NAGEL RICE, LLP,

Plaintiff,

v.

BLUME, FORTE, FRIED, ZERRES & MOLINARI,

Defendant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1869-24

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-5282-24

Civil Action

Sat Below:
Hon. Robert Heys Gardner, J.S.C.

(Submitted: June 26, 2025)

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT NAGEL RICE, LLP

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[i] Transcript is included because it is not a transcript of one of the decisions under appeal, was part of the record below, and is therefore not subject to R. 2:6-1(a)(1)(I). Additionally, the trial court makes reference to the decision in its Order of February 28, 2025, which is being appealed. See Pa1.

[ii] This certification is dated October 1, 2024 because it was originally submitted in opposition to Defendant's earlier motion to dismiss and thus bears the earlier date.

[iii] Omitted pursuant to R. 2:6-1(a)(2).
[iv] Omitted pursuant to R. 2:6-1(a)(2).
[v] Omitted pursuant to R. 2:6-1(a)(2).

[vi] This certification was e-filed on February 20, 2025 in opposition to Defendant's motion for fees and costs. However, it was originally filed on October 1, 2024 in opposition to Defendant's motion to dismiss and thus bears the earlier date.

INDEX TO SUMMARY JUDGMENT DOCUMENTS

[vii] Transcript is included because it is not a transcript of one of the decisions under appeal, was part of the record below, and is therefore not subject to R. 2:6-1(a)(1)(I). Additionally, the trial court makes reference to the decision in its Order of February 28, 2025, which is being appealed. See Pa1.

[viii] This certification is dated October 1, 2024 because it was originally submitted in opposition to Defendant's earlier motion to dismiss and thus bears the earlier date.

TRANSCRIPT INDEX

Name	Date	Description
1T	January 17, 2025	Trial court's decision granting Defendant's motion for summary judgment

PRELIMINARY STATEMENT

This is a fee dispute between successive law firms which litigated the underlying matter which was a bus accident where a young student died. Plaintiff Nagel Rice ("Plaintiff") took over the file after Defendant Blume, Forte, Fried, Zeres & Molinari ("Defendant" or the "Blume Firm") had it for only six months. Defendant never filed a lawsuit and performed minimal work on the file. After taking over, Plaintiff litigated the case for nearly five years with the two defendants and performed extensive work.

The firms agreed to arbitrate their fee dispute. The arbitration agreement (the "Agreement") provided that New Jersey law would apply. Absent this condition, Plaintiff would never have agreed to arbitrate. The parties appeared for a few hours and the arbitrator failed to take testimony. The arbitrator also issued an opinion which did not apply New Jersey law and violated the express terms of the Agreement.

Plaintiff filed a motion to vacate the arbitration award and the Blume Firm filed a motion to dismiss. Both motions were denied by the trial court. Despite this denial, the trial court then granted the Blume Firm's motion for summary judgment. The trial court thereafter granted the Blume Firm's motion for costs and fees under the frivolous litigation statute.

The trial court granted summary judgment by ignoring the specific requirements of the Agreement which was violated in numerous respects:

- The testimony at the arbitration hearing was not taken under oath.
- The arbitrator failed to follow the New Jersey Rules of Evidence, despite the fact that the Agreement required the Rules to be followed. This permitted Defendant to provide incompetent testimony from an attorney who was not involved in the underlying matter, did not speak to the attorneys who were involved in the underlying matter, and simply reconstructed their hourly work on the case as best as he could determine.
- The trial court failed to follow New Jersey law and did not make findings of fact and law regarding a reasonable hourly billing rates for the two attorneys who did work on the case. Indeed, while the parties agreed that $500.00 per hour was a reasonable rate for one of them – a partner – the arbitrator ignored that and found a reasonable rate of $750.00 per hour for both of them – one of whom was only a junior attorney. The arbitrator then multiplied $750.00 by the amount of reconstructed hours regardless of whether the work was non-legal or not. This included hours for Defendant attending the decedent's funeral, something which no fee split case supports.

The arbitrator exceeded his powers, resulting in the arbitration award being procured through undue means.

The trial court's ruling granting Defendant's costs and fees is similarly flawed. First, the trial court did not issue a decision or provide any explanatory basis for its decision, simply entering an Order. This is contrary to the Court Rules and controlling law which requires courts to provide an explanation for their rulings and findings of fact and conclusions of law. Second, the application to vacate the arbitration award hardly meets the strict requirements of the frivolous litigation statute and court rule. Nor can it, as Plaintiff satisfies the criteria of the statute for vacation of an arbitration award – or, at the very least, has made a good faith argument that these criteria are satisfied.

The decision to award costs and fees was erroneous for two additional reasons. Defendant is proceeding pro se and is therefore precluded by court rule and controlling case law from being awarded costs and fees. Furthermore, even if this Court decides that Defendant can be awarded its costs and fees, the amount awarded by the arbitrator is excessive and without basis in the record.

The trial court's decision to grant Defendant's motion for summary judgment should be reversed. Even if this Court does not reverse the grant of summary judgment, it should reverse the trial court's ruling granting Defendant its fees and costs or lower the amount of fees granted or, alternatively, remand this matter to the trial court for further proceedings.

PROCEDURAL HISTORY

Plaintiff-Appellant Nagel Rice, LLP filed its Complaint on August 2, 2024. (Pa60).[1] On September 11, 2024, Defendant-Appellee Blume, Forte, Fried, Zeres & Molinari, PC filed a motion to dismiss pursuant to R. 4:6-2(e), and on October 11, 2024, Plaintiff cross-moved to vacate the underlying arbitration award. See (Pa73 at 3:18 – 25).[2] On October 25, 2024, after hearing oral argument, see (Pa71), the trial court denied both motions. (Pa83 – 84 at 24:25 – 25:2; Pa85 at 27:19 – 20). Defendant filed its Answer on October 29, 2024. (Pa117).

On November 22, 2024, Defendant filed its motion for summary judgment. (Pa14). On January 17, 2025, after hearing oral argument, the trial court granted Defendant's motion for summary judgment. (Pa2; 1T at 12:1 – 4).[3]

On January 31, 2025, Defendant filed its motion for attorney's fees pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1. (Pa95). On October 28, 2025 –

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[1] "Pa__" refers to Plaintiff's Appendix.

[2] While neither of these motions are the subject of the instant appeal, both are discussed because in the trial court's February 28, 2025 Order granting Defendant's motions for attorney's fees – which is subject to this appeal – the trial court states that "Opposition and reply are noted. The opposition raises the same issues that were argued at the 4:6-2 Motion and the Defendant's Motion for Summary Judgment; this Court at both of those occasions noted the Plaintiff's well-argued issues but was not convinced by the arguments." See (Pa1).

[3] "1T" refers to the trial court's January 17, 2025 decision granting Defendant's motion for summary judgment.

without oral argument and without issuing any decision or findings – the trial court granted Defendant's motion. (Pa1).

On February 28, 2025, Plaintiff timely filed its Notice of Appeal. (Pa4).

STATEMENT OF FACTS

A. Factual Background and Arbitration

This case finds its genesis in the underlying matter of Vargas v. Paramus Bd. Of Ed., in which a child was killed in a Paramus bus crash on May 17, 2018. (Pa133 at ¶ 1). The two defendants were the Paramus Board of Education and the trucking company that hit the bus as it crossed Rt. 80. (Pa133 at ¶ 1; Pa61 at ¶ 3). Defendant was engaged by the father of the decedent child in or about May, 2018. (Id.). Defendant never filed suit and devoted the majority of its efforts to preventing the release of a Dept. of Transportation video of the accident. (Pa133 at ¶ 1; Pa62 at ¶ 4). The bulk of the other work performed was ministerial in nature including requesting medical records and the like. (Pa62 at ¶ 4). See also (Pa53 – 58).

In October 2018, the client terminated Defendant and engaged Plaintiff. (Pa133 at ¶ 1; Pa62 at ¶ 5). Plaintiff litigated the case for approximately five years and obtained a settlement for the client, first settling with the Paramus Board of Education and then with the trucking company. (Id.).

Plaintiff and Defendant entered into an arbitration agreement to resolve Defendant's fee regarding its pre-filing work on the underlying matter. (Pa34; Pa62 at ¶ 6). The Agreement provided that "**The testimony shall be under oath.**" (Pa37 at § 15D, emphasis added). Plaintiff never agreed that the case would be arbitrated without sworn testimony. (Pa134 at ¶ 4). Plaintiff never agreed that the New Jersey Rules of Evidence would not apply or that evidence rules requiring competent testimony from individuals with Zoom would not apply. (Id.). The parties agreed also to arbitrate *provided* New Jersey law applied. (Id.). In absence of these express requirements, Plaintiff would never have agreed to arbitrate the fee dispute. (Id.).

Prior to the arbitration, Plaintiff was provided with a reconstruction of the hours that was done by John E. Molinai, Esq. – one of Defendant's attorneys – although he informed Plaintiff that he did not actually work on the underlying file. (Pa52; Pa133 at ¶ 2). See also (Pa45) ("The Claimant testified that … a time sheet had been constructed by Mr. Molinari for the time that David Fried had devoted to the matter"); (Pa46) ("[Defendant] has constructed and calculated the time devoted to the matter by David Fried, Esq."). Mr. Molinari advised that there were two attorneys who worked on the file – David Fried, Esq. and a junior attorney – and both were available to testify at the arbitration. (Pa133 at ¶ 2). Neither of these two attorneys provided the hours they worked on the file. (Id.).

Also prior to the arbitration, Plaintiff stipulated that the reasonable rate for Mr. Fried's time on the file was $500.00 per hour. (Pa134 at ¶ 3; Pa138).

On May 9, 2024, a binding fee arbitration was held for a few hours with the Hon. Ned R. Rosenberg, J.S.C. (Ret.) who awarded the Blume Firm $56,250.00. (Pa51). The arbitration was flawed in numerous respects.

Initially, despite it being required in the Agreement, Judge Rosenberg failed to swear in the witnesses – Mr. Molinari and Bruce H. Nagel, Esq. (Pa134 at ¶ 5). While Mr. Molinari admitted that the junior attorney who worked on the file still worked at Defendant – and that Mr. Fried, who had retired, could appear via Zoom – neither of them provided testimony. (Pa133 at ¶ 2; Pa135 at ¶ 6). Instead of taking this necessary testimony from knowledgeable witnesses, Judge Rosenberg ignored the rules of evidence, accepted non-competent evidence, and permitted Mr. Molinari to explain that he reconstructed what he thought the time incurred by the two attorneys was – even though he admitted that he never spoke to the two attorneys regarding what work they performed on the file. (Id.). This relaxation of the Rules of Evidence was contrary to the Agreement, which provides that: "The New Jersey Rules of Evidence shall generally govern these proceedings, but may be relaxed as the Arbitrator **and the parties** deem fitting…" (Pa36 at § 15A, emphasis added). Nagel Rice never agreed to relax

the Rules of Evidence and in fact demanded that the Agreement be adhered to, and the Rules of Evidence be applied. (Pa134 at ¶ 4).

Pursuant to the controlling case law governing fee disputes, the court is required to make detailed findings of fact and conclusions of law. See, e.g., R. 1:7-4; La Mantia v. Durst, 234 N.J. Super. 534, 537, 540-44 (App. Div. 1989), cert. den., 118 N.J. 181 (1989). Judge Rosenberg did not do so here. See (Pa49 – 50). The case law also requires a finding of reasonable hours worked and reasonable hourly rates for the attorneys who performed the work. See, infra, § III(b)(iii). Judge Rosenberg also failed to make *any* findings on these two critical factors, as required. See (Pa49 – 50). He also violated New Jersey law by awarding fees for attending a funeral and speaking with the press – both of which are non-legal tasks which did not contribute to the ultimate outcome of the case. (Pa136 at ¶ 10) See also, infra, § III(b)(iv).

At the arbitration, Mr. Molinari requested an hourly fee for Mr. Fried of $750.00, despite the fact that he had already stipulated a fair rate of $500.00. (Pa134 at ¶ 3; Pa136 at ¶ 8; Pa139). Judge Rosenberg then awarded $750.00 per hour for both Mr. Fried *and* the junior attorney who worked on the case, despite the fact that Mr. Molinari never suggested a fair rate for the junior attorney. (Pa50; Pa136 at ¶ 8). Moreover, instead of following New Jersey law, Judge Rosenberg simply took the total hours reconstructed by Mr. Molinari – and

accepted an additional 12.5 hours with no support or explanation whatsoever – and awarded $750.00 per hour for all work performed. (Pa50 – 51; Pa136 at ¶ 9).

In addition to all the foregoing, there was something not quite right with Judge Rosenberg. (Pa134 at ¶ 5). In addition to failing to swear in the witnesses, he seemed not to have a grasp of the law that applies to fee splits. (Id.). When Mr. Molinari explained that the May 28, 2018 entry of 3 hours of billed time was for attendance at the child's funeral, Plaintiff raised the fact that no New Jersey case had ever permitted a fee award for attending a funeral or speaking to the press, but Judge Rosenberg had no idea that this time was not recoverable. (Id.). After the arbitration, Judge Rosenberg advised Plaintiff's counsel that he was not feeling well and in fact went to the hospital right after Plaintiff's counsel left his office. (Id.).

B. The Trial Court Grants Defendant's Motions For Summary Judgment And For Attorney's Fees Without Issuing A Decision Or Providing Any Explanation For Its Ruling

Plaintiff filed its Complaint on August 2, 2024, challenging the arbitration award. (Pa60). On September 11, 2024, Defendant filed a motion to dismiss pursuant to R. 4:6-2(e), and on October 11, 2024, Plaintiff cross-moved to vacate the underlying arbitration award. See (Pa73 at 3:18 – 25). On October 25, 2024, the trial court denied Defendant's motion to dismiss, finding that Plaintiff's

Complaint "is a very specific pleading. I think it is specifically pled enough to put the other side on notice of what the allegations are." (Pa84 at 25:3 – 6). The trial court also denied Plaintiff's cross-motion. (Pa85 at 27:19 – 20).

Defendant filed its Answer on October 29, 2024. (Pa117).

On November 22, 2024, Defendant filed its motion for summary judgment. (Pa14). On January 17, 2025, the trial court granted Defendant's motion for summary judgment. (Pa2; 1T at 12:1 – 4). The **entirety** of the trial court's analysis is as follows:

> I don't find in fact the plaintiff has met any of these particular six factors here [governing vacation of arbitration awards]. There is no showing here, and I don't think discovery in this particular case is going to add additional – enlighten anyone with regard to those particular six factors.

(1T at 11:8 – 14).

On January 31, 2025, Defendant filed its motion for attorney's fees pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1. (Pa95). On October 28, 2025 the trial court granted Defendant's motion. (Pa1). The trial court issued an Order but did not issue a decision or provide *any* explanation for its ruling. (Id.). It also awarded fees despite the fact that Defendant appeared pro se.

LEGAL ARGUMENT

I. STANDARDS GOVERNING APPEAL

"An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge… Therefore, this Court must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

"A trial judge's decision to award attorney's fees pursuant to *Rule* 1:4–8 is addressed to the judge's sound discretion… and will be reversed on appeal only if it "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment."" McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (quotation omitted).

II. STANDARD GOVERNING MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is intended to provide a prompt disposition of actions which involve no factual dispute or legal issues, and that are ripe for adjudication as a matter of law. See, Judson v. Peoples Bank & Trust Co. of

Westfield, 17 N.J. 67, 74 (1954).[4] In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 539-40 (1995), the New Jersey Supreme Court adopted the well-known summary judgment standard articulated by the United States Supreme Court in the 1986 trilogy of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The Brill Court observed:

> Read together, Matshushita, Liberty Lobby, and Celotex adopted a standard that requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'

Brill, 142 N.J. at 533. Where factual and or legal issues exist, summary judgment is not appropriate. Most importantly for present purposes, all favorable inferences are to be given to the opponent of the motion. Id.

In order to support its motion for summary judgment, Defendant has the burden of showing that no factual disputes or legal issues exist with regard to Plaintiff's claims against them. It is well settled that the burden is on the party

[4] When deciding a motion for summary judgment, a trial court should evaluate evidentiary materials as required by R. 4:37-2(b) relative to the burden on the moving party should the matter proceed to trial. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 539-540 (1995).

moving for summary judgment to exclude all reasonable doubt as to the existence of any genuine issue of fact. Sokolay v. Edlin, 65 N.J. Super. 112, 120 (App. Div. 1961).

III. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Raised below: Ja2; 1T at 12:1 – 4)

a. Standard Governing Private Arbitration In New Jersey

Private contractual arbitration in New Jersey is governed by the Revised Uniform Arbitration Act, N.J.S.A. 2A:23B-1, et seq. (the "Act"). There are six grounds for vacating an arbitration award:

> (1) the award was procured by corruption, fraud, or other undue means;
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
> (4) an arbitrator exceeded the arbitrator's powers;
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

N.J.S.A. 2A:23B-23(a) (footnotes omitted).

With regard to the first ground for vacation, this Court has ruled that:

> "The phrase "undue means" contained in *N.J.S.A.* 2A:23B-23a(1) "ordinarily encompasses a situation in which the arbitrator has **made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record.**"

Washington Twp. Bd. of Educ. v. Sal Elec., Inc., No. A-3279-09T2, 2011 WL 1661009, at *7 (App. Div. May 4, 2011), quoting State, Off. of Emp. Rels. v. Commc'ns Workers of Am., AFL-CIO, 154 N.J. 98, 111 (1998) (emphasis added). See also Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P., 356 N.J. Super. 567, 580-81 (L. Div. 2002) (vacating arbitration award as the "product of undue means" where "the arbitrator applied the incorrect legal rule" in "manifest disregard of law and contrary to established public policy").

With regard to the fourth ground for vacation, "[a]rbitrators exceed the scope of their powers when they disregard the terms of the parties' contract or rewrite the contract for the parties." Pepper ex rel. Pepper v. Sadley, No. A-3459-11T2, 2013 WL 2257842, at *2 (App. Div. May 24, 2013), cert. den., 216 N.J. 8 (2013), citing Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391 (1985) ("When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract

confers. The scope of an arbitrator's authority depends on the terms of the contract between the parties"). This "relate[s] both to the procedure that the arbitrator must apply in resolving disputes and the substantive matters that he may address." Commc'ns Workers of Am., Loc. 1087 v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 448 (1984). ""When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."" Policemen's Benev. Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011), quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960). "Thus, our courts have vacated arbitration awards… when arbitrators have, for example, added new terms to an agreement or ignored its clear language." Policemen's Benev. Ass'n, 205 N.J. at 429 (collecting cases).

The foregoing includes the arbitrator's failure to apply the law agreed upon by the parties. **Thus, "if the arbitration agreement calls for the arbitrator to apply New Jersey law, and the arbitrator fails to do so, the arbitrator exceeds his or her powers."** Kadi v. Massotto, No. A-2555-07T2, 2008 WL 4830951, at *8 (App. Div. Nov. 10, 2008) (emphasis added), citing Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 365 (1994) (discussing vacation of arbitration award based on "fundamental error of New Jersey law"). See also Sutter v. Oxford Health Plans, LLC, No. CIV. 10-4903 GEB, 2011 WL 2652163, at *3 (D.N.J. July 5, 2011) ("An arbitrator exceeds his

power if an arbitration agreement calls for the application of New Jersey law, and the arbitrator fails to apply New Jersey law when fashioning an award").

b. The Trial Court Erred By Granting Summary Judgment Because The Arbitration Award Was Procured Through Undue Means And The Arbitrator Exceeded His Powers

As set forth below, the arbitrator's multiple failures to adhere to the Agreement's requirements – including failing to adhere to New Jersey law – resulted in him exceeding his authority in contravention of the Act. See Pepper, 2013 WL 2257842 at *2; Cnty. Coll. of Morris Staff Ass'n, 100 N.J. at 391; Commc'ns Workers of Am., Loc. 1087, 96 N.J. at 448; Policemen's Benev. Ass'n, 205 N.J. at 429; Kadi, 2008 WL 4830951 at *8. Moreover, the arbitrator's failure to apply New Jersey law, as required, constitutes a mistake of law which results in the arbitration award being procured through undue means. See Washington Twp. Bd. of Educ., 2011 WL 1661009 at *7; Liberty Mut. Ins. Co., 356 N.J. Super. at 580-81. Thus, the trial court erred by granting Defendant summary judgment.

i. The Arbitrator Disregarded The Parties' Agreement And Failed To Apply New Jersey Law Regarding Taking An Oath

The arbitration agreement states that "The testimony shall be under oath." (Pa37 at § 15D). The arbitrator failed to have the witnesses take an oath. This violation of the agreement requires vacation of the award. See State, Office of

Employee Relations v. Commc'ns Workers of Am., AFL-CIO, 154 N.J. 98, 112 (1998) ("Arbitrators also exceed their authority by disregarding the terms of the parties' agreement").

In addition, N.J.R.E. 603 requires witnesses to take an oath:

> Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law.

Given the unequivocal language of the rule, it is clear that all prospective witnesses must be sworn or affirmed prior to the giving of testimony. State in Interest of R. R., 79 N.J. 97, 108 (1979). Here, it is undisputed that the arbitrator failed to take an oath from any of the witnesses. This is a clear violation of New Jersey law.

Based on the foregoing, the arbitrator exceeded his power and the arbitration award was procured through undue means, and the trial court erred in granting the motion for summary judgment. The matter should be reversed and remanded for discovery and trial.

ii. The Arbitrator Disregarded The Parties' Agreement By Not Applying the Rules of Evidence

Judge Rosenberg conducted the arbitration without conforming to the Rules of Evidence. His reasoning for the foregoing was that:

> [B]ased upon the organizational conference, correspondence and email exchanges the Arbitrator would consider the process to be one that the parties

> specifically wanted to be as informal as possible with the rules of evidence relaxed.

(Pa47). As a result, Judge Rosenberg relied on N.J.A.C. 12:105-4.10 which provides that "[c]onform[ance] to legal rules of evidence is not necessary." (Id.).

This was simply without basis. Not only did Judge Rosenberg not provide any explanation regarding the correspondence and email he was relying upon, but he simply ignores the Agreement itself, which clearly provides:

> The New Jersey Rules of Evidence shall generally govern these proceedings, but may be relaxed as the Arbitrator **and the parties** deem fitting…

(Pa36 at § 15A, emphasis added). Plaintiff never agreed to relaxing the Rules of Evidence – and would not have ever agreed to arbitrate in that scenario – and thus Judge Rosenberg not only failed to apply New Jersey law but went outside the scope of his authority. (Pa134 at ¶ 4).

More specifically, Judge Rosenberg allowed Mr. Molinari to explain the amount of time and services provided Mr. Fried and the junior attorney even though he had no personal knowledge about these subjects, never spoke to these two attorneys, and therefore could not provide competent evidence. Mr. Nagel objected to Mr. Molinari being allowed to provide his explanation. Judge Rosenberg overruled the objection.

Further, Defendant never produced to Plaintiff or put into evidence any work product or their underlying file on the matter. The explanation from Mr.

Molinari violated the Rules of Evidence including N.J.R.E. 602 ("Lack of Personal Knowledge – A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . . .") and N.J.R.E. 802 ("Hearsay Rule – Hearsay is not admissible except as provided by these rules . . ."). Mr. Molinari had no knowledge regarding the work performed or how long it took to perform the work. He never spoke to the two attorneys on the file or called them as witnesses even though they were available to testify. Further, Mr. Molinari's explanation regarding the work performed and time spent by others was hearsay for which there is no exception. Judge Rosenberg allowed this explanation and relied on it exclusively in making his award. This is a clear violation of New Jersey law and the parties' Agreement and requires the award to be vacated.

Based on the foregoing, the arbitrator exceeded his power and the arbitration award was procured through undue means, and the trial court erred in granting the motion for summary judgment. The matter should be reversed and remanded for discovery and trial.

iii. The Arbitrator Applied Incorrect Law Regarding Defendant's Fee Request

Under prevailing New Jersey law, Defendant is entitled to a fair hourly rate for their legal work, as the case was not filed and was not substantially complete for trial when Plaintiff substituted in. An attorney hired on a contingent

fee basis and discharged before completion of the services is not entitled to recover fees on the basis of such contingent agreement; instead, he or she may be entitled to recover on a *quantum meruit* basis for the reasonable value of the services rendered which is deemed a fair hourly rate unless the case was "substantially prepared" for trial upon transfer to new counsel. La Mantia, 234 N.J. Super. at 543. See also Cohen v. Radio-Electronics Officers Union, 146 N.J. 140, 164-65 (1996); Bruno v. Gale, Wentworth & Dillion Realty, 371 N.J. Super. 69, 74-75 (App. Div. 2004).

Where the file is not substantially prepared, the first attorney has the burden of proving entitlement based on the hourly rate. "[I]f the predecessor's work, no matter how extensive, contributed little or nothing to the case, then the ceding lawyer should receive little to no compensation." Glick v. Barclays De Zoete Wedd, Inc., 300 N.J. Super. 299, 311 (App. Div. 1997). See also La Mantia, 234 N.J. Super. at 541-543. If a ceding lawyer's work contributed little to a recovery for the client, and the new attorney was crucial in the success of the case, then the predecessor's compensation should be based, at most, upon a standard hourly rate. Glick, 300 N.J. Super. at 311, citing, Anderson v. Conley, 206 N.J. Super. 132, 150-151 (L. Div. 1985) and Dinter v. Sears, Roebuck & Co., 278 N.J. Super. 521, 535 (App. Div. 1995).

Here, Nagel Rice agreed to arbitrate provided New Jersey Law applied. (Pa134 at ¶ 4). Mr. Molinari was free to provide competent evidence and he elected not to submit any work product or the testimony of the two attorneys who performed the work, but instead a post-facto reconstruction. (Pa45 – 46; Pa52; Pa133 at ¶ 2). This is an incurable defect in his case. In all published and unpublished contingent fee split cases, the firm seeking an hourly award presents evidence of the work product they performed and offers testimony of the attorneys involved. Mr. Molinari admitted that he had no direct knowledge of what was done, or by which attorney, and that both of the attorneys who performed work were available to testify at least by Zoom. (Id.; Pa133 at ¶ 2; Pa135 at ¶ 6).

By making an award to Defendant with no evidence offered on the work performed, and no evidence on a fair hourly rate offered, the arbitrator failed to apply New Jersey law, which requires this proof.

Mr. Molinari admitted that there was a junior attorney who did work on the file and the fees of the senior attorney cannot be recovered where routine work could have been done by the junior attorney. Pa133 at ¶ 2). A leading case on fee applications aptly stated, “A Michelangelo should not charge Sistine Chapel rates for painting a farmer’s barn” and made clear that “[r]outine tasks, if performed by senior partners in large firms, should not be billed at their usual

rates." Ursic v. Bethlehem Mines, 719 F. 2d. 670, 677 (3rd Cir. 1983). The party seeking fees must show the number of hours expended and the reasonable hourly rates for each attorney and where the documentation of the hours is inadequate, the court should reduce the award. Id. at 676-77. The presentation of billable hours must "set forth in sufficient detail to permit the trial court to ascertain the manner in which the billable hours were divided among the various counsel." Rendine v. Pantzer, 141 N.J. 292, 337 (1995).

In addition, New Jersey law requires there be proof that the time spent on each task was reasonable. See Id.. Here, there was no such testimony and the arbitrator failed to make any finding that the time spent was reasonable or that the hourly rate sought for the junior attorney was reasonable. (Pa50). Instead, as noted, Judge Rosenberg simply multiplied the total number of reconstructed hours by $750.00. (Id.). He also, for example, found that the work "which was performed at the outset was critical to the success" of the case, without providing any detail to explain this statement. (Id.).

Based on the foregoing, the arbitrator exceeded his power and the arbitration award was procured through undue means, and the trial court erred in granting the motion for summary judgment. The matter should be reversed and remanded for discovery and trial.

iv. The Arbitrator Applied Incorrect Law By Awarding Fees For Work With The Press and Going To A Funeral

The arbitrator failed to follow the law by awarding fees for work with the press and going to a funeral. (Pa49-50). This work is not recoverable. See Halderman v. Pennhurst State School & Hospital, 49 F.3d. 939, 942 (3rd Cir 1995). In Halderman the court found that public relations work and work with the press is not recoverable and "[t]he fact that private lawyers may perform tasks other than legal services for their clients, with their consent and approval, does not justify foisting off such expenses on an adversary under the guise of reimbursable legal fees." Id. Similarly, in Rum Creek Coal Sales, Inc v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994) the Court found that "[t]he legitimate goals of litigation are almost always attained in the courtroom, not in the media."

The rationale in Halderman applies to not allowing fees to attend a funeral. Attending a funeral is not legal work and cannot be charged to or "foisted" on another party. We found no case that allows an award for attending a funeral.

Based on the foregoing, the arbitrator exceeded his power and the arbitration award was procured through undue means, and the trial court erred in granting the motion for summary judgment. The matter should be reversed and remanded for discovery and trial.

v. The Arbitrator Failed To Follow New Jersey Law Which Requires Findings Of Fact And Conclusions Of Law

In addition to all the foregoing, the arbitrator failed to make the requisite findings of fact and conclusions of law as required by R. 1:7-4.

Our Supreme Court has made clear that in all cases involving the award of attorney's fees the courts are required to make very detailed findings of fact and conclusions of law. See Furst v. Einstein Moomjy, 182 N.J. 1, 25-26 (2004); La Mantia, 234 N.J. Super. at 537, 540-44.

Importantly, in fee disputes, New Jersey law requires a finding of reasonable hours worked and a reasonable hourly rate of the attorneys who performed the work. See R. 1:7-4; La Mantia, 234 N.J. Super. at 537, 540-44. The arbitrator failed to make any findings on these two critical factors as required. Instead, Judge Rosenberg simply stated in conclusory fashion that $750.00 per hour "is not unreasonable" for Mr. Fried and made no finding of a reasonable hourly rate for the junior attorney who worked the file. (Pa50). Judge Rosenberg then simply accepted the reconstructed 75 hours of work presented by Mr. Molinari and multiplied 75 by $750.00 with no regard to whether the work was essential, non-legal, or otherwise. (Pa46; Pa50).

Based on the foregoing, the trial court erred in granting the motion for summary judgment. The matter should be reversed and remanded for discovery and trial.

IV. STANDARD GOVERNING MOTIONS FOR ATTORNEY'S FEES PURSUANT TO *R.* 1:4-8 AND *N.J.S.A.* 2A:15-59.1

N.J.S.A. 2A:15-59.1 (the "Statute") provides in relevant part as follows:

> b. In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:
>
> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Although the Statute permits sanctions, it does not promote penalizing litigants who were unsuccessful at every turn. The history of the statute demonstrates the caution with which our Legislature enacted it and defined its parameters. In this respect, the New Jersey Supreme Court in McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993) declared:

> That history also reveals that the term "frivolous" should be given a *restrictive interpretation*. The predecessor bill, A. 1086, allowed the prevailing party to recover fees from the non-prevailing party if that party's pleading was "not substantially justified." In the course of the legislative process, the term "frivolous" replaced "not substantially justified." … Indeed, the

> Governor's conditional veto message noted the "bill's restrictive definition of 'frivolous."' *Governor's Conditional Veto Message, supra*. The replacement of "not substantially justified" with "frivolous" reflects the legislative intent to limit the application of the statute. That limitation is consistent with the premise that in a democratic society, citizens should have ready access to all branches of government, including the judiciary. See *Iannone, supra*, 245 *N.J. Super*. at 27, 583 A. 2d 770 (stating that limitation on award of counsel fees "promotes the goal of equal access to the court irrespective of economic status").

Id. at 561-562 (emphasis added). In resolving the tension between competing goals of equal access to the courts and avoidance of the costs of unnecessary litigation, the Legislature "favoring access over cost-avoidance." Id. at 562.

Therefore, sanctions are not to be issued lightly; they are reserved for particular instances where a party's pleading is found to be "completely untenable" and when "no rational argument can be advanced in its support." United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009), cert. den., 200 N.J. 367 (2009) (quotation omitted).

R. 1:4-8 (the "Rule"), founded upon the Statute and containing much of the same language, provides:

> (a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed

> after an inquiry reasonable under the circumstances:
>
> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and
>
> (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.

As noted by the Appellate Division, the New Jersey courts "have strictly construed the nature of conduct warranting sanction under *R*. 1:4-8… mindful that ""honest and creative advocacy should not be discouraged."" J.O. v. Twp. of Bedminster, 433 N.J. Super. 199, 221 (App. Div. 2013), cert. den., 217 N.J. 295 (2014) (quotation omitted). The Appellate Division has been consistent in its strict application of the Rule. See, e.g., First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 433 (App. Div.2007) (concluding that objectively

reasonable belief in merits precludes attorney fee award); Wyche v. Unsatisfied Claim and Judgment Fund, 383 N.J. Super. 554, 560-61 (App. Div.2006) (holding that plaintiff's legitimate effort to extend law on previously undecided issue precluded award of fees); K.D. v. Bozarth, 313 N.J. Super. 561, 574-75 (App. Div. 1998), cert. den., 156 N.J. 425 (1998) (declining to award attorneys' fees where plaintiff had reasonable and good faith belief in merits of claim).

V. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES (Raised below: Ja1)

a. Pro Se Litigants Are Barred From Receiving Attorney's Fees For Frivolous Litigation By Court Rule[5]

As Plaintiff argued before the trial court, R. 1:4-8 – dealing with frivolous litigation – is inapplicable here. That rule specifically provides that:

> To the extent practicable, the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party **other than a pro se party** pursuant to N.J.S.A. 2A:15-59.1.

R. 1:4-8(f) (emphasis added). See also Corigliano v. Corigliano, No. A-3046-19, 2021 WL 2909028, at *2 (App. Div. July 12, 2021) ("Because the judge imposed the sanctions on a represented party, Rule 1:4-8(f) applies"). This Court has also held that ""an award of attorney's fees to a successful litigant is meant to make a party whole. Such an award is unwarranted and inappropriate in a

[5] Below, we argued generally that fees should not be awarded.

case… where the plaintiff did not retain an attorney and has not incurred any financial obligation to pay for legal services."" Schaffhauser v. Crows Mill Trust, Docket No. C–12026–01, 2007 WL 1373293 at *2 (App. Div. May 11, 2007) (quotation omitted).

Defendant represented itself pro se in this matter and thus is barred from receiving any attorney's fees for frivolous litigation.

b. Plaintiff's Pleading And Prosecution Of This Case Were Not "Frivolous" Within The Meaning Of The Statute And Court Rule

To the extent this Court decides to address the merits of awarding Defendant its costs and fees, the trial court's decision was clearly erroneous.

In approaching the issue of deterring baseless litigation, while not discouraging honest and creative advocacy, the focus is upon the objective reasonableness of the action of a party under the circumstances. Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 85 (App. Div. 1993). Sanctions under the frivolous litigation statute and Court Rule are "not to be issued lightly" and "are reserved for particular instances where a party's pleading is found to be "completely untenable," or where "no rational argument can be advanced in its support."" McDaniel, 419 N.J. Super. at 499 (quotation omitted).

In McDaniel, the court found that "sufficient legal uncertainty existed as to the validity" of a third-party action and therefore the court could not conclude

that ""no rational argument could be advanced in its support."" Id. (quotation omitted). Consequently, the court could not agree that the plaintiff's position was ""completely untenable."" Id. quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007) ("Where a party has a reasonable and good faith belief in the merit of the cause, attorney's fees will not be awarded").

Honest and creative advocacy should not be discouraged. Wyche, 383 N.J. Super. at 561. See also J.O., 433 N.J. Super. at 221. Therefore, "an award of attorney's fees under Rule 1:4-8 will not be appropriate where there is an objectively reasonable belief in the merits of an argument" or where the plaintiff is "engaged in a legitimate effort to extend the law on a previously undecided issue." Id.

Important is the fact that a claim, even if "tenuous," *is not necessarily frivolous.* Wyche, 383 N.J. Super. at 561. In Wyche, the court held that counsel had not violated R. 1:4-8 even though he persisted in pursuing a recovery larger than an amount set by statute. Id. at 558. However, counsel offered a good faith argument for why the fund should not be bound by arbitration procedures and court rules, i.e., for modification of existing law. Id. at 661.

Here, Plaintiff's Complaint is clearly not frivolous because, as described above, it is well pled, survived a motion to dismiss, and satisfies two criteria of the statute for vacation of an arbitration award – namely, that the arbitrator

exceeded his powers and the arbitration award was procured through undue means. This includes the fact that – contrary to the Agreement – the Arbitrator never swore in the witnesses, failed to adhere to the Rules of Evidence, did not follow New Jersey law, awarded fees for going to a funeral and speaking to the press, failed to find a fair rate for the junior attorney, established Mr. Fried's rate at $750.00 per hour even though the parties agreed to $500.00, and simply applied $750.00 to all of Mr. Fried's and the junior partner's time regardless of whether it was for non-legal matters or moved the case any closer to resolution. As such, the record demonstrates that the Plaintiff's claims and arguments were made in good faith and *not* as an attempt to harass, delay, or increase the costs of litigation. At the very least, Judge Rosenberg's multiple breaches of the requirements of the Agreement clearly demonstrate that Plaintiff has made a good faith argument that these criteria for vacation of an arbitration award are satisfied here. Such good faith arguments are not what is intended by "frivolous" litigation.

While no fees and costs should have been awarded as Defendant has failed to satisfy the stringent standard under the frivolous litigation statute and the Court Rule, the trial court's award of fees was erroneous because Defendant's request for legal fees was unreasonable and excessive. The application for fees is based on the billing sheet prepared by Defendant. (Pa107). This billing sheet

purportedly identifies the billing entries for both Mr. Molinari and Mr. Hull. These entries are improper and deficient for multiple reasons.

"A lawyer's bill for services must be reasonable both as to the hourly rate and as to the services performed. That is not only the lawyer's legal obligation but his ethical one as well." Gruhin v. Gruhin, P.A. v. Brown, 338 N.J. Super 276, 280 (App. Div. 2021). As set forth in the plain language of the applicable Rules of Professional Conduct, factors surrounding reasonableness include, *inter alia*, the time and labor required; the amount involved and results obtained; time limitations; and whether the fee is fixed or contingent. R.P.C. 1.5 (a).

It is improper for an attorney to bill for services rendered with nondescript, incomplete, abbreviated and ambiguous billing notes. At minimum, an adversary is entitled to invoices "of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended." United Slate, Tile & Composition Roofers v. G & M Roofing, 732 F.2d 495, 502 n. 2 (6th Cir. 1984). What can be said, however, is that certain billing entries are so outrageous, are so patently excessive, that they may be considered *per se* unreasonable. Defendant's billing falls into this category.

The time spent was excessive and unnecessary. Defendant spent 23.8 hours researching, drafting, revising, and discussing their motion to dismiss.

(Pa108 – 114). This also includes both attorneys preparing for and attending oral argument on the motion to dismiss. (Pa110). The following time was billed regarding the motion to dismiss:

Mr. Hull:

9/10/24	.6 hours
9/10/24	1.3 hours
9/10/24	1.9 hours
9/11/24	.3 hours
9/11/24	6.6 hours
9/12/24	.6 hours
10/9/24	3.4 hours
10/20/24	1.7 hours
10/20/24	.3 hours
10/20/24	2.2 hours
10/25/24	.9 hours
10/25/24	.7 hours
10/25/24	.1 hours
10/25/24	.1 hours

Total: 20.7 hours. See (Pa108 – 110).

Mr. Molinari:

9/11/24	.4 hours
9/12/24	.6 hours
9/23/24	.1 hours
9/25/24	.4 hours
10/09/24	.2 hours
10/10/24	.1 hours
10/20/24	.4 hours
10/23/24	.1 hours
10/23/24	.1 hours
10/25/24	.7 hours

Total: 3.1 hours. See (Pa108 – 110).

Mr. Hull's 20.7 hours times $500 an hour totals $10,350.00. Mr. Molinari's 3.1 hours times $750 an hour totals $2,325.00. The total time spent by both attorneys on the motion to dismiss is $12,675.00. (Id.). All of this time should have been denied as Defendant's lost the motion to dismiss and the trial court found that Plaintiff's Complaint set forth a cognizable claim. Plaintiff's Complaint could not have been frivolous if the trial court found it set forth a cause of action. In addition, 24 hours to draft and argue a motion to dismiss is unreasonable and excessive. It should have taken no more that 10 hours in total. As a result, all the time Defendant spent on the motion to dismiss should have been rejected.

Of particular note is the time spent by both Mr. Hull and Mr. Molinari both attending the oral argument on the motion to dismiss on October 25, 2024. (Pa110). Mr. Hull argued the motion and Mr. Molinari watched the argument. They both billed .7 hours and Defendant is requesting that we pay Mr. Molinari $525.00 to watch his associate argue the motion. (Id.). This illustrates the complete unreasonableness of the billing. The trial court erroneously included this time in the award.

Similarly, both Mr. Hull and Mr. Molinari attended the oral argument on the summary judgment motion on January 17, 2025. (Pa112). Only Mr. Molinari argued the motion, yet they both billed .5 hours and they are requesting that we

pay $250.00 for Mr. Hull to watch his partner argue a motion. (Id.). This further illustrates the unreasonableness of the time. Once again, the trial court erroneously included this time in the award.

The time spent preparing the application for fees was also excessive and unreasonable. Both Mr. Hull and Mr. Molinari spent a total of 14.4 hours. See (Pa113 – 114). Mr. Hull spent 11.4 hours times at $500.00 = $5,700.00. (Id.). Mr. Molinari spent 3 hours at $750.00 = $2,250.00. (Id.). The total fees sought for preparing the fee application is $7,950.00. (Id.). This included Mr. Hull spending 3.8 hours at $500 an hour on January 28, 2025 researching "all applicable federal and state case law." (Pa113). There is absolutely no reason to have conducted research on federal law regarding their motion for fees. This $1,900.00 of time was unreasonable and should have been rejected.

In addition, the hourly rates of both Mr. Hull and Mr. Molinari are excessive. As personal injury attorneys, neither of the attorneys bills on an hourly basis and thus they have no standard hourly rate to which they bill. Mr. Hull has been an attorney for ten years focusing on personal injury cases. Defendant has failed to provide any factual or legal support that the $500.00 an hour is reasonable. We submitted to the trial court that based on his experience, Mr. Hull's hourly rate should be $300.00 an hour. As for Mr. Molinari, he also does not bill clients hourly. There is nothing in the record to support his

incredible request to be compensated at $750.00 an hour. We submitted to the trial court that Mr. Molinari's rate should be reduced to $450.00 an hour. As set forth above, much of the requested time should have been eliminated. However, even if all the time is included, with the reduced hourly rates, the total amount of fees should have been reduced to $24,195.00 (12.9 hours for Mr. Molinari at $450.00 an hour = $5,805.00) PLUS (61.3 hours for Mr. Hull at $300.00 an hour = $18,390.00).

c. The Trial Court Failed To Make Any Findings Of Fact Or Law And Therefore This Matter Must Be Remanded To The Trial Court For Further Proceedings

In addition to the fact that Defendant is barred by Court Rule and controlling case law from being awarded their costs and fees for frivolous litigation, the trial court's ruling must also be reversed because it failed to make *any* findings of fact or law to explain or support its ruling.

R. 1:7-4(a) provides that:

> The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon… on every motion decided by a written order that is appealable as of right.

This rule requires courts to ""state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s]."" Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594 (App. Div. 2016) (quotation

omitted). "The trial court does not discharge that function simply by recounting the parties' conflicting assertions and then stating a legal conclusion." Id. at 595.

Appellate courts' "capacity to resolve appeals is a direct function of the trial court's adherence to its obligation to clearly state findings of fact and conclusions of law pursuant to Rule 1:7-4(a)." Lenscoat, LLC v. Elowitz Photography, LLC, No. A-0077-24, 2025 WL 1671981, at *3 (App. Div. June 13, 2025). "Without a statement of reasons, "[they] are left to conjecture as to what the judge may have had in mind."" Id. (quotation omitted). See also, e.g., Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990) (quotation omitted) ("failure to perform the fact-finding duty "constitutes a disservice to the litigants, the attorneys and the appellate court""); Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000) ("neither the parties nor we are well-served by an opinion devoid of analysis or citation to even a single case").

Following the dictates of R. 1:7-4(a) is equally applicable in cases concerning the award of attorney's fees. For example, in Salch, 240 N.J. Super. at 442 – a post-divorce action – defendant wife moved for counsel fees. The trial court ruled: "Taking into consideration all of the circumstances as well as the case law, also taking into consideration the financial resolution that was achieved by the parties as part of the Judgment of Divorce, I do not find that

there's any basis for the court to grant the request of [the defendant wife].” Id. at 443. This Court reversed the judgment of the trial court and remanded the case for full review. Id. at 444. The reason was that the trial court failed to address the relevant “standards set forth in our statutes and cases.” Id. at 443. Instead, “[t]he trial judge's rather cryptic opinion in this case addressed none of these issues in any meaningful way and fell far short of his obligation under *R.* 1:7–4.” Id. See also Waltman v. Fyi Directories, Docket No. L-422-03, 2010 WL 3933245, at *3 (App. Div. Sept. 30, 2010) (“the trial court's decision to award [defendant] sanctions was flawed because the court failed to make findings of fact and conclusions of law to support the award of sanctions”).

Here, the trial court did no more than enter an Order, without providing any decision to support or explain its ruling. (Pa1). This failure is not only violative of R. 1:7-4(a) and controlling case law but precludes this Court from engaging in any meaningful review of its decision. Accordingly, if this Court does not determine that Defendant is precluded as a pro se litigant from being awarded its costs and fees, this matter should be remanded to the trial court for further proceedings.

CONCLUSION

For all the reasons set forth above, the trial court's decision to grant Defendant's motion for summary judgment should be reversed. Even if this Court does not reverse the grant of summary judgment, it should reverse the trial court's ruling granting Defendant its fees and costs or lower the amount of fees granted or, alternatively, remand this matter to the trial court for further proceedings.

Respectfully submitted,
Bruce H. Nagel
BRUCE H. NAGEL

Dated: June 26, 2025

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NAGEL RICE, LLP,

Plaintiff-Appellant,

vs.

BLUME FORTE FRIED ZERRES & MOLINARI,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1869-24

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-5282-24

Civil Action

SAT BELOW: HON. ROBERT HEYS GARDNER, J.S.C.

DEFENDANT-RESPONDENT'S BRIEF IN SUPPORT OF ITS OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL FROM THE TRIAL COURT'S AWARD OF SUMMARY JUDGMENT AND FRIVOLOUS LITIGATION COSTS AND FEES.

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PRELIMINARY STATEMENT

Defendant-Respondent Blume Forte Fried Zerres & Molinari (hereinafter "Defendant") was granted Summary Judgment, dismissing Plaintiff-Appellant Nagel Rice (hereinafter "Plaintiff")'s Complaint, which sought vacatur of a binding arbitration decision. The Honorable Robert H. Garner, J.S.C. found that the Trial Court could only vacate an arbitration award if Plaintiff met one of the six factors under N.J.S.A. 23A:23B-23(a). Judge Gardner held that ***none*** of those factors existed in the instant matter, and no discovery could or would change same.

Thereafter, Defendant was awarded costs and fees for Plaintiff's frivolous litigation, as Plaintiff was notified several times of the completely untenable nature of Plaintiff's claims, in addition to being advised on the record by Judge Gardner as to Plaintiff's inability to meet any factor under the only statute by which the relief sought could be provided.

Simply stated, Bruce Nagel, Esq. of Plaintiff, and Defendant contractually agreed to enter final binding arbitration, adjudicated by the Honorable Ned M. Rosenberg, J.S.C. (Ret.), and upon receiving a decision that was not to his liking, Mr. Nagel initiated the lawsuit below with the sole purpose of harassing Defendant. Plaintiff lacked any legal basis to seek vacatur of the decision and filed its Complaint in bad faith. Plaintiff's allegations can be summarized as

assertions that the arbitration agreement was "violated" because New Jersey law was not applied, and that the arbitration hearing was procedurally flawed. Those arguments were (and remain on appeal to be) wholly without merit. New Jersey law was clearly applied, both during the arbitration and at the Trial Court, and all aspects of the arbitration were procedurally sound, as delineated in Judge Rosenberg's lengthy detailed arbitration decision, and set forth under the operative arbitration agreement. That does not amount to "exceeding powers" of an arbitrator, or procurement of an arbitration award by "undue means." Indeed, Judge Gardner denied Plaintiff's motion to vacate, delineating the specific reasons as to why Plaintiff had not, and could not, show any of the six factors under N.J.S.A. 23A:23B-23(a) as present in this matter, which, again, are the only factors upon which Plaintiff's requested relief could be provided.

Judge Gardner aptly held that there were no genuine issues of material fact, and that because Plaintiff failed to meet any elements under N.J.S.A. 23A:23B-23(a), Defendant was entitled to a determination as a matter of law. On appeal, Plaintiff rehashes the same misplaced assertions, and does not offer any argument of merit, as to issues of fact missed or law misapplied, warranting reversal on appeal.

Additionally, Judge Gardner's sound discretion in awarding Defendant frivolous litigation costs and fees should not be disturbed, as all relevant factors

were considered and there is no showing of a clear error of judgment. Respectfully, given Judge Gardner's decision in denying Plaintiff's motion to vacate, which sought the exact same relief as Plaintiff's Complaint, there could be no question that Plaintiff pursued its claim in bad faith, and was sanctioned accordingly, as this meritless litigation is exactly the type of matter our Court Rules set out to protect against and penalize. In fact, Plaintiff's frivolous litigation continues at present time, as counsel specifically agreed not to pursue an appeal to vacate the final binding arbitration award beyond the Superior Court, and yet Plaintiff's bad faith harassment of Defendant has been brought before the Appellate Division. There was no abuse of discretion and no basis for reversal or remanding the matter to the Trial Court.

For the foregoing reasons, and those detailed infra, Defendant respectfully requests that Plaintiff's appeal be denied in its entirety.

COUNTER STATEMENT OF FACTS

A. *The Final Binding Arbitration Agreement, Submissions and Proceeding.*

Plaintiff and Defendant entered into an agreement to engage in a final binding arbitration (the "Agreement"), to be adjudicated by the Honorable Ned M. Rosenberg, J.S.C. (Ret.), to resolve a contingency fee dispute relating to a settled Law Division matter, wherein Defendant provided initial representation for a claimant (Vargas), and Plaintiff subsequently assumed representation. See

Pa35-38. Plaintiff's counsel, Mr. Nagel, selected both the forum and Judge Rosenberg as the arbitrator. See Pa42.

The Agreement, in relevant part, set forth that the arbitration would proceed according to the New Jersey Arbitration Act (N.J.S.A. 2A:23B-I, et seq.) and that same was "an *informal process in which strict rules of evidence usually are not applicable*[.]" See Pa35 at ¶1 and ¶7 (emphasis added). Additionally, the Agreement set forth that the New Jersey Rules of Evidence "may be relaxed as the Arbitrator and the parties deem fitting to achieve substantial justice between the parties." Pa36 at ¶15(A). The Agreement further provided that Judge Rosenberg was empowered to employ "all rights and powers of an arbitrator under the statutes governing this arbitration, and the rules governing commercial arbitrations of the American Arbitration Association or the International Institute for Conflict Prevention and Resolution (CPR), whichever affords greater flexibility." Pa35-36 at ¶7.

The Agreement additionally provided that testimony may or may not be recorded or under oath. Ibid. Testimony under oath was one of Judge Rosenberg's "tentative choices of the procedural options available." Pa36 at ¶15. The decision was to be final and binding. Id. at ¶11. Moreover, the Agreement set forth that appeals to the Appellate Division to vacate the award are *not* permitted: "The decision rendered hereunder shall not be subject to

appellate review except by the Superior Court of New Jersey on a motion for confirmation or vacation of the award." Pa37.

Both parties submitted written arbitration statements to Judge Rosenberg in advance of the hearing, which proceeded on May 9, 2024. See Pa42-45. Judge Rosenberg conducted the arbitration hearing at his office, during which counsel for both Plaintiff (Mr. Nagel) and Defendant (John Molinari, Esq. and Terrence Hull, Esq.) further discussed the arguments outlined in the submitted statements. Ibid. During the arbitration hearing, Plaintiff's counsel argued that Defendant's time sheet reconstruction was not the best evidence, that certain time entries were excessive, how legal services provided should be billed, the valuation of an hourly rate for involved counsel from the Defendant (David Fried, Esq.), the applicability of various New Jersey case decisions, such as La Mantia, etc. See Pa45-50. Following the hearing, both parties provided additional submissions for Judge Rosenberg to consider. Pa46. There was no objection made during the hearing as to the arbitration proceeding without "sworn testimony," nor was there any objection asserted in the additional post-arbitration submissions to Judge Rosenberg.

For purposes of the arbitration, there was no stipulation to a fair hourly rate for Mr. Fried. See Pa46. Plaintiff asserted, both in his submission to Judge Rosenberg and during the arbitration, that Mr. Fried's hourly rate should be

$450/hour, which was different than the figures exchanged during negotiations prior to the arbitration in an attempt to settle the matter. Defendant asserted, both in the submission to Judge Rosenberg and during the arbitration, that Mr. Fried's hourly rate should be $750/hour, which was different than the figures exchanged during negotiations prior to the arbitration in an attempt to settle the matter.

Judge Rosenberg issued his binding decision on July 10, 2024 – a ten-page written decision, outlining the relevant facts, procedural history, applicable New Jersey law, terms of arbitration and conclusions of law. See generally Pa42-51. The decision, in pertinent part, set forth that New Jersey law was applied, the rules of evidence were relaxed, the considerations taken and analyzed in terms of testimony and evidence presented at the hearing, what case law was reviewed and analyzed in relation to the underlying facts and how the ultimate award was determined. See Pa42, Pa47 ("In this case based upon the organizational conference, correspondence and email exchanges the Arbitrator would consider the process to be one that the parties specifically wanted to be as informal as possible with the rules of evidence relaxed."), Pa48-51.

Judge Rosenberg addressed consideration of Mr. Molinari's reconstruction of the time expended on the underlying file, explaining that he reviewed the time entries, in conjunction with considering Mr. Molinari's

experience and explanation as to how same was recreated via review of file notes, e-mails, phone call and meeting summaries, correspondence, filings, other documentation, etc., and deemed it to be credible and sufficient for the purposes of the arbitration. Pa45, Pa49 (Judge Rosenberg acknowledged and outlined, again, that the time sheets were sufficient "based upon the relaxed rules for arbitration . . . [and that] a certified civil trial attorney is more than qualified to figure the time which Mr. Fried had devoted to the matter[.]"). Judge Rosenberg further considered the foregoing in light of Mr. Fried having long-since retired from the practice, and having moved out of State. Pa45. Judge Rosenberg also pointed out during the arbitration, and again in his written decision, that many of the proposed time entries were "without regard for even travel and related time" for which additional time needed to be accounted. Ibid.

Judge Rosenberg also considered arguments advanced, both in the parties' written submissions and at arbitration, as to the compensability of Mr. Fried's press interactions, "background work," and "non-legal" work at the client's requests. Pa48-50. There was no time entry entered for a press conference at a funeral home, as the Vargas Family held visitation hours at a funeral home on May 20, 2018, and the funeral was conducted on May 21, 2018, but Defendant's first billing entry in relation to a television interview and discussion with the Vargas Family did not occur until May 28, 2018. See Pa20; Pa54.

Judge Rosenberg additionally reviewed, considered and applied New Jersey law, focusing on La Mantia v. Durst, 234 N.J. Super. 534 (App. Div. 1989) as "the leading case in a [fee dispute] such as this" and various other New Jersey case decisions, cited throughout the ten-page decision. See Pa42 ("the parties and the Arbitrator agree that New Jersey law is applicable"), Pa47-50.

B. *Plaintiff's Frivolous Complaint and Denied Cross-Motion to Vacate Judge Rosenberg's Arbitration Award.*

On or about August 2, 2024, Plaintiff filed its frivolous Complaint. See Pa61-65. Plaintiff's Complaint requested that Judge Rosenberg's final binding arbitration award be vacated, due to the arbitration's procedure, application of evidentiary rules and arguments pertinent to the underlying fee dispute. Ibid. Defendant sent Plaintiff a frivolous pleading letter, simultaneously with a Notice of Motion to dismiss for failure to state a claim, also seeking an award of attorneys' fees and costs. See Pa68-69; see generally Pa73 at 3:19-21.

Defendant's frivolous pleading letter outlined that Judge Rosenberg conducted the arbitration within the discretion and powers afforded to him under the New Jersey Arbitration Act and Binding Arbitration Agreement, and that the latter, in addition to Judge Rosenberg's final binding arbitration decision specified that the parties agreed to an informal arbitration with related rules of evidence and the application of New Jersey law. Pa68-69. The frivolous pleading letter put Plaintiff on notice that Defendant would file a motion for fees

and costs if Plaintiff's Complaint was not dismissed with prejudice within 28 days. Ibid. Plaintiff's Complaint was not withdrawn or corrected.

In response to Defendant's Notice of Motion to dismiss for failure to state a claim, Plaintiff filed a Notice of Cross-Motion seeking to vacate Judge Rosenberg's arbitration award, which was the entirety of the relief sought under Plaintiff's Complaint. See generally Pa73 at 3:19-21. The Honorable Robert H. Gardner, J.S.C. heard oral argument on the aforementioned motions on October 25, 2024 and denied Plaintiff's cross-motion to vacate the arbitration award. See Pa85 at 27:19-20.

Specifically, Judge Gardner held that the *only* basis by which the Trial Court could vacate Judge Rosenberg's binding arbitration award was under one of the six specific factors set forth under N.J.S.A. 2A:23B-23(a):

> [T]he scope by which this Court can exercise . . . its discretion under [N.J.S.A. 2A:23B-23(a)] with regard to vacation of an arbitration award, it only comes down to really . . . six different subject matters: [1] corruption, fraud, undue means, [2] partiality of the arbitrator, [3] refusal to postpone the hearing, [4] arbitrator exceeded the powers, [5] no agreement to arbitrate at all, and [6] improper notices of the hearing are the only six bases by which this Court can exercise -- can vacate the underlying award."
>
> See Pa84 at 25:9-19.

Judge Gardner further held that there is "no real showing" in this case of Plaintiff meeting any of the six factors under N.J.S.A. 2A:23B-23(a):

> There's no real showing here of corruption, fraud, or undue means . . . [or] partiality of the arbitrator. There was no issue regarding postponing the hearing [or that] the arbitration exceeded the powers . . . [as Judge Rosenberg] clearly exercised his powers under the . . . binding arbitration agreement[.] There was an agreement to arbitrate . . . and also improper notices of the hearing, which it doesn't really rise to the level[.]
>
> Id. at 25:20 – 26:11.

Judge Gardner found that Plaintiff's asserted grievance regarding "swearing the witnesses" pertained to only attorneys who spoke at the arbitration, and that under RPC 3.3, candor to the tribunal, which is "binding in New Jersey on all lawyers, and . . . [maintains that] everyone still has an obligation to tell the truth. I don't find the fact that there was a lack of swearing here . . . or objection by one side or the other that the other side wasn't sworn is of no moment here." See Pa84-85 at 26:12 – 27:9. Any other allegations raised by Plaintiff, such as reasonable hourly rates and the compensability of background/non-legal work, were "of no moment" since all issues were raised in front of Judge Rosenberg. See Pa85 at 27:10-14. Regardless, all other allegations or issues do not "form the basis of the Court's ability under [N.J.S.A. 2A:23B-23(a)], the vacation of the arbitration award, to – statute to in fact do that." Id. at 27:14-18.

Thus, the Trial Court found that Plaintiff could not meet any factor under N.J.S.A. 2A:23B-23(a), which was the only basis by which the Trial Court could

vacate Judge Rosenberg's final binding arbitration award, and denied Plaintiff's motion to vacate. Id. at 27:19-20.

C. *Defendant's Follow-up Frivolous Litigation Letter and Entry of Summary Judgment.*

Since Judge Gardner found that Plaintiff could not show any of the six factors under N.J.S.A. 2A:23B-23(a), essentially finding that there is no legal basis for Plaintiff's Complaint, Defendant sent Plaintiff a follow-up frivolous litigation letter, further outlining that Plaintiff's claims continue to be advanced in bad faith. See Pa88-90. Defendant again put Plaintiff on notice as to its bad faith claim seeking fees and costs, "[s]ince the only relief Plaintiff seeks in its Complaint is vacatur of Judge Rosenberg's final binding arbitration award, and since Judge Gardner denied Plaintiff's motion to vacate, explaining Plaintiff's inability to meet any factor to vacate under the only applicable statute, then we are compelled to reiterate that, as a matter of law, Plaintiff's Complaint cannot be sustained." Pa89.

Defendant filed an Answer, asserting Separate Defenses which specifically outlined that Plaintiff could not meet any factor under the only statute which could provide a basis for relief, N.J.S.A. 2A:23B-23(a), and that Plaintiff's action was frivolous and was noticed as such, under the Frivolous Lawsuit Statute, N.J.S.A. 2A:15-59.1. See Pa118-25, at Separate Defenses 12 and 13 ("Answering Defendant reserves the right, upon the conclusion of this

matter or at any such other appropriate time, to seek all costs and legal fees under the Frivolous Lawsuit Statute, N.J.S.A. 2A:15-59.1).

Plaintiff did not withdraw or correct its Complaint, and thus, Defendant was forced to file a Notice of Motion for summary judgment. See Pa14-33. Defendant's summary judgment motion outlined, again, that Plaintiff could not attain the relief sought under the applicable statute, that Judge Gardner held as to same, and that Defendant was therefore entitled to dismissal relief as a matter of law. See ibid. In opposition, Plaintiff suggested discovery was needed to conduct depositions of various individuals to discern information potentially relevant to the arbitrated fee dispute, and not being in any way relevant to establishing proofs to vacate an arbitration award.

Judge Gardner heard oral argument on the aforementioned summary judgment motion on January 17, 2025 and granted Defendant summary judgment, reaffirming that Plaintiff could not meet any factor under the applicable statute, and no discovery would change that. See 1T10:6 – 12:4. Judge Gardner stated that the "Court is familiar with this matter since in fact I handled the motion to dismiss back on October 25th . . . [and] indicated at that time that the Complaint was not dismissed, just that the motion was denied." 1T4:1-5. Judge Gardner held that:

> As indicated, there was a previous motion in this matter under 4:6-2(e) which the Court denied because I found that within

the four corners of the Complaint a viable cause of action existed, which is what 4:6-2(e) is for – used for.

I did not make a decision with regard to whether in fact – beyond that whether in fact there was a basis for the in fact or law to have the matter continue. I think Mr. – I appreciate Mr. Nagel's position, but I think he misconstrues my prior decision and/or maybe I was not clear in fact of what I was deciding.

As we said, that would really have been a motion for summary judgment in favor of the plaintiff, which I denied because I didn't think there was sufficient basis before me.

. . .

I don't find in fact the plaintiff has met any of these particular six factors [under N.J.S.A. 2A:23B-23(a)] here. There is no showing here, and I don't think discovery in this particular case is going to add any additional – enlighten anyone with regard to those particular six factors.

Certainly I went through them before with regard to the 4:6-2(e) motion. There's no allegation here of corruption, fraud or undue means. There's no allegation here with regard to the partiality of the arbitrator. There was – there was no refusal to postpone the hearing. The arbitrator found within the four corners of what the arbitration agreement was for, which was to decide apparently a fee split between the parties. There was an agreement to arbitrate. And the notices apparently – no one has alleged that there were improper notices of the hearing.

Therefore, pursuant to the statute there is no basis for the matter to continue. And that being the case the Court will grant the motion for summary judgment on behalf of the defendant.

1T10:6 – 12:4.

D. *Defendant Is Awarded Costs and Fees for Plaintiff's Frivolous Litigation.*

An Order was later entered advising Defendant to file an application if costs and fees were to be pursued under Rule 1:4-8. See Pa3-4. Throughout this litigation, and even after Defendant was awarded summary judgment and invited to file the instant application with the Court, Defendant has offered to resolve all claims and not pursue bad faith allegations for the arbitration award figure, but Plaintiff has continually refused. See generally Pa108-14 (billing entries pertaining to settlement correspondence and negotiations).

On January 31, 2025, Defendant filed a Notice of Motion for attorneys' fees and costs pursuant to Rule 1:4-8(b) and N.J.S.A. 2A:15-59.1. Pa95-96. Included with Defendant's moving papers were Certifications of both attorneys who worked on this matter. Pa97-116, Pa129-32. Said Certifications of Counsel outlined the eight factors to be considered under RPC 1.5(a) when determining the reasonableness of a fee, as well as enumerated summaries of both attorney's background credentials and experience in support of the proposed rates. See Pa103-06, Pa130. Additionally attached to the supporting Certifications of Counsel was an itemized billing accounting sheet for fees incurred from the frivolous litigation, delineating not just the amount of time expended and when, but setting forth detailed billing entries describing the work performed. Pa108-14. Defendant's supporting brief, again, rehashed Plaintiff's "completely

untenable" litigation, protracted procedural history and application of the accounted costs and fees as to the frivolous proceedings.

Plaintiff opposed Defendant's application, regurgitating its inapplicable dismissal and summary judgment arguments, and essentially arguing that because Plaintiff's Complaint survived a pre-Answer motion to dismiss, same equated to good faith, and that Defendant's proposed rates and time exhausted litigating the underlying matter was excessive. See generally Pa133. Of note, at no point did Plaintiff argue that Defendant was not entitled to frivolous litigation costs and fees because it appeared pro se.

On February 28, 2025, the Court entered an Order awarding Defendant $40,581.56 for attorneys' fees and costs, based upon Plaintiff's frivolous litigation. Pa1. Judge Gardner explained that the "[o]pposition and reply are noted. The opposition raises the same issues that were argued at the 4:6-2 Motion and the Defendant's Motion for Summary Judgment; this Court at both of those occasions noted the Plaintiff's well argued issues but was not convinced by the arguments." Ibid.

Thereafter, Defendant advised Plaintiff of the Agreement's plain language that no appeal to vacate Judge Rosenberg's final binding award could proceed beyond the Superior Court to the Appellate Division. See Pa37. Defendant also

advised Plaintiff of its intent to seek "additional costs and fees after defeating [Plaintiff's] frivolous appeal."

LEGAL ARGUMENT

I. STANDARDS OF REVIEW

Plaintiff appeals both the Trial Court's entry of summary judgment, as well as its award of frivolous litigation costs and fees. Plaintiff has not asserted any argument evidencing the Trial Court's misapplication of summary judgment, as the record is devoid of any genuine issue of material fact or incorrect decision as a matter of law. Plaintiff additionally has not asserted any argument showing an abuse of discretion by the Trial Court, or clear error in judgment, premised upon inappropriate factors, by awarding Defendant frivolous litigation costs and fees. Plaintiff's appeal fails on these bases alone.

A. *The Trial Court Appropriately Applied The Summary Judgment Standard*.

When a party appeals a trial court's grant of summary judgment, the appellate court is to exercise *de novo* review as to whether summary judgment was proper. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 427 (App. Div. 2004). An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge. W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012). Summary judgment is appropriate where there is no genuine issue as to any material fact challenged. R. 4:46-2(c). "The practical

effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

B. *There Was No Abuse of Discretion By The Trial Court When Awarding Frivolous Litigation Costs and Fees, As The Decision Was Premised Upon Relevant Factors and Was Without Clear Error In Judgment.*

The Appellate Division reviews a trial court's award of frivolous litigation attorneys' fees and costs for an abuse of discretion. McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011). Reversal is warranted "only if [the trial court's decision] 'was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" Ibid. (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

II. Summary Judgment Was Appropriately Granted, As No Aspects of the Arbitration Agreement Were "Ignored," and There Was No Showing of Procurement Via "Undue Means." (Pa2)

Plaintiff argues that the Trial Court inappropriately granted summary judgment by "ignoring" requirements of the Agreement which were violated, and by providing dispositive relief in light of an arbitration award procured via "undue means." Pb2. At the outset, no aspect of the Agreement was "ignored" by the Trial Court, setting aside that Plaintiff's Complaint failed to articulate any aspect of N.J.S.A. 23A:23B-23(a), which provided the singular basis for the

relief sought. Each of Plaintiff's contested points pertaining to the requirements of the Agreement were extensively briefed, argued and decided upon during the prior proceedings. Furthermore, no aspect of Judge Rosenberg's decision-making, use of powers, or ultimate award, evidences procurement via "undue means." To that end, no aspect of Judge Gardner's rulings at the Trial Court level evidences an incorrect application of the summary judgment standards in that respect. There is no genuine issue as to any material fact, but rather a simple application of the only statute applicable when considering vacating an arbitration award, which was done several times by Judge Gardner.

A. *There Was No Failure to Take Sworn Testimony At the Arbitration, Which Plaintiff's Counsel Conceded to Judge Gardner*. (1T13:15-24)

Plaintiff has repeatedly parroted the same tired argument that Judge Rosenberg "failed to have the witnesses take an oath . . . [which amounts to a] violation of the Agreement require[ing] vacation of the award." Pb16. Any continued allegation as to flawed procedure due to failure to swear in witnesses at the arbitration is folly.

The Agreement provided that testimony may or may not be recorded or under oath. See Pa35 at ¶7. It did not require that witnesses take an oath, but rather that testimony under oath was one of Judge Rosenberg's "*tentative* choices of the *procedural options available*." Pa36 at ¶15 (emphasis added). Judge Gardner found that Plaintiff's asserted grievance regarding "swearing the

witnesses" falls under RPC 3.3, which is binding on all New Jersey attorneys, maintaining that "everyone still has an obligation to tell the truth. I don't find the fact that there was a lack of swearing here . . . or objection by one side or the other that the other side wasn't sworn is of no moment here." See Pa84-85 at 26:12 – 27:9.

Since the only participants at the arbitration hearing were three attorneys and a retired judge, Judge Gardner pointed out that "under RPC 3.3 . . . there [is] a requirement under the [RPC] with candor to the tribunal[.] . . . [T]hat's why lawyers are never sworn in when you argue in front of a court on the record, because by the [RPC], you're obligated as a lawyer to basically tell the truth and/or not advocate for something that you know . . . patently to be false[.]" 1T13:15-24. To be sure, Plaintiff's counsel actually conceded on the record that he had not considered said flaw to his sworn testimony argument, stating, "I don't think I even considered that at the time[.] I can't argue what the RPC says, but what I – what I'm raising is – and to – it's – it's an interesting (indiscernible) the Court, and that is does the RPC in some way nullify a contractual agreement between the parties[.]" See 1T14:1-7.

Thus, Plaintiff cannot reasonably claim that Trial Court erred, and the award should be vacated, because the arbitration was "procedurally flawed," when Judge Rosenberg explicitly considered this very component of Plaintiff's

present claim, and not only explained the basis for consideration of such evidence, but provided numerous citations to case law, the N.J.A.C. and the Arbitration Act granting him the broad latitude to determine relevant evidence. See Pa42-51. Plaintiff's argument regarding the Rules of Evidence "requiring" Judge Rosenberg to have the three attorneys present at the arbitration take an oath and give sworn testimony is simply false. This was an arbitration, where the Rules of Evidence were specifically agreed to be relaxed, and Judge Rosenberg was imbued with the wide-ranging discretionary powers of an arbitrator under the Agreement. See generally Pa35-36. Additionally, Judge Gardner aptly pointed out that Plaintiff's sworn testimony contention is "of no moment here." Pa85 at 27:9. Moreover, to the extent Plaintiff believes this component of its claim falls within the scope of any of the six factors under N.J.S.A. 23A:23B-23(a), Judge Gardner found "no real showing" of "undue means" or that Judge Rosenberg exceeded his powers, as he " clearly exercised his powers under the . . . binding arbitration agreement[.]" Pa84 at 25:20 – 26:11.

B. *All Rules of Evidence Were Followed and Thus, Summary Judgment was Appropriate*.

"The goal of arbitration is to bring the parties' issues to a final resolution, 'in a speedy, inexpensive, expeditious, and perhaps less formal manner' than full-blown litigation in court culminating in a lengthy trial." Curran v. Curran, 453 N.J. Super. 315, 321 (App. Div. 2018) (citing Minkowitz v. Israeli, 433 N.J.

Super. 111, 132 (App. Div. 2013)). Thus, reviewing courts have a limited role following the parties' agreement to arbitrate and must show deference to "the determination of any substantive issues that the parties have agreed to arbitrate." Ibid. Judge Rosenberg referenced same and specified that "based upon the organizational conference, correspondence and email exchanges, the Arbitrator would consider the process to be one that the parties specifically wanted to be as informal as possible with the rules of evidence relaxed." See Pa47.

The New Jersey Arbitration Act "vests arbitrators with broad discretion over discovery and other procedural matters to 'conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.'" Minkowitz, 433 N.J. Super. at 111 (citing N.J.S.A. 2A:23B-15(a)). Not only did Judge Rosenberg act fully within the scope of the powers instilled by the Arbitration Act, but Plaintiff agreed to proceeding as such under the arbitration agreement that he negotiated, created, and accepted as binding. See Pa36 at Point 15(a) ("The New Jersey Rules of Evidence shall generally govern these proceedings, but may be relaxed as the Arbitrator and parties deem fitting to achieve substantial justice…."). To that end, Judge Rosenberg reiterated such broad and informal procedural constructs, stating "that the parties specifically wanted to be as informal as possible with the rules of evidence relaxed." See Pa47. Judge Rosenberg further cited N.J.A.C.

12:105-4.10 with regard to evidence considered for an arbitration, finding that "*[c]onformance to legal rules of evidence is not necessary, and the arbitrator shall be the judge of the relevancy and materiality of the evidence offered.*" Ibid. (emphasis added).

Thus, there was no misapplication of evidentiary rules in an informal/relaxed arbitration setting, and therefore, no basis upon which to overturn the Trial Court's entry of summary judgment.

C. *Judge Rosenberg Applied New Jersey Law and Set Forth His Findings of Fact and Law.*

Plaintiff continues to make broad accusations with no support. Plaintiff claims that Judge Rosenberg "failed to apply New Jersey law," yet ignores that all pre-arbitration submissions, post-arbitration additional submissions, and every case citation within Judge Rosenberg's decision, are based upon New Jersey law. To be sure, Judge Rosenberg clearly stated in his written arbitration decision that all parties "agree that New Jersey law is applicable," and cited to the numerous New Jersey case decisions upon which the underlying *quantum meruit* analysis was based, specifying that "both counsel would agree that the leading case in a matter such as this [is] La Mantia v. Durst" with additional discussion and analysis of other New Jersey case law. See Pa42, Pa47.

Plaintiff's contention pertaining to the "flawed" arbitration procedure, and that no findings of fact or law were rendered, defies logic and does not provide

a basis upon which the final binding arbitration award can be vacated. Judge Rosenberg's decision outlines the findings of fact, based upon the arbitration hearing and the multiple written submissions (see Pa43-44, Pa46-47), and his conclusions of law in relation to the evidence considered and under New Jersey law. See Pa47-51. Plaintiff's vague allegation of Judge Rosenberg going to the hospital later after the arbitration is nothing more than a ploy, as that information has no bearing on the hearing, award or grounds to vacate. In fact, Judge Rosenberg accepted and reviewed supplemental submissions after the hearing, for further consideration of all arguments. Otherwise, Judge Gardner found that Plaintiff's ancillary allegations do not "form the basis of the Court's ability under [N.J.S.A. 23A:23B-23(a)], the vacation of the arbitration award, to – statute to in fact do that." See Pa85 at 27:14-18. Judge Rosenberg delineated all relevant facts and conclusions of law throughout his ten-page decision; thus, Plaintiff's allegation in this regard is a red herring and not a basis upon which to overturn summary judgment.

i. There Was No Compensation Request For Attending A Funeral and No Award Provided For Same.

Plaintiff complains that the awarded amount included compensation for "non-legal" time such as "attending the funeral and dealing with the press[.]" There was no time entry for "attending the funeral," and Judge Rosenberg did not award any fee for funeral attendance. Judge Rosenberg outlined that he

specifically considered Mr. Nagel's unsubstantiated argument that Blume's "non-legal" work was beyond the scope of the underlying claim, but found that Blume necessarily worked in response to the "enormity of the accident," in compliance with the client's specific requests and in accordance with "background work" under Buckelew v. Grossbard, 189 N.J. Super. 584, 587-88 (Law Div. 1983). See Pa43, Pa48-49. Regardless, there was no time capture entered for a press conference at a funeral home, as the Vargas Family held visitation hours at a funeral home on May 20, 2018, the funeral was conducted on May 21, 2018, and a three-hour entry for a television interview and discussion with the Vargas Family was entered for May 28, 2018. See Certification of Counsel at ¶26; see also Ex. C. Plaintiff has zero evidence to support these arguments, which were all raised and considered by the Trial Court. Same does not provide a basis for overturing summary judgment.

ii. There Was No "Stipulation" As To The Hourly Rate; Regardless, Differing Valuations As To An Hourly Rate Do Not Formulate A Basis To Vacate The Award and Summary Judgment Was Appropriate.

Additionally, any contrived allegation of violation of New Jersey law with respect to the determination of Mr. Fried's fair hourly rate is another false distraction. For purposes of the arbitration, there was no stipulation to a fair hourly rate for Mr. Fried. The purpose behind Plaintiff continually referencing a "stipulation" in this respect can only be to mislead the Court. Despite Plaintiff

informing both the Trial Court and the Appellate Division that there was a "stipulation" as to a $500 hourly rate, Plaintiff actually asserted, both in his submission to Judge Rosenberg and during the arbitration, that Mr. Fried's hourly rate should be $450/hour. Defendant asserted, both in the submission to Judge Rosenberg and during the arbitration, that Mr. Fried's hourly rate should be $750/hour, which was different than the figures exchanged during negotiations prior to the arbitration in an attempt to settle the matter. Mr. Fried's hourly rate was raised before Judge Rosenberg and does not form a basis for the Trial Court or Appellate Division to vacate the subject final binding arbitration award. See Pa85 at 27:10-18.

iii. No Discovery Was Needed and Judge Gardner Appropriately Deemed This Matter Ripe For Summary Judgment.

There was no dispute as to the underlying qualifications and credentials of counsel to support the hourly fee rate applied, so even while the hourly rate is not a basis for vacating the award, summary judgment was still appropriate. In fact, there was no genuine issue of material fact pertaining to any of the six factors under N.J.S.A. 23A:23B-23(a), so the matter was ripe for summary judgment. See R. 4:46-2. The only argument Plaintiff offered in opposition to summary judgment was that discovery was needed to resolve issues of fact. This desperate defense was anticipated and addressed extensively in Defendant's summary judgment brief. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520,

541 (1995) (the Court emphasizing that the litigant should not be forced to expend resources in defending a claim that will ultimately be deemed "worthless."). There is no discovery that could or would change the plain fact that, as a matter of law, Plaintiff cannot show any of the six factors under N.J.S.A. 23A:23B-23(a) to vacate an arbitration award, just as Judge Gardner previously held when denying Plaintiff's cross-motion to vacate the award. Again, said statute is the only basis upon which the relief Plaintiff sought – vacatur of Judge Rosenberg's final binding arbitration award – can be provided.

Plaintiff argued that the depositions of David Fried, Esq., John Molinari, Esq. and Retired Judge Ned Rosenberg needed to be conducted, in addition to the exchange of written discovery. This argument was wholly without merit as none of Plaintiff's proposed "discovery" would remotely speak to the six specific factors to vacate an arbitration award under N.J.S.A. 23A:23B-23(a).

The fact of the matter is that Plaintiff is simply unhappy with the binding arbitration award, and while Mr. Nagel may disagree with how Judge Rosenberg analyzed the underlying matter with respect to the cited New Jersey case decisions, and how Judge Gardner analyzed same, that does not somehow equate to New Jersey law not being applied, or that the Agreement was violated. Also, while such a contention is straightforwardly incorrect, not applying New Jersey law is not a basis upon which a binding arbitration award may be vacated, as

Judge Gardner previously found when denying Plaintiff's motion to vacate. See Pa85 at 27:10-18.

Overall, Plaintiff does not, and cannot, assert any basis as to why summary judgment was not appropriately granted, given the absence of genuine issues of material fact and the clear presentation/application of factors under N.J.S.A. 23A:23B-23(a), entitling Defendant to a determination as a matter of law. Plaintiff seems to broadly assert that Judge Rosenberg exceeded his powers as an arbitrator, leading to an award procured by undue means, but all of these arguments were raised before the Trial Court, and none of them amount to excessive use of arbitration powers or undue means. Testimony was not required under oath. The Rules of Evidence were agreed to be relaxed, and Judge Rosenberg considered the evidence offered and testimony provided within the province of his powers under the Arbitration Act. There was no failure to apply New Jersey law, as that was the only law cited, argued and decided upon – Plaintiff simply does not like that his interpretation of said law does not align with Judge Rosenberg or Judge Gardner's interpretations. There were findings of fact and law provided by Judge Rosenberg. Regardless, the Trial Court considered all of these arguments.

Plaintiff's complaints do not show that Judge Rosenberg exceeded his powers, that the arbitration award was procured through undue means or that the matter was premature for summary judgment.

III. There Was No Abuse of Discretion By The Trial Court When Awarding Costs and Fees For Plaintiff's Frivolous Litigation, As The Decision Was Premised Upon Consideration of All Relevant Factors. (Pa1)

The Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1, states that in order to find that a Complaint as frivolous, the Court must determine that the Complaint was "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury" or "[t]he nonprevailing party knew, or *should have known, that the complaint… was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law*." Ibid. (emphasis added). Similarly, Rule 1:4-8 provides a pleading is frivolous if: (1) it is "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;" (2) the claims therein are not "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;" (3) the factual allegations lack evidentiary support; or (4) the denials of factual allegations are not warranted. R. 1:4-8(a). Defendant reiterated, on multiple occasions, to Plaintiff that its meritless attempt to vacate the subject final,

binding arbitration award was a textbook example of frivolous litigation, but Plaintiff sat on his hands and ignored all.

Plaintiff filed its Complaint in bad faith in order to harass Defendant, and knew, or should have known, that the conclusory allegations of violating the Agreement were without any reasonable basis in law or equity. See Rabinowitz v. Wahrenberger, 406 N.J. Super. 126, 136-37 (App. Div. 2009) (holding that Plaintiff's counsel, Mr. Nagel, was liable for payment of an award of attorneys' fees and costs, under the Frivolous Litigation Statute, for pursuing litigation which lacked any merit, despite Mr. Nagel's failed contention that his Complaint was brought in good faith). Plaintiff's knowledge that his claims lacked any basis in law was demonstrated by his failure to relate any factor giving rise to vacating a binding arbitration award under N.J.S.A. 2A:23B-23(a) at any point within the Complaint, and that the asserted bases for vacating the award (failure to apply New Jersey law and flawed evidentiary procedure) were so blatantly contradicted by a plain reading of Judge Rosenberg's ten-page binding arbitration decision and the operative Agreement. See Pa42-51; Pa35-38. Defendant reminded Plaintiff of same in the September 11, 2024 frivolous litigation notice. See Pa68-69.

This was only furthered when Judge Gardner examined each factor under N.J.S.A. 2A:23B-23(a) on the record when denying Plaintiff's cross-motion to

vacate, detailing why Plaintiff had not and could not meet any of the factors for relief and that the statute was the only basis by which relief could be granted by the Trial Court. See Pa84-85 at 25:9 – 26:11, 27:10-20. Plaintiff could not (and never did) present any credible argument that it did not know that its Complaint "was without any reasonable basis in law or equity" when Judge Gardner explicitly detailed that there is only ***one*** statute which provides this Court with any basis to vacate the subject final, binding arbitration award, and then further outlined that there is "no real showing" in this case of Plaintiff meeting ***any*** of the six factors under N.J.S.A. 2A:23B-23(a). See Pa84 at 25:20 – 26:11. The total futility of Plaintiff's action was yet again highlighted in opposition to Defendant's summary judgment motion, when Plaintiff listed the discovery he felt needed to be conducted to establish fee dispute points relating to the underlying arbitrated matter and having ***absolutely nothing*** to do with establishing proofs under N.J.S.A. 2A:23B-23(a).

Thus, Plaintiff's general assertions as to "good faith" attempts to litigate fail, as Plaintiff's actions to date, including ignoring Judge Gardner's advisement that Plaintiff fails to meet any factor to vacate under the only statute providing relief, epitomize harassing and frivolous litigation. Simply because Plaintiff's Complaint was cognizably pled to "survive a motion to dismiss," does not somehow disinfect the frivolous nature of the litigation. Pb30. To that end,

meeting the liberal pleading criteria in response to a pre-Answer motion to dismiss is a wholly different standard than having the case dismissed on summary judgment, and has no bearing on reversing Judge Garnder's sound discretion in awarding Defendant frivolous litigation costs and fees.

Continuing to the present time, Plaintiff chose to ignore the terms of the final binding Arbitration Agreement and appeals the failed vacatur motion to the Appellate Division, despite contractually agreeing not to do so. Pa37. Plaintiff is consistent, at least, by continuing to parade the same falsehoods and flawed arguments pertaining to the underlying arbitration proceeding and merits of the underlying arbitrated fee dispute, when same has no relevance to vacating an arbitration award under N.J.S.A. 2A:23B-23(a), or appealing a summary judgment decision or award of frivolous litigation costs and fees. This type of conduct only further underscores Plaintiff's irrational and untenable arguments and repeatedly highlights that Plaintiff's claims are without an iota of credible evidence to support same. As Defendant asserted to the Trial Court, Plaintiff has been refused and denied at every turn, but barrels forward in bad faith.

A. *Plaintiff's New Argument That A Pro Se Defendant Cannot Be Awarded Frivolous Costs and Fees Was Not Raised Below, And Thus, Cannot Be Considered On Appeal.*

Plaintiff raises on appeal for the first time the issue of Defendant as a pro se party being awarded frivolous costs and fees. Plaintiff asserted that it "argued

generally that fees should not be awarded[,]" but Plaintiff absolutely did not previously argue that a pro se law firm is barred from ever pursuing or being awarded frivolous litigation costs and fees. Pb28. The Appellate Division, respectfully, should decline to address Plaintiff's new argument because it was not raised below, was not argued below, and does not involve jurisdictional or public interest concerns. Zaman v. Felton, 219 N.J. 199, 226-27 (2014); see Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.") (internal quotation and citation omitted).

In support of Plaintiff's new argument, it did not cite a single published decision and only cited to two unpublished decisions, which ***do not*** stand for the position that a pro se law firm cannot be awarded costs and fees for frivolous litigation, as Plaintiff suggests. Schaffhauser v. Crows Mill Trust, No. A-0954-06T5 (App. Div. May 11, 2007) (slip op. at 4-5) (holding that a defendant was not entitled to judgment for which he already received reimbursement, and was not entitled to attorney's fees after not prevailing on the underlying motion)[1]; Corigliano v. Corigliano, No. A-3046-19 (App. Div. July 12, 2021) (slip op. at

[1] See Pa157-58.

4-5) (explaining that the Trial Court erred when sanctioning a represented party instead of the attorney representing the party, having nothing to do with barring frivolous litigation fees to be awarded to a pro se law firm).[2] Setting aside that Plaintiff never raised this argument before, and setting aside that Plaintiff's cited unpublished case law does not stand for barring pro se litigants from receiving frivolous litigation costs and fees, if one were to follow Plaintiff's proposed line of thought, no pro se litigant would ever be able to seek protection or relief under N.J.S.A. 2A:15-59.1 or Rule 1:4-8, which is not the case or intent behind the statute and Rule.

Plaintiff had the opportunity to present this new argument to the Trial Court, but failed to do so. Plaintiff's cited supporting unpublished decisions do not endorse barring a pro se litigant from being awarded frivolous litigation costs and fees. There is no argument being asserted that Plaintiff's new argument speaks to the jurisdiction of the Trial Court, or concerns matters of great public interest, as the argument does neither and should be considered moot as such.

B. *Defendant's Hourly Rates and Billing Entries Were Exceedingly Detailed and Comprehensive, Providing The Trial Court With Sufficient Probative Value To Determine The Reasonableness of The Time Expended, All Within the Trial Court's Discretion.*

[2] See Pa140-41.

Plaintiff argues, without any support, that certain billing entries of Defendant's are "outrageous," and "patently excessive," as were the hourly rates assigned to each billing attorney. Pb32-36. Plaintiff dedicated an entire page of its appeal brief (Pb33) to listing only the dates and amounts of time spent on each date that Defendant's attorneys expended in relation to Defendant's pre-Answer motion to dismiss. Plaintiff provides the blanket statement that said time expended and billed was "unreasonable and excessive," without support. Pb34.

Curiously, Plaintiff decided not to include the billing entry descriptions which accompanied each of the dates/times listed, encompassing three pages of billing statements. Pa108-10. Plaintiff disregards these entries as unreasonable and excessive, but ignores that every entry was calculated to six-minute increments, tracked with a clock in accordance with industry billing entry standards. The entries were additionally separated out to delineate between review, research, drafting, appearances, etc., and then further parsed by what specific areas of law were being researched and from what sources, what documents were being reviewed and for what reason, what sections of each motion, brief or letter were being drafted, etc. Plaintiff unilaterally asserts, again with zero explanation or support, that it should not have taken more than ten hours to draft and argue Defendant's motion to dismiss. Pb34. How Plaintiff

arrived at that number, or why the explanations for all of Defendant's billing entries should be disregarded, is a mystery.

Plaintiff further argues that any time billed for Defendant's motion to dismiss should be barred and disregarded since the motion was denied. Pb34. Plaintiff offers no support for this proposition because no such support exists. Plaintiff fails to appreciate that these were costs and fees awarded under the Frivolous *Litigation* Statute, not the Frivolous-Motions-Only-Won Statute. The entirety of Plaintiff's litigation was frivolous. One does not parse out each pleading, motion, correspondence, and document in separate vacuums, but rather considers the completely untenable and harassing nature of the litigation on a whole.

Similarly, Plaintiff erroneously argues that Defendant failed to provide any support for Mr. Hull's hourly rate as $500/hour, or Mr. Molinari's hourly rate is $750/hour. Pb35. In an effort of efficiency, instead of repeating the extensive credentials and justifying qualifications under RPC 1.5(a), which served as the basis for the Trial Court in setting the hourly rates at $500 and $750, Defendant refers to the ten paragraphs included with Mr. Hull's supporting Certification submitted to the Trial Court with Defendant's motion for frivolous litigation costs and fees, as well as the 11 paragraphs included within Mr. Molinari's supporting Certification. See Pa103-05; Pa129-130. In

stark contrast to the foregoing, Plaintiff summarily decrees that Mr. Hull's hourly rate should be $300/hour and Mr. Molinari's set to $450/hour. Pb35-36. Unsurprisingly (but again, consistent), Plaintiff ignores Defendant's legal and factual support for its underlying argument, offers zero support for its proposed hourly rates, and requests this Court follow accordingly simply because Plaintiff says so.

Ultimately, this Court will only reverse a trial judge's discretionary decision to award frivolous litigation costs and fees if the award was not premised upon consideration of all relevant factors or amounted to a clear error in judgment. McDaniel, 419 N.J. Super. 498. Judge Gardner exhibited sound discretion when entering the February 28, 2025 Order, as the relevant factors substantiating a reasonable hourly rate under RPC 1.5(a) were provided by Defendant, in addition to comprehensive billing sheets, accounting for every six minutes of time expended in relation to this litigation. See Pa108-14. Furthermore, in addition to Defendant continually notifying Plaintiff of its frivolous endeavors and Defendant's intent to apply to the Trial Court for the appropriate sanctions/relief, Judge Gardner outlined, on the record, the only statute upon which relief could be granted to Plaintiff, and how/why Plaintiff could not, and would not, meet any of the six factors under said statute, but Plaintiff continued with its litigation. Thus, there can be no reasonable

argument, or any meritorious argument at all, that Judge Gardner's award amounted to a clear error in judgment.

It is respectfully requested that this Court deny Plaintiff's arguments in their entirety and not disturb Judge Gardner's February 28, 2025 Order.

C. *The February 28, 2025 Order Awarding Frivolous Litigation Costs and Fees Provided Written Reasoning, And Appropriately Reviewed The Submitted Time Records*.

Plaintiff also argues that the entire matter should be remanded to the Trial Court because the February 28, 2025 Order "failed to make any findings of fact or law to explain or support its ruling[,]" which disregards the written reasoning supplied with the entered Order and mischaracterizes the supporting case decisions cited. Pb36.

As an initial matter, Judge Gardner did provide written findings as to his decision. See Pa1 (holding that the "[o]pposition and reply are noted. The opposition raises the same issues that were argued at the 4:6-2 Motion and the Defendant's Motion for Summary Judgment; this Court at both of those occasions noted the Plaintiff's well argued issues but was not convinced by the arguments."). As Judge Gardner set forth, the moving papers, opposition and reply were all considered. Ibid. Within each "noted" filing, there were legal arguments asserted as to the frivolous nature of Plaintiff's litigation, the notice of same supplied time and time again, and detailed attorney Certifications and

itemized time billing spreadsheets outlining the work performed, rates, etc. See Pa103-05; Pa129-130. As Judge Gardner held, Plaintiff's arguments in opposition were presented to the Trial Court for a ***third time***, and still not appreciated in successful opposition of Defendant's frivolous costs and fees application. See Pa1.

Plaintiff still persists at present time, presenting the same arguments as to the final binding arbitration proceedings, asserting that all courts should accept Plaintiff's interpretation of same, and thus, the litigation cannot be frivolous. Pb31. Just because Plaintiff would prefer a more worded explanation, further outlining the utter frivolous nature of its pleadings and filings, does not equate to a fatal flaw in the entered decision or constitute a violation under Rule 1:7-4(a). Judge Gardner did indeed provide a written explanation, and further referenced prior rulings which have rehashed the same arguments.

Plaintiff now argues that the provided written reasoning "precludes this Court from engaging in any meaningful review of [the Trial Court's] decision[,]" but this is wholly without merit. Pb38. The subject Order referenced the arguments previously unsuccessfully asserted, as well as those advanced by Defendant in the moving papers and reply. Pa1. This Court is not left to fumble in the dark as to how the decision was made, but instead has ample reasoning previously provided as to how and why Plaintiff cannot meet any of the six

factors under N.J.S.A. 2A:23B-23(a), rendering the litigation untenable. See 1T, Pa83-85. Moreover, within the case decisions to which Plaintiff cited, reversing awards of fees and costs without findings of fact and law, there was either no time sheet provided, or an arbitrary figure awarded without any basis provided in the record (i.e., no explanation of tasks performed, hours expended, rate calculations, etc.). That is *not* the case here, as Defendant submitted a detailed itemized billing time sheet, in addition to lengthy attorney Certifications providing ample background information, credentials and qualifications for the involved billing attorneys. Pa97-116, Pa129-132.

In opposition, and as Plaintiff repeated in its instant application, Mr. Nagel arbitrarily determined an hourly rate for each of the two billing attorneys, without any explanation or justification (in stark contrast to the abundant justification provided by counsel for Defendant), and then went even further to declare that various tasks should not take more than a few hours' time, again without any explanation or justification – simply because Mr. Nagel deems it so. It appears that Plaintiff believes this entire matter should be remanded because Judge Gardner did not expand more upon his written explanation, and explicitly state that the Trial Court rejected Plaintiff's unsupported rate proposals and unsupported slashing of time spent litigating this case, and instead accepted Defendant's fleshed-out justifications for hourly rates and detailed

itemized billing entries. This is inherent in the Trial Court's decision and explanation, but beyond that, adding such a sentence to the Order's decision would not change anything or provide more substance for this Court to review.

Ultimately, Plaintiff's argument is yet another in a long line of misguided and mischaracterized misdirection. The Trial Court's February 28, 2025 Order provided sufficient written explanation and reference to the controlling case law, and Judge Gardner's award should not be disturbed, as it fell well within his discretion and was premised upon ample supporting factors and information.

CONCLUSION

Thus, for the foregoing reasons, as well as those supplied an all submissions to the Trial Court, it is respectfully request that this Court deny Plaintiff's appeal in its entirety.

BLUME FORTE
Attorneys for Defendant-Respondent

John E. Molinari
BY: _____
JOHN E. MOLINARI

DATED: July 28, 2025

NAGEL RICE, LLP,

Plaintiff,

v.

BLUME, FORTE, FRIED, ZERRES & MOLINARI,

Defendant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1869-24

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-5282-24

Civil Action

Sat Below:
Hon. Robert Heys Gardner, J.S.C.

(Submitted: August 11, 2025)

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT NAGEL RICE, LLP

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PRELIMINARY STATEMENT

While conceding that we have applied the correct standard for vacating the arbitration award, Defendant has failed to address the multiple flaws in the arbitration process and decision. Notably, it failed to answer how the arbitrator could have reached the decision to award 100% of the hours allegedly worked at a rate of $750 per hour for both the senior attorney and the junior associate. Defendant also failed to respond to the fact that the arbitrator failed to make findings of fact and conclusions of law regarding critical issues.

Nor did Defendant address the other core mistakes:

1. Not taking testimony under oath which is required by the arbitration agreement;

2. Awarding fees for attending the funeral and giving a press conference;

3. Not making findings, as required by law, regarding the reasonableness of time spent, not making findings regarding the hourly rate, and not hearing any testimony as to how an hourly rate of $750 per hour applies to a junior associate in northern New Jersey.

Additionally, the opposition brief fails to articulate what can possibly be frivolous when an arbitration award that is deeply flawed is attacked.

The orders below should be vacated.

LEGAL ARGUMENT

I. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT DID NOT ERR BY GRANTING ITS MOTION FOR SUMMARY JUDGMENT (Raised below: Pa2; 1T at 12:1 – 4)

In its moving brief, Plaintiff explained that there as six statutory criteria for vacating an arbitration award, as set forth in N.J.S.A. 2A:23B-23(a). With regard to the first criterion – procurement of an arbitration award through "undue means" – Plaintiff set forth how "[t]he phrase … "ordinarily encompasses a situation in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record."" Washington Twp. Bd. of Educ. v. Sal Elec., Inc., No. A-3279-09T2, 2011 WL 1661009, at *7 (App. Div. May 4, 2011) (Pa169)[1], quoting State, Off. of Emp. Rels. v. Commc'ns Workers of Am., AFL-CIO, 154 N.J. 98, 111 (1998). See also Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P., 356 N.J. Super. 567, 580-81 (L. Div. 2002) (vacating arbitration award as the "product of undue means" where "the arbitrator applied the incorrect legal rule" in "manifest disregard of law and contrary to established public policy"). And, with regard to the fourth criterion – an arbitrator exceeding the scope of his power – Plaintiff set forth how it is met when the arbitrator "disregard[s] the terms of the parties'

[1] "Pa__" refers to the June 26, 2025 Appendix on behalf of Plaintiff-Appellant.

contract or rewrite[s] the contract for the parties." Pepper ex rel. Pepper v. Sadley, No. A-3459-11T2, 2013 WL 2257842, at *2 (App. Div. May 24, 2013) (Pa155), cert. den., 216 N.J. 8 (2013), citing Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391 (1985) ("When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract confers. The scope of an arbitrator's authority depends on the terms of the contract between the parties"). "Thus, our courts have vacated arbitration awards... when arbitrators have, for example, added new terms to an agreement or ignored its clear language." Policemen's Benev. Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011). Therefore, "if the arbitration agreement calls for the arbitrator to apply New Jersey law, and the arbitrator fails to do so, the arbitrator exceeds his or her powers." Kadi v. Massotto, No. A-2555-07T2, 2008 WL 4830951, at *8 (App. Div. Nov. 10, 2008) (Pa148), citing Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 365 (1994) (discussing vacation of arbitration award based on "fundamental error of New Jersey law").

Notably, Defendant does not challenge these legal standards applicable to the first and fourth criteria of N.J.S.A. 2A:23B-23(a). Indeed, Defendant never addresses them at all and does not once cite or attempt to distinguish *any* of the cases relied upon by Plaintiff to support these arguments. Accordingly,

Defendant concedes that Plaintiff has articulated the correct legal standards applicable to these criteria. Instead of addressing the foregoing, Defendant makes multiple factual arguments. These, however, find no basis in the record and/or demonstrate that there are disputes regarding material issues of fact which precluded entry of summary judgment.[2]

First, the Agreement requires testimony under oath in the absence of an agreement otherwise. Db18; (Pa36, § 15). "**If no other options are selected**, [the arbitrator] shall proceed as follows… The testimony shall be under oath." (Pa36-37, § 15(D), emphasis added). Defendant ignores this sentence because no other option was chosen by the parties – nor does Defendant attempt to argue otherwise – and thus the Agreement required testimony under oath. Accordingly, as explained in Plaintiff's opening brief, Pb18, Defendant's argument that the arbitrator relied on N.J.A.C. 12:105-4.10 is of no moment. Db20.

Relatedly, Defendant's conclusory argument that the parties agreed to relax the Rules of Evidence provides no citation to the record and is directly contrary to the express terms of the Agreement, which provides that: "The New Jersey Rules of Evidence shall generally govern these proceedings, but may be relaxed as the Arbitrator **and the parties** deem fitting…" (Pa36 at § 15A,

[2] Defendant's argument that not applying New Jersey law is not a basis upon which a binding arbitration award may be vacated," Db26, is stated in conclusory fashion, without any citations, and should be ignored by this Court.

emphasis added). Db20. And Defendant's reliance on the arbitrator's statement that the parties "wanted to be as informal as possible" fails to respond to Plaintiff's arguments that this statement is directly contrary to the portion of the Agreement just quoted and that the arbitrator does not provide any basis for this erroneous conclusion. (Pa47); Pb18; Db21.[3]

Defendant failed to address Plaintiff's argument that Judge Rosenberg improperly allowed Mr. Molinari to explain the amount of time and services provided by Mr. Fried and the junior attorney even though he had no personal knowledge about these subjects, never spoke to these two attorneys, could therefore not provide competent evidence, and that doing so was violative of N.J.R.E. 602 (Lack of Personal Knowledge) and N.J.R.E. 802 (Hearsay). Pb18-19. Defendant further failed to address Plaintiff's arguments that by making an award without competent evidence, and proof that the time spent on each task was reasonable, the arbitrator failed to apply New Jersey law which requires this sort of proof and which the parties agreed would govern. Pb19-22.

[3] Further, Defendant's argument that the Agreement provides that appeals to the Appellate Division are not permitted is incorrect. Db3-5, 15, 30. The portion of the Agreement relied upon by Defendant is, unlike the remainder of the Agreement, contained within square brackets and specifically contains a line where the parties are to initial their agreement. (Pa37, Pa39). While Mr. Molinari (who signed the Agreement for Defendant, (Pa38)) initialed on this line, (Pa37), Mr. Nagel (who signed the Agreement for Plaintiff (Pa39-40)), did not sign on this line and did not agree to this extra condition. (Pa39).

Defendant's argument that the trial court correctly found that failing to take testimony under oath is immaterial based on R.P.C. 3.3's requirement that all attorneys act with candor is also of no moment. Db18-19; (Pa84-85 at 26:12 – 27:9). The trial court did not consider this factor in its decision, and now this panel is obligated to review the dismissal de novo.[4]

What's more, the trial court's basis for relying on R.P.C. 3.3 is erroneous. As Defendant acknowledges, see Db19, the trial court's reasoning was that because of R.P.C. 3.3:

> [T]hat's why lawyers are never sworn in when [they] argue in front of a court on the record, because by the Rules of Professional Conduct, [they're] obligated as a lawyer to basically tell the truth and/or not advocate for something that [they] know truth – patently to be false, correct?

(Pa78 at 13:19 – 25). This is simply incorrect. The reason that lawyers are not sworn in when they are advocating for their clients is not because of R.P.C. 3.3 but because they are not fact witnesses providing factual testimony. N.J.R.E.

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[4] Defendant's citations in support of this argument are to the transcript of the motion for summary judgment. See Db19 (citing to 1T at 13:15 – 24 and 1T at 14:1 – 7). This is erroneous. The colloquy regarding R.P.C. 3.3 took place in the oral argument for the earlier motion to dismiss. See (Pa78 at 13:19 – 25).

Additionally, Defendant's argument that Plaintiff "conceded" the argument regarding R.P.C. 3.3 mischaracterizes the record. Db19. What counsel actually stated was that he had not previously "considered" the argument, and that while "it's a very interesting argument, [] I still think it does not undercut the fact that the parties contractually agreed to conduct [the arbitration] under oath." (Pa78 at 14:2, 7-10).

603 provides that "[b]efore testifying a witness shall be required to take an oath or make an affirmation to tell the truth under the penalty provided by law." This applies to all witnesses – including lawyers providing factual testimony. In New Jersey Div. of Youth & Fam. Servs. v. J.Y., this Court reversed because:

> Attorneys were permitted to make material factual representations that were then accepted by the court in lieu of sworn testimony from witnesses… [and] [j]udicial findings [were made] based on … unsworn colloquy from attorneys…

352 N.J. Super. 245, 264-65 (App. Div. 2002). See also, e.g., Rivera v. Dover VF L.L.C./Vornado Realty Tr., No. A-3188-10T2, 2011 WL 5515373, at *2 n. 2 (App. Div. Nov. 14, 2011) (Pra3 n. 2)[5] ("*N.J.R.E.* 603 [] requires that testimonial evidence be presented through witnesses who are either under oath or make an affirmation to tell the truth… the motion judge should not have permitted the attorneys to make material factual representations as to the parties' incomes in lieu of sworn testimony from witnesses or other competent evidence").[6] Finally, regardless of whether attorneys can provide factual testimony without being under oath – and they must be – this is simply what the

[5] "Pra__" refers to Plaintiff's August 11, 2025 Reply Appendix on behalf of Plaintiff-Appellant.

[6] Additionally, R. 1:4-4(b) provides that lawyers must certify to the truth of the factual statements they make in certifications.

parties agreed to, and not doing so contravened the requirements of the Agreement. (Pa36-37, ¶ 15(D).

Defendant's argument that there was no stipulation as to a fair hourly rate for Mr. Fried is erroneous. Defendant does not cite to the record and ignores the email he sent to Mr. Nagel where he *admits* the very opposite, stating:

> **The only agreement we reached was an hourly rate of $500 for work performed by David Fried.** (Pa139, emphasis added).

Defendant's argument that the arbitrator did not apply the incorrect law by awarding it fees for attending decedent's funeral and speaking to the press is also mistaken. Initially, Defendant concedes that Plaintiff is correct that the legal standard does not allow for fees for attending a funeral and/or giving an interview. Instead, Defendant argues that attending the funeral and speaking to the press are not reflected in its reconstructed time entries and therefore could not have been considered by the arbitrator. However, Defendant admits that visitation hours at the funeral home occurred on May 20, 2018 and the funeral occurred on May 21, 2018. Db24. Defendant's billing entries – which, again, were reconstructed by Mr. Molinari – contains a two hour entry for May 21, 2018 for: "**Interview** and retainer signed by The Vargas Family." (Pa53, emphasis added). This is confirmed by a video of Mr. Fried being interviewed by CBS reporter Natalie Duddrige on May 20, 2018 at the funeral home,

reflecting that he was there and that he spoke to the press. See *Funeral To Be Held For Student Killed In School Bus Crash* (CBS New York, May 21, 2018) (beginning at 1:19), https://www.youtube.com/watch?v=hJWV1bEgX-8. There is also a three hour entry for May 28, 2018 for: "T.V. interview and discussion with family." (Pa54). Defendant receiving fees for Mr. Fried's presence at the funeral home, being interviewed there, and being interviewed again later is precisely what Plaintiff argued. As the arbitrator noted in his decision:

> Mr. Nagel argued **that Mr. Fried's television appearance at the funeral home… and speaking at that time as well as at a press conference** was not law related and not within the scope of legal services that one would expect to be rendered in a personal injury matter. (Pa45, emphasis added).

Next, Defendant's argument that the arbitrator did not award any fees for the foregoing is also contrary to the evidence. Mr. Molinari testified regarding the total hours he reconstructed and 12.5 hours of miscellaneous time. His reconstruction includes the entries for attending the funeral and speaking to the press. (Pa53-54). In addition to acknowledging that such non-legal services were discussed by the parties, the arbitrator, in his analysis of the legal issues, specifically addressed this issue:

> [The Nagel Firm] raises questions with regard to the attorneys who had worked on the matter together with Mr. Fried and the compensability of certain work such as that in dealing with the media which were a time consuming portion of the Blume representation.

(Pa48). Then, in his conclusions and award, the arbitrator held:

> With regard to the argument that work is non-legal that was beyond the scope of a personal injury claim, this was a complicated matter due to the enormity of the accident and continued publicity at the time which still continues to this day, and an attorney is compelled to undertake anything requested by the client. (Pa49).

II. DEFENDANT HAS FAILED TO DEMONSTRATE ANY GROUND FOR AWARDING FEES FOR FRIVOLOUS LITIGATION (Raised below: Pa1)

As explained in Plaintiff's moving brief, it argued generally below that R. 1:4-8 provides for frivolous litigation fees "**other than [to] a pro se party.**" R. 1:4-8(f) (emphasis added). Pb28. Defendant's argument that this would preclude a pro se litigant from seeking protection of R. 1:4-8 and N.J.S.A. 2A:15-59.1 is of no moment, as it is contrary to both their language and purpose. Db33. As this Court stated in Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn:

> [R. 1:4-8:] specifically permits only the **reimbursement of attorneys' fees and expenses** incurred by a party. It does not permit the reimbursement of a party's loss of income in dealing with frivolous litigation. If a person, other than a lawyer, such as a doctor, plumber, or unskilled laborer, is the subject of frivolous litigation, appears pro se, and succeeds in convincing the court that his adversary has acted in a frivolous fashion, the court cannot, under the rule, reimburse the doctor, the plumber, or the unskilled laborer, the income he did not receive from his job. **This rule simply compensates a party for the legal fees and expenses it actually incurred and became obligated for** as a direct result of the adversary

> pursuing frivolous litigation. Public policy also supports our reading. To compensate an attorney for his lost hours would confer on the attorney a special status over that of other litigants who may also be subject to frivolous claims and are appearing pro se. There is nothing to indicate that that was the intent of the rule.

410 N.J. Super. 510, 545–46 (App. Div. 2009), cert den., 203 N.J. 93 (2010) (footnote omitted, emphasis added).[7] The Supreme Court subsequently relied on Quinn to support its holding "reject[ing] counsel fee awards to attorneys who represent themselves." Segal v. Lynch, 211 N.J. 230, 264 (2012).

Nor is Defendant's response to Plaintiff's argument that its prosecution of this case is not frivolous within the meaning of R. 1:4-8 of any merit. Indeed, the very fact that, as described above, Defendant concedes the standards regarding an arbitration award being based on undue means, or an arbitrator exceeding the scope of his authority, only supports the fact that Plaintiff has a good faith basis in challenging the arbitration award. This conclusion is only further supported by the fact that, as described above, the arbitrator's failure to take testimony under oath was contrary to the plain language of the Agreement, that the trial court's argument based on R.P.C. 3.3 is without legal basis, there is an email stipulating a fair hourly rate for Mr. Fried, that the arbitrator relied

[7] See N.J.S.A. 2A:15-59.1(c)(1) (emphasis added) (sanctions are for "**reimbursement**… [of] fees and costs"); R. 1:4-8(d) (emphasis added) (sanctions are for "reasonable attorneys' fees and other expenses **incurred**").

on incompetent evidence, and the arbitrator improperly awarded fees for non-legal tasks like attending a funeral and speaking to the press. Defendant also ignores Plaintiff's argument that the arbitrator improperly applied a rate of $750.00 per hour to the unnamed junior partner's work. Pb31.

Defendant's response to Plaintiff's argument that, regardless of the fact that no fees and costs should have been awarded, its request for legal fees was unreasonable and excessive also fails. There were no findings as to the reasonableness of the time billed or the amount of fees awarded, as required by Rendine v. Pantzer, 141 N.J. 292, 337 (1995). There was no testimony regarding the foregoing, which is also required. These failures resulted in the arbitrator failing to follow New Jersey law which is expressly required by the Agreement.

In addition, there is no response to the fact that Defendant spent 23.8 hours researching, drafting, revising, and discussing their motion to dismiss, billing an excessive $12,675.00. Pb32-34. While Defendant states that it billed according to the accepted six-minute increments, and its billing entries were properly separated and delineated, that has nothing to do with the fact that the *aggregate* time spent on this motion was simply excessive. Db34.

Defendant's response to Plaintiff's argument that, in any event, no fees should have been awarded for the motion to dismiss because it was denied is simply a blanket assertion that this is erroneous because Plaintiff's *entire case*

is frivolous. Db35. Aside from the fact that denial of the motion only supports Plaintiff's position that this litigation is not frivolous, even if, *arguendo*, Plaintiff's claims were frivolous, that does not mean it is entitled to fees for a motion which it lost. Nor does Defendant respond to why Mr. Molinari and Mr. Hull should receive fees for watching one another argue motions. Pb34-35. Nor does Defendant even attempt to explain their excessive fee in preparing the application for fees. Pb35.

Defendant challenges Plaintiff's argument that a reasonable fee for Mr. Molinari would have been $450.00 per hour instead of $750.00 per hour as without support. Db35-36. However, while it supports this rate by relying on Mr. Molinari's certification, the latter simply states in conclusory fashion that "$750/hour [] is a reasonable rate for an attorney of similar standing and experience. (Pa103, ¶ 34). Defendant's basis for billing Mr. Hull at $500.00 per hour relies on the same conclusory assertion. (Pa130, ¶ 6).

Finally, Defendant's argument that the trial court did actually provide written findings to support its decision to award costs and fees is completely incongruous with the evidence. Db37. The trial court did no more than enter an order. (Pa1). The trial court noting in a single sentence that opposition and reply were filed, and that the issues were argued at the motion to dismiss and the motion for summary judgment, does not in any way satisfy R. 1:7-4(a)'s

requirements. The bare order clearly does not ""state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s]."" Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594 (App. Div. 2016) (quotation omitted). It comes as no surprise then that Defendant does not address any of the case law cited by Plaintiff interpreting this rule. Pb36-38.

III. THE COURT SHOULD IGNORE DEFENDANT'S MULTIPLE AND IMMATERIAL *AD HOMINEM* ATTACKS AGAINST PLAINTIFF **(Not argued below)**

Defendant's *ad hominem* attacks on Plaintiff should be disregarded by this Court as they have absolutely nothing to do with the operative issues in this appeal. By way of example, Defendant cites Rabinowitz v. Wahrenberger, 406 N.J. Super. 126, 136-37 (App. Div. 2009), cert. granted, 199 N.J. 542 (2009), appeal dismissed, 200 N.J. 500 (2009) – a case involving Mr. Nagel – and states that in that case "Mr. Nagel was liable for payment of an award of attorneys' fees and costs under the Frivolous Litigation Statute," implying that Mr. Nagel regularly files meritless claims in bad faith. Db29. In reality, however, Rabinowitz held the very opposite, with this Court vacating the trial court's award of sanctions against Mr. Nagel. 406 N.J. Super. at 136-37. Indeed, this Court explicitly rejected what Defendant attempts to do by relying on

Rabinowitz – that is, relying on "prior instances of aggressive litigation tactics" – when "[s]anctions should relate to present conduct, not past conduct." Id.

Defendant's other *ad hominem* attacks should similarly be ignored as having no relation to the relevant issues. See, e.g., Db40 ("Plaintiff's argument is yet another in a long line of misguided and mischaracterized misdirection"); Db26 (""Plaintiff is simply unhappy with the binding arbitration award"); Db31 ("Plaintiff … continu[es] to parade the same falsehoods"). Indeed, with regard to stipulating Mr. Fried's hourly rate, Defendant accuses Plaintiff that this is a "contrived allegation … [and] is another false distraction … to mislead the Court." Db24. Yet, as set forth above, Mr. Molinari sent Mr. Nagel an email where he admits they agreed on a $500.00 per hour rate for Mr. Fried. (Pa139).

CONCLUSION

For all these reasons, the trial court's decision to grant Defendant's motion for summary judgment should be reversed. Even if this Court does not reverse the grant of summary judgment, it should reverse the trial court's ruling granting Defendant its fees and costs or lower the amount of fees granted or, alternatively, remand this matter to the trial court for further proceedings.

Respectfully submitted,

Bruce H. Nagel

Dated: August 11, 2025 BRUCE H. NAGEL