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| | ) SUPERIOR COURT OF NEW<br>) JERSEY,<br>) APPELLATE DIVISION<br>) DOCKET NO. A-003587-23 |
| LEUNNITH FIORAVANTE,<br><br>Plaintiff<br><br>v.<br><br>MATTHEW FIORAVANTE,<br><br>Defendant | ) SUPERIOR COURT OF NEW<br>) JERSEY<br>) CHANCERY DIVISION-FAMILY<br>) PART<br>) HUDSON COUNTY<br>) Docket No. FM-09-2314-22<br><br>CIVIL ACTION<br><br>SAT BELOW:<br><br>HON. GARY POTTERS, J.S.C. |

# AMENDED BRIEF OF INTERESTED PARTY/APPELLANT, THE LAW FIRM OF VENTURA, MIESOWITZ AND KEOUGH, PC

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Submitted 10/02/2024

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## Rules

## PRELIMINARY STATEMENT

Without any notice to the Law Firm of Ventura, Miesowitz and Keough, PC (hereinafter "Law Firm"), and without the Law Firm being able to submit a factual defense to defendant's quest for sanctions and fees, on June 17, 2024, the court entered an order, *sua sponte*, finding the Law Firm jointly and severally liable for legal fees in the amount of $208,602.07 to defendant as a frivolous litigation sanction. On June 18, 2024, the court entered a judgment in the amount of $208,602.07 against the Law Firm payable in 30 days or by July 17, 2024. The court determined that because plaintiff's attorney, James Vigliotti, Esq. (hereinafter "Vigliotti"), "of counsel" to the Law Firm, acted in bad faith in pursuing plaintiff's claim that she was under duress when she signed the post-nuptial agreement, the Law Firm was also responsible for paying the sanction.

The court made no findings of fact, and it did not state any conclusions of law as to how the Frivolous Litigation Rule applied to the Law Firm, other than covering Vigliotti under its malpractice insurance policy and him being listed on its letterhead. It provided no findings as to what behavior the Law Firm engaged in that warranted sanctions of $208,602.07. Instead, the court improperly sanctioned the Law Firm because it found it was "guilty by association."

The court also deprived the Law Firm of an opportunity to address the

Frivolous Litigation Rule's exceptional circumstances factor as to why they should not be held jointly and severally liable for the fees or address the reasonableness of the fees because the court's ruling was made prior to the Law Firm having adequate notice that it was being exposed to liability.

## PROCEDURAL HISTORY[1]

After a divorce trial on February 13 and 14, 2024 where Vigliotti represented plaintiff, the court issued an opinion and an order on February 21, 2020 which denied plaintiff's request to overturn the postnuptial agreement. (LFa1)[2]. That order also set out a briefing schedule on the issue of attorney fees. (LFa1).

Defendant filed a motion for legal fees and costs against Vigliotti and not the Law firm, on March 12, 2024, pursuant to the terms of the postnuptial agreement and pursuant to Rule 1:4-8. (LFa56-59).

On April 4, 2024, based on allegations plaintiff lodged against Vigliotti in an email to the court, the court ordered Vigliotti to place his malpractice carrier on notice. (LFa24).

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[1] 1T refers to February 13, 2024 Transcript; 2T refers to February 14, 2024 Transcript; 3T refers to April 4, 2024 Transcript; 4T refers to May 14, 2024 Transcript; 5T refers to June 17, 2024 Transcript

[2] "LFa" refers to the Appendix of the Interested party, the Ventura, Miesowitz and Keough, P.C. Law Firm

Thereafter, on May 10, 2024, the court entered an order, sua sponte, providing that Vigliotti and the Law Firm would be jointly and severally liable for all costs incurred at a plenary hearing which it scheduled for May 14, 2024, if Plaintiff did not appear. (LFa27).

Two days later, on May 14, 2024, the court entered a second sua sponte order directing the Law Firm to file an appearance no later than May 20, 2024 if Vigliotti was not representing the Law Firm. (LFa29). The court directed that there would be no further adjournments of the hearing on counsel fees regardless of the representation issue. (LFa29).

On June 17, 2024, as a result of its finding that Vigliotti, on behalf of plaintiff, litigated the issue of the post nuptial agreement in bad faith, the court determined that Vigliotti and the Law Firm of Ventura, Miesowitz and Keough, PC were jointly and severally liable for defendant's legal fees and costs in the amount of $192,545.57 from the first day defendant served a Notice of Frivolous Claim on November 20, 2023 through May 23, 2024. (LFa4; LFa12). It ordered this judgment be paid within 30 days or by July 17, 2024. (LFa4). It amended its decision on June 18, 2024, and increased the amount due by July 17, 2024 to $208,602.07. (LFa41-42).

On July 5, 2024, both Vigliotti and the Law Firm filed Orders to Show Cause seeking stays of the June 17, 2024 order. The Law Firm's Order to Show

Cause, however, also asked for a temporary stay for 90 days so that it could obtain a supersedeas bond and to restrain defendant from taking any action to enforce the judgment. (LFa46). Both requests were denied on the same day without oral argument. (LFa43).

On July 9, 2024, because of the tight time frame when payment of the judgment was due, Vigliotti requested permission to file an emergent stay in the Appellate Division, which was denied. (LFa83-84).

On July 12, 2024, in a letter to the court, Vigliotti requested it approve a supersedeas bond in the amount of $229,460.70 to secure the full judgment and post judgment interest, which he had obtained to cover both him and the Law Firm. (LFa85-89). On July 16, 2024, the court refused to consider the details of the supersedeas bond Vigliotti had obtained, deciding a formal motion was necessary. (LFa92). It did permit filing a motion on short notice for a stay by July 19, 2024, with opposition filed by July 25, 2024 and the reply filed by July 29, 2024, returnable on August 2, 2024. (LFa92).

On July 17, 2024, the day the payment was due, the Appellate Division denied the Law Firm's request for permission to file an emergent motion for a stay pending appeal. (LFa94).

The Law Firm filed a Notice of Appeal on July 18, 2024. (LFa95-99).

Vigliotti filed a Notice of Appeal on July 19, 2024. (LFa100-104).

On July 19, 2024, Vigliotti also filed a motion for stay of enforcement of the judgment in the Appellate Division. (LFa105-106).

On July 19, 2024, the Law Firm filed a motion for a stay at the trial level, pursuant to the court's direction that it would hear a motion on short notice. (LFa107-109).

On July 19 and 22, 2024, defendant filed opposition stating that the appeal "has now divested the jurisdiction from the Trial Court". ( LFa131 and LFa142).

On July 22, 2024 at 10:22 a.m., the Law Firm advised the court that they would be submitting their Reply on that day citing authority that established the Trial Court did have jurisdiction to issue a stay notwithstanding the appeal. The Law Firm submitted its letter at 3:52 p.m. (LFa132 and LFa144)

On that same day, July 22, 2024, the Trial Court sent a notice that a Motion Hearing was scheduled for 1:30 p.m. on July 22, 2024 which was not received by the Law Firm until after the motion was denied. (LFa145). Thereafter, no hearing took place. On July 22, 2024 at 2:56 p.m., the Trial Court determined it did not have jurisdiction to hear the Law Firm's motion for a stay and entered an order denying the motion prior to receiving the Law Firm's Reply it submitted at 3:52 p.m. (LFa136 and LFa145).

On July 25, 2024, the Law Firm sought permission in the Appellate Division for a stay based on facts that were not available in its previous request

for a temporary stay and that demonstrated the bond had been obtained, which the Appellate Division denied. (LFa140-141).

On August 7, 2024, the Law Firm sought a stay pending appeal, which the Appellate Division granted. (LFa147-148).

## STATEMENT OF FACTS

James Vigliotti who is "of counsel" to the Law Firm, represented plaintiff in her divorce. His work is not overseen by any shareholder. (LFa50). The first time the Law Firm (Mr. Ventura) became aware Vigliotti might have exposure for a frivolous litigation sanction was when Ventura and Vigliotti were in the office on Saturday, March 30, 2024. At that time, Vigliotti advised Ventura that he was preparing opposition to a Rule 1:4-8 Frivolous Litigation motion for sanctions which was due on April 1, 2024. Vigliotti advised Ventura that he did "not believe" the Law Firm was involved. (LFa51).

Defendant's motion papers, including the order for sanctions, did not name the Law Firm and defendant did not serve the Law Firm with its motion papers. (LFa56-59).

At the same time, in an April 4, 2024 Order, as a result of plaintiff's email to the court alleging that Vigliotti had signed her name to a certification without her authorization, the court ordered Vigliotti to put the Law Firm's malpractice carrier on notice. (LFa24). Thereafter, on April 12, 2024, plaintiff began

representing herself.

It was not until May 10, 2024, when, the court ordered, sua sponte, a hearing to test plaintiff's credibility as to the email allegations against Vigliotti, that the Law Firm became aware that it could potentially be held jointly and severally responsible for defendant's fees and costs. The Law Firm was not served with a copy of this order. (LFa27).

The first time Ventura became aware of the Safe Harbor letters sent to Vigliotti in November of 2023 and January of 2024 was on May 14, 2024. (LFa52). The Safe Harbor letters were not sent to the Law Firm, only Vigliotti by email, and they were not served on the Law Firm. (LFa67; LFa70).

In a second sua sponte order dated May 14, 2024, the court directed the Law Firm to file an appearance and identify who would be representing it. (LFa29). The court directed that no further submissions were permitted. (LFa28).

After seeing that order, three days later, Ventura obtained an appointment and retained an attorney at Fox Rothschild, Sandra Fava, on May 17, 2024. (LFa52). The attorney filed a Notice of Appearance on behalf of the Law Firm that same day.

On May 21, 2024, the court was emphatic that it would not consider any further submissions on the legal fee issue. (LFa30; LFa74). The court refused to

grant the Law Firm's attorney extra time for her to become familiar with the file so that she could submit responding papers. It was only because Ms. Fava was able to obtain consent from defendant's attorney for her to request an extension of time to submit paperwork on behalf of the Law Firm, that the court permitted her to file papers by June 3, 2024. (LFa38). The adversary, however, conditioned his consent on the Law Firm's attorney filing only a five-page letter brief limited to the February trial record and the court's decision. (LFa33).

On June 17, 2024, after oral argument, the court entered an order directing plaintiff to pay defendant $206,197.91 in 30 days pursuant to the terms of the postnuptial agreement. (LFa4). The court also ordered Vigliotti and the Law Firm to pay $192,545.57 within 30 days (LFa4), which amount it later amended to include defendant's fees between May 10, 2024 and May 23, 2024, increasing the amount Vigliotti and the Law Firm were responsible to pay to $208,602.07.

Vigliotti filed an Order to Show Cause to stay the judgment pending appeal on July 5, 2024. (LFa43). On the same day, the trial court denied his request. (LFa43).

On July 5, 2024, the Law Firm also filed an Order to Show Cause for a temporary stay to permit it time to obtain a bond to cover the judgment. (LFa46-47). The Law Firm set out with specificity the financial difficulties the Law Firm would suffer if a stay were not granted. (LFa53; LFa80). The Law Firm's only

assets were its business account, furniture, and equipment. As of June 17, 2024, the Law Firm's balance sheet showed $176,179.66 before deducting payroll, 401K payments, rent, and other expenses needed to keep the Law Firm operational. (LFa80). The court denied this request the same day, again, without oral argument. (LFa43).

In that order, the court did state, it "was sympathetic to the claims of the hardship . . . And if detailed information as to the bond had been provided … This Court would've been moved to grant to stay." (LFa45).

On July 12, 2024, Vigliotti obtained a supersedeas bond in the amount of $229,460.07 to secure the full judgment and post-judgment interest, which covered the Law Firm, and submitted to the court documents from the funding from the company and other particulars of the bond. (LFa85-89).

The adversary objected to the court considering Vigliotti's submissions as to the bond, and proposed order for a stay. (LFa90). In an email dated July 15, 2024, the court advised it would not consider a request for a stay without a formal application. It did however set out a motion on short notice schedule with filing the motion by July 19,2024, filing the opposition by July 25,2024 and filing a reply by July 29,2024. It set a return date of August 2, 2024, 16 days after the judgment was due to be paid, and after the expiration date for filing a Notice of Appeal. (LFa92).

On July 18, 2024, the Law Firm filed a Notice of Appeal. (LFa95-99).

On July 19, 2024, Vigliotti filed a Notice of Appeal and filed a motion for stay of enforcement of the judgment in the Appellate Division. (LFa100-104).

On July 19, 2024, the Law Firm filed a motion for a stay at the trial court level consistent with the court's direction that it could file a motion on short notice consistent with the dates set out in the court's July 15, 2024 email. (LFa107-109). The Law Firm provided the particulars of the *supercedeas* bond obtained by Vigliotti to secure the judgment. (LFa115-123). The Law Firm did not file a motion for a stay in the Appellate Division.

Immediately after Vigliotti's motion for a stay in the Appellate Division was filed, defendant's counsel sent a letter to the trial court asking the court to "reject" the Law Firm's motion, claiming that since the Law Firm filed a Notice of Appeal, it "divested jurisdiction from the trial court." (LFa131). He cited no rule or case law. (LFa131).

The trial court replied in an email to the Law Firm on July 22, 2024, at 8:38 a.m. that because an "identical motion has been filed in the Appellate Division, it declined to exercise jurisdiction over the motion filed on short notice because it did not involve enforcement of trial court's order rather it sought new relief." (LFa133).

The Law Firm sent an email advising that it would shortly submit a letter

brief in reply to defendant's opposition, providing the court with Rules and law to support the court having jurisdiction to hear its motion for stay on short notice. (LFa134). Before it received the Law Firm's legal memo on July 22, 2024 (LFa136-138), the Trial Court determined it did not have jurisdiction to hear a motion for a stay. (LFa139). It reasoned that the Law Firm's filing of a notice of appeal divested it of jurisdiction to adjudicate a request for stay on short notice and a motion for identical relief was filed in the Appellate Division. (LFa139). The Appellate Division granted the Law Firm's request for a stay pending appeal (LFa147), specifically noting that with the *supercedeas* bond, "the creditor was protected." (LFa147-148).

## LEGAL ARGUMENT

### POINT I

### THE TRIAL COURT ERRED WHEN IT MADE THE LAW FIRM JOINTLY AND SEVERALLY LIABLE FOR VIOLATIONS COMMITTED BY A SINGLE LAWYER WHO WAS "OF COUSEL" TO THE LAW FIRM.

#### A. The Trial Court denied the Law Firm's right to due process when it made it jointly and severally liable for sanctions in the amount of $208,602.07. (LFa1-6).

Under the Fourteenth Amendment to the United States Constitution, no state shall "deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV § 1. "Fundamentally, due process requires an

opportunity to be heard at a meaningful time and in a meaningful manner". Doe v. Poritz, 142 N.J. 1, 106 (1995) (citing Kahn v. U.S., 753 F.2d 1208, 1218 (3rd Cir. 1985)). Thus, the minimum requirements of due process are "notice and opportunity to be heard". Ibid.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". Mullane v. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). See also Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ( holding that "[t]he purpose of notice under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'" which may affect their legally protected interests).

Our courts have held "[t]here can be no adequate preparation where the notice does not reasonably apprise the party of the charges, or where the issues litigated at the hearing differ substantially from those outlined in the notice". Dep't of Law & Pub. Safety, Div. of Motor Vehicles v. Miller, 115 N.J. Super. 122, 126 (App. Div. 1971). "Further there is no hearing within the contemplation of due process when the effective party has not the means of knowing what evidence is offered or considered and is not afforded an opportunity to test,

explain, or refute it. Davis vs Davis, 103 N.J. Super. 284, 288 (App. Div. 1968) (quoting Hyman v. Muller, 1 N.J. 124, 129 (1948)).

In the case of McKeown-Brand v. Trump Castle Hotel and Casino, 132 N.J. 546, 558-59 (1993), the New Jersey Supreme Court discussed the process required when a court is considering awarding sanctions for frivolous litigation. Citing to the frivolous litigation statute, it stated that "[a]dequate notice and the right to a hearing are fairly implicit in N.J.S.A. 2A:15-59.1." Id. at 559 (citation omitted).

At a minimum, due process requires "notice and opportunity for hearing appropriate to the nature of the case." Mullane, 339 U.S. at 313. Furthermore, "[t]o comport with due process, a judicial hearing requires notice defining the issues and an adequate opportunity to prepare and respond." McKeown-Brand, 132 N.J. at 559 (citing Nicoletta v. North Jersey Dist. Water Supply Comm'n., 77 N.J. 145, 162 (1978)).

Here, the trial court not only denied the Law Firm its right to due process but defendant did not serve their Safe Harbor letters on the Law Firm. The defendant's motion for Rule 1:4-8 sanctions did not name the Law Firm nor did they serve the Law Firm with its motion papers. Vigliotti did not advise the Law Firm that defendant had sent Safe Harbor letters in November 2023 and January 2024. As a result of not being noticed that it might have lability alleged in the

Safe Harbor letters, the Law Firm could not take any steps to remediate or withdraw the pleadings. Therefore, by denying the Law Firm its right to be noticed before imposing sanctions, the court's judgment against the Law firm is null and void. See Foster v. New Albany Machine & Tool, Co., 63 N.J. Super. 262, 269 (App. Div. 1960) (holding that a motion to vacate a judgment obtained without notice should be granted.).

Next, continuing in this vein, the Law Firm was not mentioned in the April 4, 2024 Order which directed Vigliotti to place his malpractice carrier on notice.

It was not until May 10, 2024, for the first time, that the Law Firm's name appears in a pleading. On that date, the court sua sponte ordered that if a plenary hearing occurred on the issues of fees, Vigliotti and the Law Firm would be jointly and severally responsible for defendant's fees and costs. The Law Firm was not served with a copy of this order.

It was only because Mr. Ventura, by chance, saw a copy of the order on Sunday, May 12, 2024, in his in-box that he become aware that the court might hold the Law Firm responsible for legal fees to defendant.

Incredibly, the court stated when confronted with this due process argument by the Law Firm that because it had retained an attorney whose submission was considered and because she attended oral argument, it was not denied due process. (LFa44). To the contrary, the court's first mention of the

Law Firm's potential liability was on May 10, 2024. (LFa27). The next order, entered on May 14, 2024, directed that there would be no further submissions (LFa28), and there would not be any adjournments of oral argument on the issue of fees. (LFa29).

As a result of these orders, the Law Firm was under pressure to obtain representation with hopes that the court would let it present a viable defense to the adversary's request for fees and sanctions. On May 17, three days after the entry of the May 14 Order, the Law Firm hired an attorney. On May 21, the court reiterated that there were no further submissions permitted. (LFa30). On Friday, May 23, the attorney for the Law Firm asked the adversary to give his consent for her to request permission for a submission to the court. Then, on Thursday, May 24, she asked the adversary to agree that she could have a week to become familiar with the file. The adversary would only consent to the Law Firm's request for an extension of time to submit papers to the court if their submission was limited to a five-page brief which relied only on facts from the February trial and the court's decision. (LFa33). Therefore, the Law Firm's brief did not contain the Law Firm's legal position supported by certified facts to rebut defendant's argument that the Law Firm should be jointly and severally liable for all defendant's fees.

There were only three (3) weeks between the time the court entered the order on May 10, 2024, advising the Law Firm that it may be liable for monetary sanctions, and June 3, 2024, the date by which the Law Firm was ultimately permitted to file its 5 page brief. Within those three weeks, the Law Firm had to: find and hire an attorney, the attorney then had to become familiar with the entire file, jump through hoops to get the adversary's permission to merely request permission from the court to file a response, and then prepare and file the response. When the court eventually agreed to permit the Law Firm's attorney to submit a brief on or before June 3, it was only 2 ½ weeks after the order was entered advising that the Law Firm could be liable for fees and sanctions, a time frame which included a three-day holiday weekend. The court only relented and let the Law Firm's attorney file a limited submission because of the adversary's consent, which could only be obtained by agreeing to the adversary's conditions which limited the Law Firm's submission to a brief of no more than 5 pages and which relied only on facts from the February trial and the court's decision. It can hardly be said that this compressed time frame and the limitations on the Law Firm's submissions constituted due process, especially when the consequences of the court's ruling was so significant - a $208,000+ judgment against it!

Importantly, because the record was established prior to the Law Firm's

involvement in the case and did not contain any certified facts about the Law Firm's "involvement" in the case, the Law Firm was not able to argue that "extraordinary circumstances" exception to joint and several liability under Rule 1:4-8(b)(2)(3) did not exist, which might otherwise justify the court excluding the Law Firm in its judgment. Also, the Law Firm was not able to argue against the reasonableness of the defendant's attorney fees, or how the imposition of such a large judgment and its payment within 30 days could affect the Law Firm's financial health and threaten its very existence.

**B. The Trial Court failed to make findings of fact or conclusion of law as to how the Frivolous Litigation Rule applied to the Law Firm. (LFa1-6).**

Rule 1:7-4(a) states that "a court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right…". A trial court's failure to perform its duty to find facts and state conclusions of law constitutes a disservice to litigants, attorneys and appellate court. Curtis v. Finneran, 83 N.J. 563, 570-71 (1980).

As this Court held in Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510 (App. Div. 2009), 410 N.J. Super. 510, 547 (App. Div. 2009), certif. den., 203 N.J. 93 (2010), an attorney's fee award as a sanction under Rule 1:4-8 [the Frivolous Litigation Rule] requires findings of fact and

conclusions of law as to each element of the award. Rule 1:4-8-3(d)(2) requires courts to "describe the conduct determined to be a violation of this Rule and explain the basis for the sanction imposed" (emphasis supplied). Ibid.

Here, the trial court failed to comply with this mandate. It made no mention of any conduct determined to be in violation of Rule 1:4-8 that was committed by the Law Firm in its decision as required under Rule 1:4-8-3(d)(2). The trial court's decision only addressed the conduct of Vigliotti. (LFa1-23). The trial court determined that because Vigliotti was covered by the Law Firm's insurance, listed on the letterhead, and held himself out as being associated with the Law Firm, that was enough to draw the Law Firm into liability. (LFa22). That is a dangerous and "slippery slope" precedent – to impose substantial sanctions simply because a third party is "guilty by association".

**C. The sanctions imposed by the trial court against the Law Firm go well beyond being a deterrence for future violations as intended by R. 1:4-8. Further, the trial court failed to properly calculate the sanctions under. 1:4-8. (LFa1-6, LFa54-55).**

Rule 1:4-8(d) states, "a sanction imposed for a violation of paragraph (a) of this rule shall be limited to a sum sufficient to deter repetition of such conduct…". See Alpert, Goldberg, Butler, Norton & Weiss, P.C., 410 N.J. Super. at 624. Here, the sanction imposed (in excess of $200,000) goes well beyond being a "deterrence" for future violations, especially when the trial court did not find that the Law Firm committed any violations. The trial court focused

solely on Vigliotti's conduct. (LFa1-23). It sanctioned the Law Firm merely because Vigliotti was covered by the Law Firm's insurance, listed on the letterhead, and held himself out as being associated with the Law. The $200,000+ sanction is equivalent to giving the Law Firm a life sentence for a crime it did not commit.

The $200,000+ sanction will have an annihilative effect on the Law Firm. The Law Firm is a sub-chapter S corporation with limited assets. (LFa53). The departure of four attorneys in the past two years resulted in a 33 1/3% reduction in gross income. (LFa53). Prior to that, the Covid pandemic had a devasting effect on its personal injury practice, which was once a mainstay of the Law Firm's business. (LFa53). To keep the Law Firm in business, three of its shareholders took a 40% reduction in their base salaries and they eliminated their car leases. (LFa53). The sole assets of the Law Firm are the Law Firm's bank account and some furniture and equipment. (LFa53). As of June 26, 2024, the Law Firm's balance report showed only $176,179.61 as the total amount of funds it had prior to deducting for payroll on June 30, 2024. (LFa53). The Law Firm's cash on hand typically ranges between only $150,000 to $200,000, which includes reserves for personal injury and tax appeal costs which are extensive and essential to maintain these practices, as well as reserves for 401K contributions owed to employees, and regularly scheduled payments such as,

rent, utilities and malpractice insurance. (LFa53).

The trial court also erred when the sanctions imposed were not calculated from the time it is "clear that the action is frivolous," which would have only accrued once the offending paper is not withdrawn within 28 days. R. 1:4-8(b)(1). Here, the alleged frivolous behavior of Vigliotti would only become frivolous on December 18, 2023, 28 days after the first Safe Harbor letter was sent on November 20, 2023. The trial court therefore erred when it included legal fees (i.e., which accrued between November 20, 2023 and December 18, 2023 in its calculation. Bove v. AkPharma Inc., 460 N.J. Super. 123, 152-55 (App. Div.), certif. den., 240 N.J. 2 (2019).

**D. The judgment against the Law Firm should be reversed because it is now moot. The judgment is adequately secured by a *supersedeas* bond posted by Vigliotti and, therefore, there is no reason to keep the Law Firm in this case. (LFa147-148).**

A reversal of a trial court's decision is appropriate where the trial court's decision is "'rested on an impermissible basis', considered 'irrelevant or inappropriate factors, failed to consider controlling legal principles or made findings inconsistent with or unsupported by competent evidence.'" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536 (App. Div. 2015) (citing Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571-72 (2002) and Storey v. Storey, 373 N.J. Super. 464, 479 (App. Div. 2004)).

Because this Court's purpose is to review the trial court's decision, and

right any injustice which may have occurred, the Law Firm asks for a reversal of this judgment, as the judgment is now moot. As the Supreme Court stated in Redd v. Bowman, 223 N.J. 87, 104 (2015), "an issue is moot when our decision sought in a matter, when rendered, can have no practical effect on the existing controversy". Here, the Law Firm had no prior notice that a judgment was being entered against it and was not permitted to posit any objections to the sanctions. But most importantly, the court did not find the Law Firm engaged in any frivolous conduct.

Due to the posting of the *supersedeas* bond by Vigliotti the creditor's judgment is secured as noted by the Appellate Division when it entered a stay on behalf of the Law Firm. (LFa146-147). Regardless of what happens at the Appellate Division on the other appeals filed by Vigliotti and Leunnith Fioravante, the bond ensures that defendant will be paid the legal fees awarded.

Based on the facts in this case, the equities call for relief from this judgment. The judgment against the Law Firm is now moot and, therefore, keeping the Law Firm in this case has no practical effect on the existing controversies between Vigliotti and Plaintiff and the sanctions imposed.

## CONCLUSION

Here, the procedural safeguards which protect a litigant from a denial of due process were completely disregarded in this court's rush to judgment against

Vigliotti. The court's denial of due process was most egregious in that the Law Firm, which was not a party to the lawsuit, was in the dark as to its potential exposure for having to pay legal fees but also because this decision subjected the Law Firm having its sole asset being turned over to defendant to satisfy a $208,602.07 judgment which, in turn, would result in the Law Firm shutting its doors, without a succession plan to protect the interests of its clients.

Finally, the judgment against the Law Firm is now moot. Since the judgment is adequately secured by the *supersedeas* bond posted by Vigliotti, there is no reason to keep the Law Firm involved in this case.

Accordingly, the Law Firm asks this court to reverse the money judgment against it as there is no practical effect keeping the Law firm involved in this controversy now that a *supersedeas* bond has been posted.

Respectfully submitted,

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| LEUNNITH FIORAVANTE,<br><br>Plaintiff,<br>v.<br><br>MATTHEW FIORAVANTE,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-003587-23<br><br>SUPERIOR COURT OF NEW JERSEY<br>CHANCERY DIVISION-FAMILY PART<br>HUDSON COUNTY<br>DOCKET NO. Below: FM-09-2314-22<br><br>Sat below:<br>HON. GARY POTTERS, J.S.C.<br><br>Civil Action |

# BRIEF OF DEFENDANT/RESPONDENT, MATTHEW FIORAVANTE

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Dated: November 22, 2024

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## PRELIMINARY STATEMENT

The Law Firm of Ventura, Miesowitz, and Keough, PC (hereinafter "Law Firm") relies centrally for its Appeal on its wrong claims that there was a mandated direct "notice" required under R. 1:4-8 that should have been provided to the Law Firm by Defendant, and that it was not allowed to "meaningfully" participate in connection with the Defendant's request for sanctions and fees pursuant to R. 1:4-8. Their entire argument flaw centers on the fact that they chose not to supervise one of their attorneys, James A. Vigliotti, Esquire (hereafter "Mr. Vigliotti"), the lawyer causing immense damage to Defendant, and that Mr. Vigliotti hid the exposure from the Law Firm, and as such that somehow relieves them of liability. These positions are not supported by law, and in fact, contravene the law and purpose of R. 1:4-8, and especially is absurd and contravenes R. 1:4-8(b)(3) that mandates that the Law Firm is joint and severally liable with no such direct notice mandates. Notably, the Law Firm submits not a single basis below or here to support any "extraordinary circumstances" to relieve them of liability under R. 1:4-8(b)(3). The only mandates under R. 1:4-8 were met as to service on Mr. Vigliotti (on the Law Firm's email system) directly wherein it was his obligation to notify his own law firm as to the potential exposure, the notices and R. 1:4-8 applications that were served on him by Defendant as the trial court properly found and were sufficient under R. 1:4-8.

The trial court made several correct findings of fact and conclusions of law in its twenty-three (23) single-spaced Order of June 17, 2024, as well as on the record on June 17, 2024, with the Law Firm's counsel at the time, Sandra Fava, Esquire of Fox Rothschild appearing and, including, but not limited to, that Mr. Vigliotti's office used is in the Law Firm; Mr. Vigliotti shared a receptionist with the Law Firm; Mr. Vigliotti used an assistant from the Law Firm; Mr. Vigliotti's utilized the Law Firm's computer system and bookkeeper; Mr. Vigliotti was on the Law Firm's letterhead, he was on the Law Firm's website as one of the Law Firm's attorneys; Mr. Vigliotti had Plaintiff sign a retainer with the Law Firm; and, most critically, Mr. Vigliotti was on the Law Firm's malpractice policy ("precisely because Mr. Vigliotti is on the malpractice policy suggests and informs that the Court is cognizant of what he was doing. Whether they supervised, whether they directed, whether they controlled, what level of responsibility the law firm had on those issues that's for a different forum between Mr. Vigliotti and he [sic] law firm." (5T:31-13). In fact, the Law Firm cannot escape malpractice liability if Mr. Vigliotti did not keep the Law Firm apprised of an issue, which is no different than the issue in the instant case.

The trial court properly concluded that notice was provided to Vigliotti and imputed to the Law Firm under R. 1:4-8, not once, but on several occasions by Defendant. In fact, even though not mandated, the Law Firm was provided the opportunity to retain Ms. Fava to represent them in the fee dispute, and the Law Firm

was also provided the opportunity to respond to the Defendant's application for sanctions and fees even though R. 1:4-8 does not mandate such participation. The trial court also rejected the Law Firm's "exceptional circumstances" based on only the alleged lack of notice due to Mr. Vigliotti and alleged lack of disclosure argument stating that it would not hold such a "narrow reading of the language." (5T:32-23). In sum, the Law Firm made the exact same flawed arguments that were properly rejected by the trial court that they now make on appeal.

## PROCEDURAL HISTORY

On May 6, 2022, Plaintiff, Leunnith Fioravante (hereinafter "Plaintiff"), retained the Law Firm with Mr. Vigliotti signing on behalf of the Law Firm, with Mr. Vigliotti as the primary lawyer to represent her in her matrimonial matter against the Defendant. (Da1-7). Mr. Vigliotti, on behalf of the Plaintiff, filed the Complaint for Divorce on Law Firm letterhead on June 17, 2022 after a marriage of just five (5) years, seeking to set aside the parties' postnuptial agreement (hereinafter "PNA") under N.Y. law. On November 28, 2022, the Defendant filed an application to enforce the parties' PNA. (Da104-106). On December 9, 2022, the Court issued an Order (Da8-10) and scheduled a plenary hearing to address the enforceability of the parties' PNA based on the single claim of coercion by Plaintiff due to some alleged baby promise and based on representations to the trial court concerning the viability of that claim by Plaintiff and Mr. Vigliotti as part of their response to the application.

(Da9).

A plenary hearing was conducted over two (2) days (February 13, 2024, and February 14, 2024) (T1; T2). At trial, the evidentiary representations concerning the viability of the baby promise claim by Plaintiff and Mr. Vigliotti was completely absent at trial and had no basis in law or fact such that Plaintiff had no basis for a case of coercion at all under New York law. On February 21, 2024, the trial court issued a forty-three (43) single-spaced Order (Da11-53) thereby concluding that the PNA was enforceable, Plaintiff's claims were found to be "meritless", she did not present a credible claim and "there [was] not a scintilla of evidence" as to Defendant's alleged coercion.[1] (Da37).

It was undisputed below that the Defendant provided three (3) Safe Harbor letters to Mr. Vigliotti on November 20, 2023 (LFa66-68), December 19, 2023 (Da54-56) and January 8, 2024 (LFa69-72). Defendant specifically referenced the Law Firm in said correspondence to Mr. Vigliotti. (Da55). Specifically, Defendant wrote "my client has consulted with civil counsel such that under the law he will pursue fees owed against your client and as allowed against your firm under the frivolous litigation law such that your carrier should be placed notice as I understand the process from the civil attorney. See R. 1:4-8; N.J.S.A. 2A:15-59.1." (Da54-55)

[1] Notably, the Law Firm did not dispute the finding below and not dispute on appeal the trial court's findings that Mr. Vigliotti pursued a frivolous case.

(emphasis added). Mr. Vigliotti was therefore obligated to advise his firm under R. 1:4-8(b)(3). Moreover, it was the Law Firm's obligation to supervise Mr. Vigliotti pursuant to R.P.C. 5.1.

On March 12, 2024 after Plaintiff's claims were deemed frivolous by the trial court, Defendant filed an application against the Plaintiff and the Law Firm for Counsel Fees and Costs pursuant to the PNA and R. 1:4-8. (Da57-71). On April 3, 2024, Plaintiff became adverse to Mr. Vigliotti and the Law Firm and wrote to the Court stating that Mr. Vigliotti was "engaging in what I have been told may be characterized at best as *ultra vires* actions, and at worst, unethical ones, going so far as to submit a Certification and a second *in camera* certification to this Court, both of which I expressly told him not to do, and which he nevertheless signed my name upon and submitted on my behalf." (Da107). On April 4, 2024, based on Plaintiff's representation that Mr. Vigliotti signed her name without her authorization, the trial court entered an Order (LFa24-25) directing Mr. Vigliotti to immediately place his malpractice insurance carrier on notice. (LFa24).

On April 5, 2024, Mr. Vigliotti sent a letter to the trial court advising that the Law Firm's managing partner, Michael Ventura, Esquire, respectfully requested that they be permitted to provide notice to their malpractice carrier after the trial court's

ruling on the pending applications. (Da72).[2]

Even though there was no mandate under R. 1:4-8, the trial court allowed extra participation by the Law Firm, and it hired counsel. Ms. Fava filed a submission on behalf of the Law Firm on June 3, 2024[3]. Ms. Fava was provided five (5) pages to submit an Opposition to Defendant's application for fees and sanctions on behalf of the Law Firm but only used approximately four and one-half (4 ½) pages, and did in fact argue that there were exceptional circumstances under R. 1:4-8 to not hold the Law Firm liable for fees and based the entire argument on alleged lack of notice (which contradicted R. 1:4-8 since there is no separate notice mandate to the Law Firm). Mr. Vigliotti already submitted extensive filings on the issues such that it was reasonable to limit the Law Firm's page limit to add to the positions.[4] The trial court allowed oral argument as to the frivolous litigation motions from Ms. Fava and made arguments to the trial court on behalf of the Law Firm that included claims on the instant appeal as to the same notice claims. (T5:24-2). Ms. Fava attempted to argue that the Law Firm was not provided any notice. (T5:25-6). The trial court responded and refuted same correctly, noting an email between Mr. Vigliotti and his then client

[2] Clearly by April 5, 2024 and months before argument on June 17, 2024 on the fees claims, the Law Firm knew there was issue and that they were exposed to serious liability and did not nothing about it until late in the motion practice.

[3] Pursuant to R. 2:6-1(2), the submission submitted by the Law Firm on June 3, 2024 was specifically noted in the June 17, 2024 Order, demonstrating the Law Firm was able to make its arguments below even though such participation was/is not mandated under R. 1:4-8.

[4] Notably, the Law Firm admits that it discussed the case with Mr. Vigliotti on March 30, 2024 about one week before Mr. Vigliotti wrote to the Court. (LFa51).

Plaintiff, "Look at the email that Mr. Resnick wrote, because your – Mr. Vigliotti, whatever his status with the firm, advises Ms. Fioravante [and he] references the law firm. Now, whether Mr. Vigliotti spoke with the powers that be at the firm, that's a different issue. . . But Mr. Vigliotti, himself, acknowledged that the law firm had exposure. . . That's an important fact." (T5:72-9).

Furthermore, Ms. Fava argued that the Law Firm was at a disadvantage for not having been at the motions, not been at the trial, not been able to see the testimony "and all of that, that is precisely the reason why we say – why we're positioning, as a court of equity, to impose the joint and several liability to the firm without having had notice or opportunity to have, again, remedied or responded or interjected in what was happening is inequitable." (T5:79-3). The flawed argument assumes Mr. Vigliotti did not exist and had an obligation to include the Law Firm in the case, and more importantly, below the Law Firm not only did not dispute the frivolous finding, it did not advise the trial court how it would have made a difference at the motion or at trial. The trial court responded, "[i]f Mr. Vigliotti was not on the firm's malpractice policy I think your equitable – your equitable argument would have greater merit or it would be more persuasive with the Court. The fact that Mr. Vigliotti is on the policy, he's on the letterhead, he holds himself out as representing the firm. It's not for litigants and adversaries to – to define the scope of – of what level of *imprimatur* of authority a lawyer has on behalf of a law firm. I hear the

argument, and I think the narrow construction that you're seeking to have attached to that provision of the 1:4-8 rule would render the rule inutile." (T5:79-9).

Ms. Fava also argued that "extraordinary circumstances" existed, which should not render the Law Firm jointly and severally liable with Mr. Vigliotti and Plaintiff, because that the Law Firm "had no notice of this matter under [sic] May 12th." (T5:25-6). Setting aside they were on constructive notice through Mr. Vigliotti of the entire case, the Law Firm conceded to having a discussion with Mr. Vigliotti on or about March 30, 2024 (LFa51), and Mr. Vigliotti wrote to the Court on April 5, 2024 stating that Mr. Ventura objects to placing their malpractice carrier on notice. (Da72). Thus, the Law Firm had more than sufficient time to argue exceptional circumstances but did not previously because they had no such argument. The Court responded as follows:

> "That issue – I'm going to come back to that in a moment, but you raised it now, so let me just address it now. Isn't that issue, and the propriety of how Mr. Vigliotti conducted himself, and what the firm knew, when the firm knew it, isn't that all for a dispute between Mr. Vigliotti and the law firm, and Ms. Fioravante as opposed to having that dispute be raised and adjudicated in this proceeding? And let me just put a little mean on those bones. . . We have a litigant who is out over $200,000. Why should that litigant, the defendant, now be sucked into the vortex of a dispute between an individual lawyer and their law firm to scope, duty and responsibilities? Isn't that really for a different forum?" (T5:25-18).

The Court additionally stated:

"Because of Mr. Vigliotti failing to inform them of what was going on and when it was going on, correct?" . . . "Mr. Vigliotti, in communicating with Ms. Fioravante in the January 13th email (Da81-83) (before the February 2024 trial) and correspondence uses the word law firm. . . Again, so that's between Mr. Vigliotti and the firm. Why should Mr. Fioravante get sucked into the vortex of that dispute after spending $200,000?" (5T:26-20; 5T:27-1).

Notably, Mr. Vigliotti also utilizes the Law Firm's Retainer Agreement's which specifically note that the Plaintiff retained the Law Firm and not Mr. Vigliotti individually, and Mr. Vigliotti signed the Retainer Agreement "[f]or the Firm." (Da5) (emphasis added). The Law Firm never argued below that the trial court's frivolous findings as to Mr. Vigliotti were in error. The Law Firm also has never brought an action against Mr. Vigliotti for his actions that have exposed the Law Firm to liability.

On June 17, 2024, the trial court entered an Order and granted Defendant's application for counsel fees. (LFa1-23). Plaintiff was ordered to pay the amount of $206,197.91 to Defendant as the PNA mandated fee shifting to her. (LFa4). Additionally, Mr. Vigliotti and Law Firm were ordered jointly and severally to pay Defendant $192,545.57 not later than thirty (30) days. (LFa4).

Defendant also submitted an updated Certification of Attorneys' Services with his original May 23, 2024 filing that needed to be ruled upon. (Da110). Accordingly,

the trial court issued a corrected Order on June 18, 2024, to $222,254.41 for Plaintiff to pay and $208,602.07 for Mr. Vigliotti and the Law Firm to pay the Defendant jointly and severally. (LFa41-42).

After the June 2024 orders in issue were entered, there were various applications filed by Mr. Vigliotti and the Law Firm asking for a stay that were denied for various reasons irrelevant to the instant appeal.

On August 7, 2024, the Law Firm filed a motion for a stay pending appeal with this Court, which was granted by the Appellate Division. (LFa147-148). Thereafter, on August 29, 2024, Mr. Vigliotti filed a stay motion with the trial court that was granted on October 18, 2024. (Da108-109).

## STATEMENT OF FACTS

On May 6, 2022, Plaintiff retained the Law Firm and not Mr. Vigliotti individually to represent her in her matrimonial matter below. (Da1-7). Mr. Vigliotti executed the Retainer Agreement "[f]or the Firm" and Plaintiff signed her name next to Mr. Vigliotti's name. (Da5). For the next two (2) years, Mr. Vigliotti pursued a frivolous claim on the Law Firm's letterhead at all times, and held himself out as part of the Law Firm to set aside the terms of the parties' Postnuptial Agreement (hereinafter "PNA") under New York law. (Da1-7). Given the unequivocal terms of the PNA and the undisputed facts surrounding same, Defendant demanded on three (3) separate occasions (November 20, 2023, December 19, 2023, and January 8,

2024) that Plaintiff and Mr. Vigliotti withdraw the claims to set aside the PNA as it was in direct violation of R. 1:4-8, and the parties' PNA and not supported by N.Y. law. (LFa66-68; Da54-56; LFa69-72).[5] Defendant provided notice to Mr. Vigliotti via electronic mail using his Law Firm email address on November 20, 2023, December 19, 2023, and January 8, 2024. (Da73; Da54; Da74). Additionally, in November 2022, Defendant filed a Notice of Cross Motion, that Plaintiff's claims were frivolous and must be withdrawn immediately. (Da104-106). The Law Firm's full name and address were on all correspondence and pleadings wherein Mr. Vigliotti worked in an office, and Mr. Vigliotti used the Law Firm's email address. (Da75; Da104).

Notably, the Defendant always identified the Law Firm that he was associated with on every set of motion papers filed with the trial court. (Da57; Da75; Da104; Da106). In fact, Defendant filed and served on Mr. Vigliotti at his Law Firm a Notice of Cross Motion on November 28, 2022, a second Notice of Cross Motion on November 29, 2023, and a third application for fees and sanctions on March 12, 2024. (Da104; Da75; Da57).

It is significant to note that the Law Firm submitted no fact or legal argument to support the claims that R. 1:4-8 mandates additional direct notice to the Law Firm

[5] The Law Firm does not dispute the facts and did not argue below or on appeal that the frivolous findings by the trial court were erroneous.

where the attorney is employed or that extra copies of documents must be sent to the same firm wherein that the attorney works, or that the Law Firm had to be individually named in addition to Mr. Vigliotti in the R. 1:4-8 letters and the pleadings. Same would make no sense since R. 1:4-8(b)(3) does not specify said specific language and clearly that would have if the drafters wanted law firms to have additional direct notice. It is the Law Firm's responsibility to supervise its lawyers. R.P.C. 5.1.

According to the Law Firm's Brief, the Law Firm became aware that "Vigliotti might have exposure for a frivolous litigation sanction" when they were both working in the office on Saturday, March 30, 2024. (LFa51). The Law Firm's Brief asserts that Mr. Vigliotti "advised Ventura that the Law Firm was not involved in any way." (LFa51). However, that not only contradicted the email dated January 13, 2024 Mr. Vigliotti sent to his then client Plaintiff as to the Law Firm's exposure (Da81-91), but the Law Firm's Certification to the trial court dated July 5, 2024, states differently. (LFa50-55). Specifically, "I [Law Firm] asked him [Vigliotti] if the Law Firm was involved and he replied that he did not believe so." (LFa51). The Law Firm also knew as of April 5, 2024 based on Mr. Vigliotti's letter to the Court about placing the malpractice carrier on notice. (Da72). This contradicts with the Law Firm's statement that they were not aware that they "could potentially be jointly and severally responsible for defendant's fees and costs" until May 10, 2024. (LF51-

52). The Law Firm was certainly at that point obligated to review the motion papers and Orders, and certainly is charged with knowing the law under R. 1:4-8 and its obligation to supervise its lawyers. A copy of the Court's Order dated May 10, 2024 was served upon Mr. Vigliotti, a representative of the Law Firm. (LFa26-27; Da92-94). Moreover, it is noteworthy that the Law Firm claims Mr. Vigliotti lied to it about the status of the fees case and kept it hidden (LFa51), yet it stands with Mr. Vigliotti on appeal and has filed no action below against Mr. Vigliotti for his intentional bad acts against the Defendant in this regard.

The Law Firm incorrectly states in its Brief on page 16 that a plenary hearing would occur below on the issues of fees. Same is inaccurate. The PNA does not mandate a plenary hearing as to fees. (Da95-96). The trial court's May 10, 2024 order was addressing potentially scheduling a hearing as to a dispute between Mr. Vigliotti and Plaintiff. (LF26-27). Specifically, paragraph 6 of the trial court's order dated May 10, 2024, provides in part: "[i]n the event the Court is required to conduct a plenary hearing on the issue of whether there has been a waiver of the attorney-client privilege, to permit the release of the Vigliotti Certification submitted in camera, then the costs of the plenary hearing and all preparation related thereto . . . shall be borne by the plaintiff, attorney Vigliotti and his law firm, the allocation of which shall be joint and several." (LFa27). As such there was never a hearing set for fees as claimed by the Law Firm.

Despite the trial court's electronic correspondence stating that it would not accept any further submissions on the issues, which was reasonable given the voluminous submissions that were thus far been provided to the trial court by the Plaintiff and Mr. Vigliotti, including ***three*** (3) Certifications provided by Mr. Vigliotti, the trial court accepted a Letter Brief by the Law Firm's attorney, Sandra Fava, Esquire of the law firm Fox Rothschild, LLP on June 3, 2024. (T5:15-18). Ms. Fava's submission contained a Statement of Facts and Legal Argument and argued these exact same points which are currently being recycled by the Law Firm for a second time on appeal, and did not even use all of the allotted pages. (T5:15-10). Ms. Fava was also provided the ability to argue the Law Firm's positions at length during oral argument on June 17, 2024 even though there was no mandate under the law for any such participation. (T5:24-2). All arguments made by Ms. Fava were properly rejected by the trial court during oral argument on June 17, 2024 as set forth above. (T5:27-24; T5:40-9). The Law Firm complains that they did not file a Certification in order to refute why they should not be held jointly and severally; however, Defendant did not allege any facts other than relied upon R. 1:4-8(b)(3), as a matter of law. The Law Firm did in fact argue in their Letter Brief and at oral argument that they should not be liable jointly and severally (5T:24-25; 5T:25-1), and nothing stopped Mr. Vigliotti from arguing that he alone should be liable and not the Law Firm, which he did not do (he lied to the Law Firm as per the Law Firm,

and did nothing to protect them according to the Law Firm). (T5:89-13).

In addition, despite having the opportunity to do so, nowhere did the Law Firm argue below that there were any exceptional circumstances under R. 1:4-8(b)(3) other than the flawed claim of lack of notice, and they do not do so on appeal other than to claim it allegedly could not afford to pay the Judgment (a mew argument). (T5). However, ability to pay is not a factor under R. 1:4-8 as to being held liable for the conduct of one of its lawyers. Otherwise, lawyers could easily bring frivolous claims and escape liability claiming inability to pay. Nor did Law Firm dispute that Mr. Vigliotti pursued a frivolous case and the trial court's findings that he did. The only argument is that Mr. Vigliotti did not tell them in time, which is not the Defendant's problem and not a basis under R. 1:4-8. Mr. Vigliotti repeatedly mentioned in his pleadings to the trial court that he spoke with other lawyers, retired judges and the like about this case. (T5:59-5; Da97). It is implausible that he did not speak to any of the partners of his own firm wherein he has been with the Law Firm for many years. The Law Firm does admit that they never supervised or monitored Mr. Vigliotti as required by RPC 5.1.

After oral argument, the trial court entered an order directing the Plaintiff to pay the Defendant $206,19.91 in thirty (30) days pursuant to the explicit terms of the PNA. (LFa1-23). The trial court also ordered Mr. Vigliotti and the Law Firm to pay $192,545.57 within thirty (30) days (LFa4), which it later amended to include

Defendant's fees between May 10, 2024 through May 24, 2024. (LFa41-42). Ultimately, the Law Firm, Mr. Vigliotti and Plaintiff were jointly and severally liable for $208,602.07 as mandated by R. 1:4-8(b)(3). (LFa41-42).

On July 5, 2024, the Law Firm filed an Order to Show Cause for a stay alleging financial difficulties with no credible support for same. (LFa46-49). However, not once did the Law Firm state that they cannot pay these monies out of their own personal accounts or that Mr. Vigliotti could not pay the Judgment which would have absolved them. No personal finances were attached to demonstrate their inability to pay the outstanding judgment. Even though Mr. Vigliotti could pay the outstanding Judgment, even if the Law Firm had to pay something, they do not deny that they may have a line of credit that can loan the Law Firm funds to pay the Judgement. Interestingly, the Law Firm is silent regarding Mr. Vigliotti's clear ability to pay the outstanding Judgment or why Mr. Vigliotti is not paying the Judgment to avoid the Law Firm from paying same or even offering to indemnify them.

On July 5, 2024, the trial court issued a three (3) page single spaced Order denying the Law Firm's request for a stay. (LFa43-45). Specifically, the trial court noted:

> Attorney Ventura's assertion that the June 17, 2024, Order and Opinion were entered without notice and the opportunity to be heard is belied by the firm's retention of counsel, counsel's submission (which was not requested, but permitted) and argument. There is no due process violation to be found on the subject facts. Similarly, this

> Court summarily rejects the arguments the June 17, 2024 ruling is based on a deficient record and attorney Ventura was not permitted to challenge the reasonableness of the claimed attorneys' fees. Nothing is put forward supporting the naked assertion the record is deficient. Of particular significant are the numerous transcripts provided by the defendant's counsel which make clear what was said, by whom, when and the central role such statements play in the June 17, 2024 analysis and ruling. . . All opponents to the attorneys' fee award had ample opportunity to challenge the reasonableness of the claimed attorneys' fees. Only plaintiff did this in earnest, albeit in a supplemental submission that while was not authorized, was considered." (LFa43-45).

## LEGAL ARGUMENT

### I. THE TRIAL COURT DID NOT ERR WHEN IT MADE THE LAW FIRM JOINTLY AND SEVERALLY LIABLE FOR FRIVOLOUS LITIGATION PURSUANT TO RULE 1:4-8(b)(3).

As a threshold matter, based on R. 1:4-8(b)(1) that does not require additional and direct notice to the Law Firm by Defendant such that their entire due process argument fails, the trial court did not deny the Law Firm's right to due process when it made it jointly and severally liable for sanctions given, *inter alia*, the imputed notice under R. 1:4-8(b)(3), they knew about the instant litigation for four (4) months before the Order was entered, and their retention of counsel, Sandra Fava, Esquire of Fox Rothschild, LLC afforded them extra participation in the litigation below.

"[I]n the interpretation of a statute our overriding goal has consistently been to determine the Legislature's intent." Young v. Schering Corp., 141 N.J. 16, 25 (1995) (quoting Roig v. Kelsey, 135 N.J. 500, 515, (1994)). In doing so, "we need

delve no deeper than the act's literal terms." State v. Gandhi, 201 N.J. 161, 180 (2010) (quoting State v. Thomas, 166 N.J. 560, 567, (2001)). Put another way, "[w]here a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning" and a court should not consider "extrinsic interpretative aids." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004)). See also O'Connell v. State, 171 N.J. 484, 488 (2002). We will "neither rewrite a plainly written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." Ibid. The first step in interpreting the statute is to look "to the plain language of the statute[,]" and "ascribe to the statutory language its ordinary meaning[.]" D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007).

After applying the foregoing principles to the within matter, the analysis in this case begins and ends with R. 1:4-8's plain text. The language used by the Legislature does not include the additional requirement of providing direct notice to the Law Firm, when the attorney guilty of the wrongdoing has been provided proper notice. The Law Firm argues that the trial court did not make a finding as to the amount of sanction that would deter the Law Firm from future conduct. However, since the Law Firm was not the specific wrongdoer, the trial court did not have to

make such a finding.

If the Court will consider a due process argument, Defendant notes the following: due process is not a fixed concept, but a flexible one that depends on the particular circumstances. Zinermon v. Burch, 494 U.S. 113, 127 (1990). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

This case is distinguishable from Mullane given the fact that this matter did not involve a R. 1:4-8 application and did not provide for notice by publication. Mullane v. Hanover Bank & Tr. Co., 339 U.S. 306 (1950). In Mullane, the only notice given to the parties was by publication in a local newspaper. Id. at 309. Such notice was insufficient under the Fourteenth Amendment since the trust company were able to notify the potential beneficiaries by ordinary mail given the fact that they had access to their personal addresses. Id. at 318.

Similarly, this matter is distinguishable from Miller. Dep't of Law & Pub. Safety, Div. of Motor Vehicles v. Miller, 115 N.J. Super. 122 (App. Div. 1971). Employee, Miller, was notified that he would be tried for accepting bribes. Id. His defense was that he took no bribe, or in any way participated in such an illegal

activity. Id. There was nothing in the case to alert him to the fact that he was being charged with acting as a conduit for bribe money intended for another employee, or that he had entered into a common scheme with another employee. Id. This was not a R. 1:4-8 case. In the instant matter, the Law Firm was well aware of the claims against Mr. Vigliotti constructively through Mr. Vigliotti, and given the Court's Order of April 4, 2024 the Law Firm knew then and had about three (3) months in order to address same. It is beyond belief that Mr. Vigliotti did not say something to anyone at the Law Firm, or that the Law Firm did not approach Mr. Vigliotti to discuss this case, when the Law Firm carried a six (6) figure receivable from Mr. Vigliotti on this case in the amount of $80,000 for over a year.

In McKeown-Brand v. Trump Castle Hotel & Casino, the Supreme Court specifically addressed whether the statute (N.J.S.A. 2A:15-59.1) violates due process. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 558 (1993). The Supreme Count found that "[a]t a minimum, due process requires notice and an opportunity to be heard appropriate to the nature of the case." Id. at 558 (quoting Mullane, 339 U.S. at 313). In order to comport with due process, a judicial hearing requires notice defining the issues and an adequate opportunity to prepare and respond." Nicoletta v. North Jersey Dist. Water supply Comm'n, 77 N.J. 145, 162 (1978). In McKeown-Brand, Defendant filed a motion on notice to Plaintiff, who received all the process she was due. Id. at 559. As such, the Supreme

Court found that the "procedure in the present case conformed to these requirements." Id. at 559.

In Sharon v. Weinstein, 305 N.J. Super. 236, (App. Div. 1997), the Appellate Court noted that, "[m]any lawyers practice as partners, members, or associates of law firms. When a client retains a lawyer with such an affiliation, the lawyer's law firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise . . . and the firm is liable to the client for the lawyer's negligence." (Sharon v. Weinstein, 305 N.J. Super. 236 (App. Div. 1997); quoting, Restatement of the Law Governing Lawyers, §79 (Tentative Draft No. 8, 1997). Moreover, the firm and its principals are ordinarily liable for wrongful acts of lawyers who have an "of-counsel relationship" with the firm, to the extent that and while they are doing firm work. Id. at 241; Restatement, *supra*, §79.

The foregoing case law that the Law Firm relies upon as to the lack of notice cites all involve mandated notice to the wrongdoer attorney and not additional notice to the Law Firm, and as such, are all further irrelevant to the within matter. As set forth above, and as detailed below, it is undisputed that proper notice was given to Mr. Vigliotti, on behalf of the Law Firm.

Defendant's motion for R. 1:4-8 sanctions named Mr. Vigliotti (at the Law Firm) and provided notice to Mr. Vigliotti at the Law Firm and thereby the Law Firm. Contrary to the Law Firm's assertions that it had only "three (3) weeks" to "become

familiar" with the matter, they neglected to mention that Mr. Vigliotti, a lawyer with the Law Firm, was in the case from its inception in June 2022, and the Law Firm clearly had access to him. In fact, the Law Firm knew at the very least by the end of March 2024 that there was a potential issue yet chose not to investigate same. The Law Firm admitted in Ms. Fava's June 3, 2024 submission to the Court that he had knowledge of the within matter when a member of the firm saw Mr. Vigliotti working in the office on a weekend on March 30, 2024. (LFa51).

The Law Firm was also made aware of the within matter and the potential malpractice claim pursuant to the Court's Order of April 4, 2024. Mr. Ventura specifically requested that the Law Firm "be permitted to provide notice to our malpractice carrier after Your Honor's ruling on the pending applications. The serving of notice prior to the conclusion is premature and would likely impact the cost and/or the eligibility of our future coverage." (Da72). Therefore, the Law Firm had months to prepare and not weeks as claimed. Clearly, the Law Firm cannot escape malpractice liability if they did not supervise or get information about the case from the offending lawyer, and likewise, they cannot escape a R. 1:4-8 liability based on the same argument.

Notably, there were only two (2) days of trial transcripts (on February 13, 2024 and February 14, 2024) and extremely limited evidence that demonstrated that Mr. Vigliotti had no case at all, which is all the Law Firm needed to know, and

confirm that Mr. Vigliotti's case was frivolous and baseless (which is not disputed by the Law Firm).

There is no dispute that Plaintiff signed a Retainer Agreement with the Law Firm and it was signed on the Law Firm's behalf by Mr. Vigliotti in May 2022. (Da1-7). There is also no dispute that Vigliotti was properly served with the R. 1:4-8 letters and all pleadings to the Law Firm letterhead as to the R. 1:4-8 issue. It also cannot be disputed that R. 1:4-8 or any case law, does not mandate any independent notice or independent participation by the Law Firm of the wrongdoing lawyer. R. 1:4-8 does not mandate the Defendant to add the Law Firm as an independent wrongdoer, it only requires notice to Mr. Vigliotti with the Law Firm's name, which was properly done. It is further not disputed that the Law Firm elected to not supervise Mr. Vigliotti in contravention to R.P.C. 5.1. Also, it cannot be disputed that the Law Farm is charged with being knowledgeable of R. 1:4-8(b)(3) as to its exposure of Mr. Vigliotti's bad acts as it cannot claim ignorance of the law. See In re Hollendonner, 102 N.J. 21 (1985); In re Wittreich, 5 N.J. 79 (1950). Furthermore, the Law Firm set forth not a single fact or claim before the trial court or this Court to support a claim of "exceptional circumstances" under R. 1:4-8 (b)(3), other than the notice claim and that it cannot afford to pay the judgment, which is not a basis to escape liability for an intentional conduct of one of its lawyers.

Moreover, R. 1:4-8 is clear inasmuch that the notice is imputed to the firm. R.

1:4-8 specifically provides that notice must be provided to the attorney or pro se party, which was done and undisputed. It does not require that additional notice must be provided to the attorney's law firm. Rather, the attorney has the obligation to inform its Law Firm of the Safe Harbor correspondence received or any such litigation. It is not required that the Law Firm be personally served to all of the managing partner(s), when Mr. Vigliotti was properly and effectively served. As specifically set forth on the Plaintiff's Retainer Agreement, Mr. Vigliotti was working on the Plaintiff's matter "[f]or the Firm." (Da1-7).

Moreover, this was not a situation wherein the misconduct occurred in one (1) week and the Law Firm was not able to have notice from Mr. Vigliotti. Rather, as set forth above, the Law Firm was on constructed notice and should have been told by Mr. Vigliotti from the first set of cross motions filed in November 2022. (Da104-106).

Moreover, the Law Firm claims that as a result of not being noticed that it might have liability alleged in the Safe Habor letters, the Law Firm could not take any steps to remediate or withdraw the pleadings. The Law Firm should have been monitoring Mr. Vigliotti from the filing of the Complaint for Divorce or at least since November 2022, and could have intervened then such that Defendant should not suffer the extreme financial harm caused by Mr. Vigliotti due to the Law Firm's claimed supervising error. The Law Firm should have also noticed that Mr. Vigliotti

did take a retainer agreement on the case, and he was not sending out bills to the Plaintiff on a monthly basis, which as noted by the trial court. (T5:69-12; T5:70-1) Moreover, Mr. Ventura, or anyone else at the Law Firm, failed to take any action in the proceeding since March 30, 2024 to May 2024. The Law Firm was more than able to request to intervene at that point in time, hire counsel to represent the Law Firm, submit documentation in further opposition of Defendant's application and the like; however, the Law Firm voluntarily chose not to until May 2024.

In sum, the trial court was correct in finding that there were no procedural defects as to the Law Firm to allow it to escape liability caused by Mr. Vigliotti's intentional conduct.

### A. The Trial Court made findings of fact and conclusions of law as to how the Frivolous Litigation Rule applied to the Law Firm.

In Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn (410 N.J. Super. 510 (App. Div. 2009), certify. den., 203 N.J. 93 (2010), the attorney and the law firm were awarded the amount of $66,192.51, not only as legal fees due under the retainer agreement, but also as a sanction pursuant to R. 1:4-8(d)(2). R. 1:4-8(a) sets forth what constitutes frivolous litigation. Id. at 543. It includes pursuing litigation that has no legal basis, such as the matter herein. Ibid. Alpert, however, focused on the lack of an analysis concerning "whether an attorney appearing pro se may recover as a sanction 'reasonable attorneys' fees.'" Id. at 544. The within matter does not deal with a pro se attorney seeking fees pursuant to R. 1:4-8 and is therefore

distinguishable to the matter herein. Moreover, the Alpert matter did not distinguish the attorney (A.G.) from the attorney's law firm (Alpert, Goldberg, Butler, Norton & Weiss, P.C.); rather, the A.G. and Alpert, Goldberg, Butler, Norton & Weiss, P.C. were treated as one, united entity. Likewise, Mr. Vigliotti and the Law Firm should be treated as one, united entity consistent with R. 1:4-8(b)(1), and the trial court made several findings of fact and conclusions of law in the record required by R. 1:7-4(a) to support the R. 1:4-8 award.

The trial court's twenty-three (23) paged, single spaced Order dated June 17, 2024 includes its findings of fact and conclusions of law and how liability among Plaintiff, Mr. Vigliotti, and the Law Firm was joint and several. (LFa1-23). The analysis commences on page eleven (11) of the Court's June 17, 2024 Order. The trial court also stated on the record on June 17, 2024 several findings of fact and conclusions of law as to why the Law Firm was also included in the trial court's decision. (T5:40-14). In fact, on page sixteen (16), the trial court specifically noted that Defendant's counsel sent "a second frivolous lawsuit notice based on the colloquy on the record during the December 15, 2023 oral argument. Specifically, he references plaintiff's counsel's repeated requests to push back the pre-trial submission dates, the [c]ourt referencing the importance of plaintiff's credibility, the precarious position plaintiff will find herself in if deemed not credible after kicking the can down the road for one year and the myriad changing positions of plaintiff.

There was no response to this letter. This email references both plaintiff **and the law firm**. Whether Mr. Vigliotti shared with his firm is not required to be adjudicated by this Court." (LFa16). (Emphasis added). Rather, the trial court determined that the Defendant should not be entangled in the mess of determining which percentage the Law Firm is liable for, Mr. Vigliotti and the Plaintiff as the dispute is between them.

The Law Firm concedes in its amended brief that the trial court's decision addressed the misconduct of Mr. Vigliotti. (VB24)[6]. The Law Firm also notes in its brief that given the fact that Mr. Vigliotti was covered by the Law Firm's malpractice insurance, listed on the letterhead, and held himself out as being associated with the Law Firm, that was enough to draw the Law Firm into liability (VB24); however, the Law Firm misses a key point found by the trial court, which is the fact Mr. Vigliotti for the Law Firm entered into a retainer agreement with the Plaintiff. (Da1-7). Most importantly, pursuant to R. 1:4-8 (b)(3), a law firm shall be jointly responsible for violations committed by its partners, shareholders, associates and employees except in extraordinary circumstances. The trial court specifically and correctly noted that the within matter does not qualify as "extraordinary circumstances," (T5:31-21) because of the notice claim, and therefore the Law Firm shall be held liable in accordance with the explicit language of the Court Rule.

[6] "VB24" refers to Ventura, Miesowitz and Keough, P.C. (Appellant's) Brief, page 24.

Additionally, the Law Firm incorrectly states that the trial court must say what the Law Firm independently did wrong that was a violation of R. 1:4-8, which is absurd since R. 1:4-8(b)(3) is clear that Vigliotti's wrongdoing is all that is needed to hold the Law Firm liable. It does not mandate specific wrongdoing on the part of the Law Firm against the Defendant.

### B. The Trial Court properly calculated the sanctions under R. 1:4-8, and the judgment against the Law Firm is not moot since Mr. Vigliotti has appealed.

The Law Firm claims that the $200,000+ sanction will have an "annihilative effect" on the Law Firm. Same is not a basis to escape liability and this was not argued below by Ms. Fava for the Law Firm. It is Mr. Vigliotti's conduct that needed to be deterred, and clearly the message to the Law Firm is that it needs to supervise its lawyers. Respectfully, this is not a valid defense or excuse. The trial court noted in its June 17, 2024 Order and on the record that pursuant to paragraph 4 of the February 21, 2024 Order and Opinion and the ruling awarding Defendant attorneys' fees pursuant to Article XVI(2) of the PNA (page 41 of the Opinion), the analysis to be performed on the invoices submitted by Defendant's counsel is limited to determining the reasonableness of the attorneys' fees and costs. Specifically, the trial court noted in its June 17, 2024 Order that "[t]his stands in contrast to the required analysis for an award of attorneys' fees and costs pursuant to R. 5:3-5, for which nobody claimed applies or addressed in any of the voluminous written submissions."

Thereafter, the trial court carefully calculated the Defendant's counsel's Certification of Services through May 23, 2024 and determined the proper amount of fees due to the Defendant. Obviously, the trial court did not allow the Defendant to be financially injured by the intentional conduct of Mr. Vigliotti, which supported the amount of sanction ordered. The Law Firm had an opportunity to make an argument about the unreasonableness of the fees and when the trial court asked the Law Firm's counsel if she had a position on that, she said, "I do not." (T5:22-5). Neither Mr. Vigliotti nor the Law Firm made an issue as to the reasonableness of the fees since they knew that they were reasonable. In fact, not a single line item in a bill was criticized.

Lastly, the judgment against the Law Firm should not be reversed as it is not moot given Mr. Vigliotti's and Plaintiff's appeal of the Court's June 17, 2024 and June 18, 2024 Orders. The approval of a *supersedeas* bond does not absolve the Law Firm of its liability under R. 1:4-8. There is no 100% guarantee that the bond will be paid at the end of the appeal such that the law Firm needs to remain liable until the judgment is paid.

Ultimately, the Appellant goes to great lengths to try to raise the impression that the trial court was not accommodating to the Law Firm. That is completely false. The trial court did extensive work on this case with multiple submissions from multiple parties and even though it did not have to allow the Law Firm to participate,

it did allow same and accepted even more documentation and arguments from the Law Firm. The trial court was dealing with an attorney whose intentional conduct severely injured an unsuspecting litigant such as a court of equity certainly had the power and did exercise its power to correct this grave injustice.

## CONCLUSION

For the aforementioned reasons, it is respectfully requested that that the Court affirm the trial court's findings below.

Attorneys for Defendant/Respondent,

By: _____
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