.) to help them accomplish illegal or fraudulent objectives. As Fellerman said of the crime fraud exception to the attorney-client privilege: “The exception encompasses a type of communication that is alien to the fundamental reasons that underlie the privilege.”

(Id.)

As privileges interfere with the truth-seeking function of the courts, they are disfavored and narrowly construed. State v. Terry, 218 N.J. 224, 239 (2014) (“courts construe privileges narrowly because they prevent factfinders from hearing relevant evidence and thus undermine the search for truth.”); State v. Mauti, 208 N.J. 519, 531 (2012) (“Privileges have “disfavored status” because they have an effect on the truth-seeking function.” (citation omitted); State v. Szemple, 135 N.J. 406, 414 (1994)(citation omitted)(“[P]rivileges should always ‘be construed and applied in sensible accommodation to the aim of a just result’”)

### **c. Fraud on the Court**

A fraud on the court occurs “where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to

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<sup>9</sup> N.J.R.E. 504 (Lawyer-Client); N.J.R.E 506 (Patient-Physician); N.J.R.E. 509 (Marital Privilege); N.J.R.E. 511 (Priest-Penitent); N.J.R.E. 519 (Mediator privilege); and, N.J.R.E. 534 (Mental Health Provider-Patient)

adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Triffin v. Automatic Data Processing, Inc., 394 N.J. Super. 237, 251 (App. Div. 2007). "Unlike common law fraud on a party, fraud on a court does not require reliance." Id. While most often invoked to vacate a judgment, the concept applies to any "scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense." Hyland v. Kirland, 204 N.J. Super. 345, 374 (Ch. Div. 1985) (citation omitted).

The conclusion should be unassailable, that the participants in this case embarked on a scheme designed to fool the judicial system and to improperly influence the courts handling of Plaintiff's bankruptcy claim and Superior Court judgment. Hodkinson and O'Connor's creation of lists of expenditures which they knowingly and falsely represented to be Plaintiff's conversion of business funds and their manipulation of that data to assure that the total exceeded Plaintiff's bankruptcy claim and judgment against the businesses was false. That false result was magnified by Defendants' wholesale and uncritical acceptance of the that data without subjecting it to review, testing, question, or examination, and their adoption of the information which Hodkinson said was entirely his work product as their "professional" analysis, without revealing to the Bankruptcy Court or the Superior Court their close relationship to Hodkinson and O'Connor's attorney and

their extensive meetings with O'Connor, Hodkinson and Turner. That information which was never disclosed to the Bankruptcy or the Superior Court would likely have raised questions by about the *bona fides* of the Bederson Report. The respectability and professional reputation which Defendants conferred on Hodkinson and O'Connor's scheme was designed to defraud the courts and interfere with the court's truth-seeking function.

**d. Fraud is Anathema to the Purpose and Policy of the Litigation Privilege**

Defendants' creation and use of the Bederson Report, a false analysis cloaked in the integrity and prestige of the accounting firm, was a fraud upon both the bankruptcy and state courts. It falsely represented itself to be Raquet's "analysis" of Park Avenue's books and records when it was nothing more than a compilation of QuickBooks entries "cherry-picked" by Hodkinson and O'Connor which Defendants never questioned, examined, or tested, but simply put into a more professional form. That misrepresentation to the Bankruptcy and State courts contravenes the public policy underlying the litigation privilege: As the court in Durand Equipment Co., Inc. v. Superior Carbon Products, Inc., 248 N.J. 581, 584-85 (App. Div. 1991) noted:

The truth-seeking function of the court demands evidence.

\* \* \*

The court's need for evidence demands that all participants in the process of gathering evidence for use

at trial be immune from any liability for damages for their part in that process.

\* \* \*

The absolute immunity granted to witnesses is not designed to benefit the dishonest witness but to further the broad public interest in having witnesses who are unafraid to testify fully and openly.

As Fellerman said in applying the crime-fraud exception to the attorney-client privilege: “the enforcement of the privilege would result in a direct and clear impairment of the administration of justice . . . [and] would totally frustrate the orderly processes of the judicial system.” Fellerman, 99 N.J. at 507.

Overlooking Defendants’ fraud upon the Bankruptcy Court and the Superior Court contravenes the truth-seeking function underlying the litigation privilege and impairs the integrity of the judicial system. It defies reason to think that the policy underlying the litigation privilege could ever countenance Defendants’ fraud.

### **Conclusion**

The trial court’s decisions, which first granted Defendants’ motion for reconsideration and then denied Plaintiff’s motion for reconsideration, were both, and for related reasons erroneous: the court, in granting Defendants’ motion completely misunderstood Plaintiff’s conspiracy claim as a fraud upon him, rather than as a fraud upon the court; both decisions overlooked or failed to appreciate the significance of case law, both direct and analogous, that the litigation privilege could be waived if not timely asserted, and both decisions failed to recognize that a

fraud upon the court is antithetical to the principles underlying the litigation privilege.

For these reasons, the Court should find that it was error to grant Defendants' motion for reconsideration, error to dismiss Plaintiff's Complaint, and error to deny Plaintiff's motion for reconsideration. Upon these conclusions, this Court should order Plaintiff's Complaint to be reinstated and remand the case for trial.

Respectfully submitted,

*Steven Menaker*

Steven Menaker  
Attorney for Plaintiff/Appellant  
Karl Halligan

SM:al

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KARL HALLIGAN,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff/Appellant,	:	Docket No. A-000793-24
	:	
v.	:	<b>Civil Action</b>
	:	
BEDERSON, LLP, SEAN RAQUET,	:	On Appeal From:
JOHN O'CONNOR and HARRY	:	Superior Court of New Jersey
HODKINSON,	:	Law Division, Hudson County
	:	Docket No. HUD-L-1494-19
Defendants/Respondents.	:	
	:	Sat Below:
	:	Hon. Joseph A. Turula, P.J.Cv.
	:	

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**BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS BEDERSON,  
LLP AND SEAN RAQUET IN OPPOSITION TO PLAINTIFF/APPELLANT  
KARL HALLIGAN'S APPEAL**

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## **PRELIMINARY STATEMENT**

This appeal by plaintiff/appellant Karl Halligan (“Halligan”) presents three simple questions: (1) Are Halligan’s claims against defendants/respondents Bederson, LLP (“Bederson”) and Sean Raquet (“Raquet”) (collectively, the “Bederson Defendants”) barred by the litigation privilege? (2) Did the Bederson Defendants waive the litigation privilege? (3) Is there a crime-fraud exception to the litigation privilege and, if so, did Halligan demonstrate a prima facie case of fraud?

The answer to the first question is yes. The answer to the second and third questions is no.

Notwithstanding the tortured procedural history and the confusing factual morass presented in Halligan’s brief, the key facts of this case are quite simple. Raquet, an accountant employed by Bederson, was retained as an expert witness in a prior bankruptcy matter involving Halligan and defendants/respondents Harry Hodkinson (“Hodkinson”) and John O’Connor (“O’Connor”). Raquet prepared a report (the “Bederson Report”) that was used by Hodkinson and O’Connor to challenge Halligan’s claim in the bankruptcy matter, was later used by the trustee to support a claim against Halligan, and was further used by Hodkinson and O’Connor to vacate a prior state court judgment against two business entities (Park Avenue Bar

& Grill, LLC (“Park Avenue”) and H&H Real Estate Enterprises, LLC (“H&H”) in which Halligan, Hodkinson, and O’Connor had been involved.

In the present case on appeal, Halligan’s claims against the Bederson Defendants are that the Bederson Defendants acted negligently and fraudulently in preparing the Bederson Report. On the Bederson Defendants’ initial motion for summary judgment, the trial court found that Halligan’s claims against the Bederson Defendants were subject to the litigation privilege, but that summary judgment was precluded by questions of fact as to whether a fraud had occurred. On the Bederson Defendants’ motion for reconsideration, the trial court reconsidered and found that Halligan had not established the prima facie elements of a claim of fraud – rendering moot any need to consider Halligan’s request to create a crime-fraud exception to the litigation privilege – and then granted summary judgment to the Bederson Defendants on the basis of the litigation privilege. The trial court then agreed to hear Halligan’s own subsequent motion for reconsideration, and affirmed its prior decision that Halligan had not established the prima facie elements of a claim of fraud, and that the litigation privilege applied to Halligan’s claims and had not been waived, and so affirmed its grant of summary judgment in favor of the Bederson Defendants.

The trial court got it right. The decision by the trial court to apply the litigation privilege to Halligan’s claims against the Bederson Defendants was correct. The

trial court's decision to reject Halligan's argument that the Bederson Defendants had waived the litigation privilege was also correct. Finally, the trial court's decision that Halligan failed to establish the prima facie elements of a fraud claim, thus rendering moot any consideration of creating a crime-fraud exception to the litigation privilege, was correct as well.

This court should affirm the entry of summary judgment in favor of the Bederson Defendants.

## PROCEDURAL HISTORY

The Bederson Defendants filed a motion for summary judgment in January 2024 to dismiss Halligan’s claims against them as barred by the litigation privilege. (Pa1; 1T at 6-7; 7T at 4. 8-12<sup>1</sup>) Halligan opposed and argued that the motion was untimely and that the litigation privilege was subject to a “crime-fraud exception.” (1T at 7,8; 7T at 14-18) The Bederson Defendants demonstrated that the motion was not untimely, that there is no “crime-fraud exception” to the litigation privilege and that, even if a crime-fraud exception did exist, Halligan failed to demonstrate the required elements of a prima facie claim of fraud. (1T at 8-9, 7T at 19-20)

After hearing oral argument on February 16, 2024, the trial court issued an oral decision on April 26, 2024, followed by a written Order on April 29, 2024. (1T at 3-11; Pa880) In this initial decision, the trial court agreed that the Bederson Defendants’ motion was not untimely and found that, while the litigation privilege applied to Halligan’s claims against the Bederson Defendants, there was a question

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<sup>1</sup> The Bederson Defendants will follow Halligan’s transcript citation designations:

- 1T April 26, 2024 transcript
- 2T July 12, 2024 transcript
- 3T September 4, 2024 transcript
- 4T September 7, 2022 transcript
- 5T March 20, 2015 transcript
- 6T September 29, 2017 transcript
- 7T February 16, 2024 transcript

of fact as to whether a fraud had occurred, requiring required denial of the motion. (1T at 3-11)

The Bederson Defendants filed a motion for reconsideration on May 20, 2024, because, although the trial court correctly found the litigation privilege applicable, the trial court failed to consider that (i) there is no “crime-fraud” exception to the litigation privilege, and (ii) Halligan did not and could not establish three of the requisite elements of a prima facie claim of fraud. (Pa882; 2T at 5-7) Halligan’s opposition again argued for a “crime-fraud” exception, but for the first time, he also argued that the Bederson Defendants had waived the litigation privilege and that the litigation privilege did not apply because the Bederson Report had been issued in a prior litigation. (2T at 7-9) The Bederson Defendants’ reply explained why they had not waived the litigation privilege and why the litigation privilege did apply to Halligan’s claims against them, and the Bederson Defendants also reiterated that Halligan failed to establish several elements of a claim of fraud and that there is no “crime-fraud” exception to the litigation privilege in New Jersey law. (2T at 9-10)

After hearing oral argument on July 3, 2024, the trial court issued an oral decision on July 12, 2024. (2T at 10-15) The trial court agreed that it had made a mistake in its prior ruling. (2T at 3, 10-15) It found that the “litigation privilege is absolute,” that the Bederson Defendants did not waive the litigation privilege and that it applied to Halligan’s claims, and that even if there were a “crime-fraud”

exception to the litigation privilege, Halligan had failed to establish all the requisite elements of a claim for fraud. (2T at 10-15) The trial court then granted the motion for reconsideration and entered summary judgment in favor of the Bederson Defendants, which decision was subsequently embodied in an Order dated July 15, 2024. (2T at 15; Pa894)

On August 14, 2024, Halligan then filed his own motion for reconsideration, arguing again that the Bederson Defendants had waived the litigation privilege, that the litigation privilege did not apply because the Bederson Report was issued in prior litigation, that there should be a “crime-fraud” exception, and that the alleged fraud had been perpetrated not on Halligan himself, but instead on “the court.” (Pa896; 3T at 3-8) The Bederson Defendants’ opposition, and Halligan’s reply, repeated their prior arguments on these points. (3T at 3-20)

The trial court heard oral argument on September 4, 2024, and held, again, that the litigation privilege applied, that the Bederson Defendants did not waive the litigation privilege, that Halligan did not establish a prima facie claim of fraud, and that if, as Halligan argued, there had been fraud on “the court,” Halligan’s remedy would have been to seek relief from the courts that had presided over the prior proceedings in which the Bederson Report had been used, rather than filing a separate claim for damages against the Bederson Defendants. (3T at 15-20)

Following the trial court's September 2024 rulings, Halligan, who had previously obtained a default judgment against O'Connor, voluntarily dismissed his claims against Hodkinson and filed this appeal. (Pa1062)

## COUNTER-STATEMENT OF FACTS

The full factual background of this case, involving multiple individual and corporate parties, long-running prior state court litigation, and federal bankruptcy proceedings, is set forth at length in the motion record. (Pa3-Pa25) However, the key facts pertinent to the issues raised in this appeal are really quite simple:

Halligan, O'Connor, and Hodkinson owned two business ventures, H&H and Park Avenue. (Pa8) Their business relationship soured, and Halligan sued O'Connor and Hodkinson in New Jersey Superior Court in 2012. (Pa11) After a 2013 trial, Judge Velazquez found that Halligan breached the H&H and Park Avenue operating agreements; decided that Park Avenue and H&H owed Halligan money for unpaid equity compensation, salary, and tax payments; and dissociated Halligan from H&H and Park Avenue. (Pa10-Pa12)

In 2014, Park Avenue filed for bankruptcy, with Halligan listed as a creditor. (Pa13) The Bederson Defendants were retained as expert accountants in the bankruptcy case to analyze the books and records of Park Avenue. (Pa13-Pa14) They then did what litigation experts do: they analyzed documents and records, they spoke with people with knowledge, and they reviewed information that had been assembled by Hodkinson and O'Connor, and then they issued a report (the Bederson Report). (Pa14-Pa19; Pa354; Pa396; Pa400; Pa404; Pa406; Pa409-Pa412; Pa420-Pa422; Pa492-Pa531)

In addition to being used in the bankruptcy case, the Bederson Report was also used by Hodkinson and O'Connor as an exhibit to their successful motion to vacate the prior judgment issued by Judge Velazquez, which resulted in the relitigation of Halligan's previously asserted claims against Hodkinson, O'Connor, Park Avenue, and H&H. (Pa19-Pa24) The Bederson Report was also used by the Bankruptcy Trustee in a separate adversary proceeding against Halligan in 2015, which Halligan quickly settled. (Pa24-Pa25)

In 2019, Halligan filed this present case against Hodkinson and O'Connor as well as the Bederson Defendants, asserting claims against the Bederson Defendants based on their preparation of the Bederson Report. (Pa3-Pa4; Pa35-Pa53)

## **LEGAL ARGUMENT**

### **HALLIGAN’S CLAIMS AGAINST THE BEDERSON DEFENDANTS ARE BARRED BY THE LITIGATION PRIVILEGE AND WERE PROPERLY DISMISSED ON SUMMARY JUDGMENT BY THE TRIAL COURT**

#### **A. STANDARDS OF REVIEW**

This court’s review of the trial court’s summary judgment decisions is de novo, e.g., Samolyk v. Berthe, 251 N.J. 73 (2022), as this court is to use “the same standard governing the motion judge’s decision,” but owes “no special deference to the motion judge’s legal analysis.” Russi v. City of Newark, 470 N.J. Super. 615, 619-20 (App. Div. 2022) (citations omitted). However, this court should review the trial court’s procedural decisions to reconsider its prior motion rulings under Rule 4:42-2 under an abuse of discretion standard, as a trial court’s decision to reconsider its prior interlocutory rulings and orders is within the trial court’s sound discretion. E.g., Lombardi v. Masso, 207 N.J. 517, 536 (2011).

#### **B. THE TRIAL COURT PROPERLY EXERCISED ITS SOUND DISCRETION UNDER RULE 4:42-2**

Incorrectly citing Rule 4:49-2 and conflating the trial court’s decisions to reconsider its prior rulings with the trial court’s rulings on the merits of the summary judgment issues, Halligan argues that the trial court erred in granting the Bederson Defendants’ motion for reconsideration and in denying his own

subsequent motion for reconsideration.<sup>2</sup> Halligan's reliance on Rule 4:49-2 is misplaced because that rule pertains to a motion to alter or amend a final judgment or order, not an interlocutory order. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Rule 4:42-2 is the correct rule for a trial court's reconsideration of an interlocutory order. Id. at 133-34. Under Rule 4:42-2, a trial court may, guided by its sound discretion and the interests of justice, reconsider its prior interlocutory decisions and orders. Id. at 134.

Here, the trial court correctly exercised its discretion with respect to both the Bederson Defendants' motion for reconsideration and Halligan's motion for reconsideration when it agreed to consider both of the reconsideration motions. Indeed, Halligan's complaints about the trial court's rulings are really focused on the merits of the trial court's decisions, not the trial court's agreement to hear and (re)consider its prior interlocutory decisions and orders.

**C. THE TRIAL COURT CORRECTLY FOUND THAT THE LITIGATION PRIVILEGE APPLIES**

At every opportunity, the trial court held that the litigation privilege applies to the Bederson Defendants. In its initial ruling on the Bederson Defendants' motion for summary judgment, the trial court found that the

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<sup>2</sup> In addition to incorrectly relying on Rule 4:49-2 on this appeal, Halligan similarly relied incorrectly on Rule 4:49-2 in opposition to the Bederson Defendants' motion for reconsideration. However, in support of his own motion for reconsideration, Halligan properly relied on Rule 4:42-2.

litigation privilege applies to Halligan’s claims against the Bederson Defendants, and the trial court never wavered from this conclusion. (1T at 10; 2T at 5, 12; 3T at 18)

“It is well-settled that a witness in a judicial or quasi-judicial proceeding enjoys an absolute immunity from civil suit for his words and actions relevant to the judicial proceedings.” Durand Equip. Co. v. Superior Carbon Prods., Inc., 248 N.J. Super. 581, 583 (App. Div. 1991). “This absolute immunity is afforded even if ‘the words are written or spoken maliciously, without any justification or excuse, and from personal ill will or anger . . . .’” Id. at 583-84 (quoting DeViva v. Ascher, 228 N.J. Super. 453, 457 (App. Div. 1988)). The litigation privilege is premised on the notion that people involved in litigation should enjoy the freedom “to speak and write freely” so they can express the truth of the matter as they view it “without fear of liability.” Williams v. Kenney, 379 N.J. Super. 118, 134 (App. Div. 2005) (internal citations omitted); see also Loigman v. Twp. Comm. of Middletown, 185 N.J. 566, 581 (2006) (explaining that the purpose of the litigation privilege is “to ensure that participants in the judicial process act without fear of the threat of ruinous civil litigation when performing their respective functions”); Hawkins v. Harris, 141 N.J. 207, 217 (1995) (noting “we wish witnesses to have absolute freedom to express the truth as they view it”).

New Jersey law establishes, and Halligan does not contest, that the litigation privilege applies to “any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” Hawkins, 141 N.J. at 216. The litigation privilege “is not limited to statements made in a courtroom during a trial” and “extends to all statements or communications in connection with the judicial proceeding.” Id. (quoting Ruberton v. Gabage, 280 N.J. Super. 125, 133 (App. Div. 1995)). The scope of the litigation privilege extends to expert witnesses and includes their expert reports even in the absence of testimony at trial. Coull v. EisnerAmper, LLP, 2023 N.J. Super. Unpub. LEXIS 2217, at \*7 (N.J. Super. Ct. App. Div. Dec. 4, 2023) (relying on Commercial Ins. Co. of Newark v. Steiger, 395 N.J. Super. 109 (App. Div. 2007)). In fact, the Coull decision specifically applied the litigation privilege to a report prepared by an expert accountant in the course of litigation. Id.

There is, and can be, no question that the Bederson Report falls squarely within the scope of the litigation privilege, as it meets all four requisite elements established under New Jersey law. See Hawkins, 141 N.J. at 216. Indeed, the trial court clearly and repeatedly found that the litigation privilege applies to the Bederson Report, and Halligan does not contest this.

**D. THE BEDERSON DEFENDANTS DID NOT WAIVE THE LITIGATION PRIVILEGE**

New Jersey law recognizes that “the litigation privilege may be waived if not raised at trial.” Hill v. N.J. Dep’t of Corrections, 342 N.J. Super. 273, 294 (App. Div. 2001); see also Lightning Lube v. Witco Corp., 4 F.3d 1153, 1197 (3d Cir. 1993) (holding that the litigation privilege was waived when it was not asserted as an affirmative defense, was not included in the parties’ pre-trial order, and was not raised during trial). Halligan’s reliance on Hill and Lightning Lube in support of his waiver argument is wholly inapposite, as those cases impose waiver because the defense was not raised at trial. Here, Halligan does not and cannot dispute that the Bederson Defendants obviously raised the litigation privilege prior to trial. Not only did the Bederson Defendants raise the affirmative defense of privilege in their answer, but the Bederson Defendants clearly raised the litigation privilege as the cornerstone of their pre-trial motion for summary judgment, entirely consistent with Hill and Lightning Lube.

Thus, under clear New Jersey law, the only correct conclusion is that the Bederson Defendants did not waive the litigation privilege because they raised it before trial. In an effort to avoid this obvious conclusion, Halligan relies on cases addressing waiver in completely different contexts – the defenses of statutes of limitations and arbitration agreements. Caselaw addressing the

circumstances in which those defenses can and should be pursued is not controlling on when the litigation privilege can and should be asserted – especially when, as noted above, there is clear New Jersey precedent that delimits when and how the litigation privilege can be waived.

Moreover, those defenses serve very different purposes than the litigation privilege. The statute of limitations is intended to prevent litigation of stale claims, and certainly that aim is not furthered by allowing a claim to get even staler by permitting a defendant to delay an inordinate amount of time before raising it. Arbitration agreements seek to avoid the resource drain of litigation by allowing for pursuit of claims in arbitration. However, an arbitration agreement is a private contract, and if the parties to that agreement elect not to exercise the right to arbitration and choose instead to consume litigation resources, that is a choice that is theirs to make. The litigation privilege, on the other hand, addresses whether a statement made in the course of a litigation, including by an expert witness, can even give rise to a claim against the party that made the statement, and thus serves the entirely different goal of permitting participants in litigation to provide opinions without fear of facing precisely the type of claims that Halligan has asserted against the Bederson Defendants.

Based on clear New Jersey law and the intended function of the litigation privilege, the Bederson Defendants did not waive the litigation privilege defense, and the trial court was correct in so finding.

**E. THERE IS NO CRIME-FRAUD EXCEPTION TO THE LITIGATION PRIVILEGE, AND EVEN IF THERE WERE, HALLIGAN FAILED TO ESTABLISH ALL OF THE REQUISITE ELEMENTS OF A FRAUD CLAIM**

Last but not least, Halligan argues that this court should establish new law in New Jersey by creating a novel “crime-fraud” exception to the litigation privilege. This court should decline to so expand New Jersey law in contravention of clear precedent, as the creation of such an exception would actually thwart the goals of the litigation privilege. To do so in this case would be further inappropriate because Halligan has failed to even establish a prima facie claim of fraud on which to base such a newly created exception.

**1. There Is No Crime-Fraud Exception To The Litigation Privilege**

No New Jersey case has ever recognized a “crime-fraud” exception to the litigation privilege; the only “exception” to the litigation privilege recognized under New Jersey law is malicious prosecution. Baglini v. Lauletta, 338 N.J. Super. 282, 297 (App. Div. 2001) (stating “[t]he one tort excepted from the reach of the litigation privilege is malicious prosecution, or malicious use of process”). Other than this one narrow exception (which is obviously not applicable here because there is and can be no malicious prosecution claim by

Halligan against the Bederson Defendants<sup>3</sup>), the litigation privilege is broadly applied as an absolute privilege in order to achieve its ends – “to ensure that participants in the judicial process act without fear of the threat of ruinous civil litigation when performing their respective functions.” Loigman, 185 N.J. at 581. As stated above, in applying the litigation privilege, New Jersey courts consider neither the justness of the immune party’s motives nor the sincerity of that party’s communications. Id. at 586. Indeed, the litigation privilege applies under New Jersey law “even if ‘the words are written or spoken maliciously, without any justification or excuse, and from personal ill will or anger . . . .’” Durand, 248 N.J. Super. at 583-84.

In fact, the important policy goals supporting the litigation privilege – that participants in litigation should enjoy the freedom “to speak and write freely” so they can express the truth of the matter as they view it “without fear of liability,” e.g., Loigman, 185 N.J. at 58; Hawkins, 141 N.J. at 217; Williams, 379 N.J. Super. at 134 – would be undermined, not advanced, by the creation of a “crime-fraud” exception. This is because “[a] witness who knows that he may be forced to defend a subsequent lawsuit ‘might be inclined to shade his

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<sup>3</sup> A claim for malicious prosecution requires proof of four elements: (1) a criminal action was instituted by the defendant against the plaintiff, (2) the action was motivated by malice, (3) there was an absence of probable cause to prosecute, and (4) the action was terminated favorably to the plaintiff. LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009).

testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.”” Durand, 248 N.J. Super. at 584 (quoting Briscoe v. LaHue, 460 U.S. 325, 333 (1983)).

**2. Even If There Were A “Crime-Fraud” Exception To The Litigation Privilege, Halligan Fails To Establish All Of The Elements Of A Claim For Fraud**

Even if there were a “crime-fraud” exception to the litigation privilege under New Jersey law – and there is not – it would not apply here because, as the trial court repeatedly recognized, Halligan failed to establish a prima facie claim of fraud against the Bederson Defendants. (2T at 12-13; 3T at 18-20) To establish common-law fraud against the Bederson Defendants under New Jersey law, Halligan must show “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person, and (5) resulting damages.” Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). The trial court correctly determined that Halligan failed to establish several of these requisite elements.

First, there is no evidence in the motion record to establish that the Bederson Defendants knew or believed that the Bederson Report contained false information. While Halligan faults Raquet for not undertaking a more

robust review and analysis of the information provided to him by Hodkinson and O'Connor, Halligan points to no evidence whatsoever (as there is none in the record) to establish that the Bederson Defendants knew or believed any of the contents of the Bederson Report to be false.

Indeed, while Halligan argues (Pb33) about the Bederson Defendants' "wholesale and uncritical acceptance of the ... data [provided by Hodkinson and O'Connor] without subjecting it to review, testing, question, or examination, and their adoption of the information which Hodkinson said was entirely his work product ....[,]" Halligan cites no evidence in the record – and in fact does not even make an assertion -- that the Bederson Defendants knew or believed this information to be false. Rather, Halligan's arguments regarding falsity are all directed against Hodkinson and O'Connor, as this sentence from Halligan's brief (Pb33) makes clear: "Hodkinson and O'Connor's creation of lists of expenditures which they knowingly and falsely represented to be Plaintiff's conversion of business funds and their manipulation of that data to assure that the total exceeded Plaintiff's bankruptcy claim and judgment against the businesses was false."

In addition, the record fails to contain, and Halligan fails to establish, that the Bederson Defendants either intended for Halligan to rely on the Bederson Report or that Halligan actually did rely on the Bederson Report. Indeed,

Halligan's brief fails to even address these essential elements of a claim for fraud. This is not surprising, as Halligan disputed many of the assertions in the Bederson Report, and he logically could not have "relied" on assertions that he himself disputed. See Triffin v. Automatic Data Processing, Inc., 394 N.J. Super. 237, 248 (App. Div. 2007) (explaining that there is no reliance when the party that claims to have relied on a statement disputed the veracity of the statement).

Unable to demonstrate reliance, Halligan seeks to eschew these issues and argues that the alleged fraud was not committed on him, but was rather a "fraud on the court." This argument fails to save Halligan for several reasons.

First and foremost, as the court in Giles v. Phelan, Hallinan & Schmiegl, L.L.P., 901 F. Supp. 2d 509, 526 (D.N.J. 2012) held, there is no exception to the litigation privilege in New Jersey for claims of fraud, including fraud on the court.

Second, Halligan cites nothing to demonstrate that there is a separate, independent cause of action under New Jersey law for damages against another party for an alleged fraud on the court. Fraud on the court can be, of course, a basis for imposing sanctions against a party or participant in litigation. See Triffin, 394 N.J. Super. at 251 (stating that "courts possess an inherent power to sanction an individual for committing a fraud on the court"). However, this means that a party seeking relief for an alleged fraud on the court should do so before the court on which the fraud was allegedly perpetrated. See, e.g., Fellerman v. Bradley, 99 N.J.

493, 504 (1985) (stating that “[t]he concept of ‘fraud on the court’ has most often been applied as a ground for vacating a judgment”) (citing Hyland v. Kirkman, 157 N.J. Super. 565, 583-84 (Chan. Div. 1978). Because Halligan never sought relief from the Bankruptcy Court nor from the Superior Court that presided over the prior state court litigation relating to the use of the Bederson Report in any of those proceedings, the trial court in this case correctly determined that Halligan’s effort to allege a fraud on the court in this case was misplaced.

Last but not least, just as he failed to establish all of the elements of a claim of common law fraud, Halligan did not and does not establish all of the elements of a claim of fraud on the court. To establish such a claim, Halligan was required to show, through clear and convincing evidence, that (1) “a party has sentiently” (2) “set in motion some unconscionable scheme” (3) “calculated to interfere with the judicial system’s ability impartially to adjudicate a matter” (4) “by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.” Triffin, 394 N.J. Super. at 251.

While these elements do not include reliance, they do include an element of knowledge of falsity – how else, for example, would a party “sentiently” “set in motion some unconscionable scheme” if that party did not know or believe that the information on which it acted was false. For the reasons set forth above, Halligan fails to establish this element.

Moreover, Halligan fails to point to any evidence in the motion record as to how the Bankruptcy Court or the court in the prior Superior Court action was “improperly influenc[ed]” or how Halligan was “unfairly hamper[ed]” in presenting his claims and defenses. Indeed, not only did Halligan elect to enter into a settlement with the Bankruptcy Trustee, but Halligan at all times had the opportunity to challenge, both before the Bankruptcy Court and the court in the prior Superior Court action, the assertions in the Bederson Report and to present evidence as to why those assertions were not correct.

For this myriad of reasons, this court should reject Halligan’s request to create a novel “crime fraud” exception to the litigation privilege in New Jersey.

## CONCLUSION

Halligan's claims against the Bederson Defendants all arise out of the Bederson Defendants' actions as retained accounting experts, including their preparation of the Bederson Report. As the trial court consistently and correctly found, the litigation privilege applied to and bars Halligan's claims against the Bederson Defendants. Further, as the trial court found, the Bederson Defendants did not waive the litigation privilege, and there is no "crime-fraud" exception to the litigation privilege in New Jersey – and even if there were, it would be of no moment, as Halligan failed to establish all of the required elements of a claim of fraud.

The trial court's order granting summary judgment in favor of the Bederson Defendants should be affirmed.

Respectfully submitted,

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Attorneys for Defendants/Respondents  
Bederson, LLP and Sean Raquet

By: /s/ H. Lockwood Miller, III  
H. Lockwood Miller, III

Dated: May 5, 2025

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**KARL HALLIGAN,**  
**Plaintiff/Appellant,**

**vs.**

**BEDERSON, LLP, SEAN  
RAQUET, JOHN O'CONNOR  
AND HARRY HODKINSON,**  
**Defendants/Respondents.**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO: A-000793-24**

**Civil Action**

**ON APPEAL FROM:  
SUPERIOR COURT OF NEW JERSEY  
CIVIL DIVISION: HUDSON COUNTY  
DOCKET NO. HUD-L-1494-19**

**SAT BELOW:  
HON. JOSEPH A. TURULA, P.J.Cv.**

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**REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT KARL  
HALLIGAN**

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## **Preliminary Statement**

Contrary to the florid characterization by Bederson, LLP (“Bederson”) and Sean Raquet (“Raquet”)(collectively, “Defendants”) of the history of this case as ‘tortured,’ and the events of this case as a ‘confusing factual morass,’ Defendants actionable conduct is both clear and beyond reasonable dispute. Together with Karl Halligan’s (“Halligan”) business partners John O’Connor (“O’Connor”) and Harry Hodkinson (“Hodkinson”), Defendants conspired to create a fraudulent analysis of Halligan’s management of Park Avenue Bar & Grill, LLC (“Park Avenue”) and used that concocted opinion—the “Bederson Report”—in the United States Bankruptcy Court to defeat Halligan’s creditor claim and in the Superior Court of New Jersey to vacate Halligan’s state court judgment.

Halligan does not dispute that Defendants’ conduct falls within the litigation privilege. What is controverted, and why this Court must reinstate Halligan’s claim, is that the litigation privilege was waived by Defendants’ failure to timely assert it and that the litigation privilege cannot be allowed to perpetrate a fraud upon the court.

## **Response to Defendants’ Counter-Statement of Facts**

In their opposition brief, Defendants assert that they “were retained as expert accountants in the bankruptcy case to analyze the books and records of Park

Avenue: “They then did what litigation experts do: **they analyzed** documents and records, **they spoke** with people with knowledge, and **they reviewed information** that had been assembled by Hodkinson and O’Connor.” (Db8)(emphasis added) That mischaracterizes what they did, which was little more than professionally format data assembled by O’Connor and Hodkinson without ever asking Hodkinson or O’Connor why the selected expenses were known to be personal to Halligan, without ever inquiring where Park Avenue—when they operated it—obtained its utility services, grocery and restaurant supplies (all of which they told Raquet were personal to Halligan), and without ever speaking with the corporate bookkeeper or accountant or anyone else to verify Hodkinson and O’Connor’s contentions. (Pb7-8).

## **Legal Argument**

### **Point I Defendants Waived the Litigation Privilege**

In arguing that they did not waive the litigation privilege (Db14) Defendants’ contend that they raised “the affirmative defense of privilege in their answer” (Db14). That contention is incorrect<sup>1</sup> and disingenuous. Litigation privilege was never raised as an affirmative defense and was, as noted in Plaintiff’s Merits Brief, never mentioned during four years of litigation, and only invoked on the eve of the

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<sup>1</sup> Defendants’ Answer asserted, as their Tenth Affirmative Defense, simply “Qualified immunity.” (Pa737)

eighth scheduled trial date. Defendants' conduct squarely meets the definition of waiver as articulated by Knorr v. Smeal, 178 N.J. 169, 177 (2003):

[W]aiver implies an election by the party to dispense with something of value, or to forego some advantage which [one] might at [one's] option have demanded and insisted on.

The 'something of value' or 'advantage' that Defendants relinquished was the complete and immediate immunity from civil suit conferred by the litigation privilege. Durand Equipment Co. v. Superior Carbon Prods., Inc., 248 N.J. Super. 581, 583 (App. Div.1991). Like the defenses of statute of limitations and disputes subject to mandatory arbitration, if Defendants asserted litigation privilege at the outset of the lawsuit, they could have asked for the immediate dismissal of Halligan's claim, and saved themselves, the other parties, other non-parties, and the judicial system the labor and expense of four years of litigation. Their conduct is clearly inconsistent with the absolute defense.

In an effort to avoid the consequences of their failure to timely assert the defense, Defendants suggest that Hill v. N.J. Dept of Corrections, 342 N.J. Super. 273 (App. Div. 2001) establishes the principle that the privilege can only be "waived if not raised at trial. (Db14). In Hill, the superintendent of a juvenile correctional facility sued the New Jersey Department of Corrections Commissioner and others for violation of the Conscientious Employee Protection Act and related conduct. After a jury verdict against them, three defendants appealed and argue,

inter alia, that their conduct against plaintiff were protected by the litigation privilege. While determining that the plaintiff's claims against them did not implicate the litigation privilege, the Court noted that: "The litigation privilege may be waived if not raised at trial." *Id.* at 294. The Hill did not address and therefore cannot be interpreted to establish the principle that the privilege can only be waived if not raised at trial.

Closer factually to this case is Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153.1197 (3d Cir. 1993) which Hill cited and which suggests that a party can waive the privilege by the failure to assert it before trial. Witco found that the defendant waived the litigation privilege by not only failing to assert it at trial, but also by failing to assert it as an affirmative defense in its answer and by failing to refer to it in its joint pretrial order.<sup>2</sup> Defendants, like Witco, failed to raise the litigation privilege as an affirmative defense in their Answer and again failed to assert it four years later when they served their Pretrial Memoranda (**Pa1020**).

Defendants' conduct throughout this case is inconsistent with reliance on the litigation privilege defense and the Court should correctly conclude that it was waived.

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<sup>2</sup> The joint pretrial order under FRCP 16(e) is the functional equivalent of the Pretrial Memoranda under R. 4:25-3.

## Point II

### Fraud Upon The Court Warrants Abrogation Of The Litigation Privilege

In its argument that there are no exceptions to the litigation privilege (except for malicious prosecution)(**Db16**), Defendants first incorrectly assert, as the trial court originally did, that Halligan failed to establish a prima facie case for common law fraud because he never relied upon defendants' misrepresentations (**Db18**). Halligan never alleged that the wrongful act underlying Defendants' conspiracy was a fraud upon him and always maintained that the fraud committed was upon the courts.

Second, Defendants maintain that there is no evidence to establish that the Bederson Report contained false information. (*Ibid.*) To the contrary, the record—and particularly the sworn statements of co-conspirator Hodkinson<sup>3</sup>—clearly establish Defendants' sentence:

- “We told Bederson (Sean Raquet) that we would do all the work and research and simply supply what we felt was damning and selective evidence against Halligan.” (**Pa1191**);
- “The guy didn't even change anything around, he just produced the exact same report that I did, that I compiled . . . So its my report with

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<sup>3</sup> Hodkinson's statements made while he was participating in a conspiracy with Defendants are admissible under N.J. Rules of Evidence 803(b)(5).

different columns. So, if you go through it, the data is a hundred percent.” (Pa 820);

- “So when I did 2008 the first time, I came up with \$35,000; and I was told in no uncertain terms by John and Andrew You need to get to 150,000. So I just manipulated the date the way I wanted it.” (Pa819).

Hodkinson’s statements; Raquet’s disingenuous certification to the Bankruptcy Court that “[Defendants] had minimal conversations and meetings with two of the principals, John O’Connor and Harry Hodkinson” (Pa282); his patently false certification to the Bankruptcy Court that he had no “connection with [O’Connor and Hodkinson’s] attorney” (Pa271); and his complete failure to subject any of the information given to him by O’Connor and Hodkinson to corroboration, analysis, or testing (Pa481-486) was sufficient to persuade the trial court to initially deny summary judgment:

But - - who was responsible for misleading the Court? Is it Hodkinson or O’Connell [sic] or the Bederson Defendants?

So that is something that a jury would have to decide if there was a fraud by the creation of a report that was merely not an analysis, but just something that was photocopied from a layman, a bar owner at the time and made into a report. So for those reasons, I find that the - - this matter has disputes of material fact that will allow the case to proceed to trial. (1T, 11:13-22)

With evidence of Defendants knowledge that the Bederson Report was a false analysis, this Court is required to reconcile two established principles fundamental to the integrity of the judicial system. The first is the litigation privilege which ensures that attorneys, parties and their representatives “be permitted to speak and write freely without the restraint of fear of an ensuing defamation action, this sense of freedom being indispensable to the due administration of justice.”” Durand Equipment Co., Inc. v. Superior Carbon Products, Inc., 248 N.J. Super. 581, 584 (App. Div. 1991)(quoting Fenning v. S.G. Holding Corp., 47 N.J. Super. 110, 117 (App. Div. 1957). In describing the breadth of the privilege, the Court in Loigman v. Township Committee of Township of Middletown, 185 N.J. 566, 583 (2005) described a panoply of negligent and intentional torts covered by the privilege:

[t]he spectrum of legal theories to which the privilege has been applied includes negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference contractual or advantageous business relations and fraud. (internal citation omitted).

The second principle fundamental to the integrity of the judicial system is that the court has inherent powers not limited by court rules to sanction parties and their counsel for litigation misconduct such as when the court is deceived or misled and the conduct has corrupted the judicial process:

[A] fraud on the court occurs ‘where it can be demonstrated, clearly and convincingly, that a party has

sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.'

[Triffin v. ADP, Inc., 394 N.J. Super. 237, 251 (App. Div. 2007)(quoting Aoude v. Mobil Oil Corp., 892 F. 2d 1115, 1118 (1<sup>st</sup> Cir. 1989)]

As Aoude noted:

[t]here is an irrefragable linkage between the court's inherent powers and the rarely-encountered problem of fraud on the court. Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system.

[Aoude, 892 F.2d at 1118]

While fraud upon the court has ordinarily been justified to vacate a judgment (Fellerman v. Bradley, 99 N.J. 493, 504 (1985)), the judicial remedies available are not so limited, as a trial court has the inherent power to "sanction the perpetration or attempted perpetration of a fraud upon the court." Triffin, 394 N.J. Super. at 253. Triffin found that because ADP alleged common law fraud, but had not relied upon defendant's representations, the court found itself "in a situation in which there is a clear wrong, yet no readily apparent remedy." *Id.* at 250. Triffin, 394 N.J. Super. at 250. Relying upon the authority of Crane v. Bielski, 15 N.J. 342, 249 (1954) (for the proposition that "where there is a civil wrong there should be a remedy") and upon Chambers v. Nasco, Inc., 501 U.S. 32, 45 (1991)(where the

Supreme Court made clear that while it must exercise caution in invoking its inherent power and must comply with the mandates of due process, in circumstances where the litigant's entire course of conduct evidences bad faith and an attempt to perpetrate a fraud on the court, such conduct is sanctionable), Triffin remanded the case to allow the trial court to impose sanctions for defendant's fraud upon the court limited only by the exercise of its reasonable discretion and the mandates of due process. Triffin 304 N.J. Super. at 253.

Defendants' cite no authority to support their contention that Halligan's remedies for Defendants' fraud upon the courts were limited to relief from the Bankruptcy Court and the original Superior Court lawsuit (**Db21**). Nor would resort to those courts have been realistic or practical because, by the time Hodkinson revealed his and O'Connor's role in creating the Bederson Report, Park Avenue had been dissolved by the Bankruptcy Court and Halligan's original Superior Court judgment had long been vacated.

Therefore, the only meaningful relief which this Court can fashion to remedy Defendants' fraud upon the Bankruptcy and Superior Courts is to abrogate their defense of the litigation privilege. This sanction is clearly less severe or consequential to Defendants than a monetary sanction might be, and allows them to defend and answer for their conduct.

### **Conclusion**

Defendants waived the litigation privilege by failing to timely assert it. Even if the Court believes the privilege was not waived, it should nevertheless abrogate the defense because Defendants use of the Bederson Report to deceive the Bankruptcy Court and the Superior Court into believing that Halligan embezzled corporate funds was a fraud upon the courts which requires sanction for the assault upon the judicial system.

Respectfully submitted,

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