MASELLI, MILLS & FORNAL, P.C.
By: Paul J. Maselli, Esquire
Attorney No. 036101986
pmaselli@masellilaw.com
400 Alexander Park, Suite 101
Princeton, New Jersey 08540
(609) 452-8411
Attorneys for Appellant

FRANCIS J. MCGOVERN, JR.

Plaintiff/Appellant,

v.

TOWNSHIP OF LOWER, TOWNSHIP OF LOWER ZONING BOARD OF ADJUSTMENT, ACHRISTAVEST PIER 6600, LLC, ACHRISTAVEST DIAMOND BEACH, LLC, & EUSTACE MITA

Defendants/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appeal Docket No. A-003681-24

On Appeal From:
Superior Court of New Jersey
Law Division, Cape May County

Trial Docket No. CPM-L-000051-21

Sat Below:
Hon. John C. Porto, J.S.C.

---

# AMENDED BRIEF OF APPELLANT, FRANCIS J. MCGOVERN, JR.

---

Dated: October 27, 2025

Of Counsel:
PAUL J. MASELLI, ESQUIRE

On the Brief:
PAUL J. MASELLI, ESQUIRE

# TABLE OF CONTENTS



# TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

# TABLE OF AUTHORITIES

# PRELIMINARY STATEMENT

Francis J. McGovern, Jr. ("McGovern") sued the Township of Lower ("Township"), Achristavest Pier 6600, LLC, Acrhistavest Diamond Beach, LLC and Eustace Mita (collectively "Mita), and Township of Lower Zoning Board of Adjustments ("Zoning")

The litigation centered on a property known as Diamond Beach Park (the "Property"), which Township had sold to Mita for $400,000 via a public auction. The sale was finalized only after Mita secured a use variance from Zoning.

After a three-day bench trial, the lower court voided the sale based on notice defects. In a summary judgment order entered after the trial, the court below voided the zoning approvals.

**Initial Fee Application**

McGovern sought an order requiring Township to pay his legal fees based on the "fund in court" rule. The lower court denied this application at the conclusion of the trial. Crucially, no fund existed at that time. In its decision, the lower court found that McGovern's motive for bringing the litigation was solely his own self-interest, not the interest of a class of persons who ultimately benefitted.

**Subsequent Sale and Renewed Fee Application**

Fourteen months after the lower court voided the sale, Township sold the Property for $1,000,000.

Following this sale, McGovern moved to alter the final judgment and vacate the prior order denying his attorney fees. McGovern argued that the litigation he personally financed conferred a $600,000 benefit upon the citizens of Township (the difference between the original $400,000 sale price and the $1,000,000 subsequent sale price). He asserted that the "fund in court" had not existed at the conclusion of the trial but came into being 14 months after the interlocutory order denying his first fee application.

The lower court denied McGovern's motion, relying on its previous finding that McGovern was ineligible for a fee award from a fund in court because his litigation intent was only for his own self-interest, and not that of a class of beneficiaries.

**Brief's Arguments on Appeal**

This brief argues that the Property's subsequent sale, and the resulting $600,000 collected by Township, constitutes a fund in court that exists only because McGovern pursued the litigation.

The brief contends that the subsequent sale is new evidence that did not exist and could not have been presented at the time of trial. This satisfies the requirement for altering the final judgment and vacating the order that denied McGovern's initial fee application.

Furthermore, the brief argues that the lower court erred as a matter of law by ruling that McGovern is barred from recovery because his intentions were solely for personal gain. The test for attorney fees from a fund in court is not whether the litigant was motivated by self-interest—as every litigant is—but whether the litigation resulted in the creation of a fund from which a class of others received a benefit.

Finally, the brief argues that the court below erred in denying McGovern's motion made under *R.* 4:50-1(b) on procedural grounds. The court below ruled that the motion was made more than one year from an order entered in January, 2024. However, that order was an interlocutory order and the final order as to all issues was entered in November, 2024. McGovern's motion was made within one year of November, 2024 and it should have been considered on the merits and not denied as procedurally defective.

## PROCEDURAL HISTORY

On February 19, 2021, McGovern filed a Complaint in Lieu of Prerogative Writs naming as defendants Township, Zoning, and Mita. Pa0001a

On March 12, 2021, McGovern filed a First Amended Complaint. Pa0010a.

On December 17, 2021, the lower court entered an Order granting McGovern's Motion for Leave to File a Second Amended Complaint. Pa0036a.

On January 4, 2022, McGovern filed a Second Amended Complaint. Pa0043a.

On January 26, 2023, McGovern filed a Third Amended Complaint. Pa0374a. The Third Amended Complaint was the final complaint upon which the case went to trial.

The Third Amended complaint contained certain factual allegations regarding Township's sale of the Property, by way of public auction, to Mita for $400,000 and regarding approvals granted to Mita by Zoning.

The Third Amended Complaint has four counts:

Count I – Zoning's approval of the use variance was arbitrary, capricious and unreasonable and should be voided;

Count II – The notice of Mita's application for a use variance and site plan approval was defective and the resolution granting them should be voided;

Count III - The Agreement of Sale and the conveyance of the Property are void *ab initio* as the notice of public auction was deficient;

Count IV - Township made an illegal gift to Mita, allowing Mita use of the Property from 2016 to 2021 for no consideration. Pa0374a-0386a.

On February 8, 2023, Mita (pa0387a) and Lower (Pa0390a) filed Answers to the Third Amended Complaint. On February 16, 2023, Zoning answered the Third Amended Complaint. Pa0401a.

A bench trial was held on May 1, 2, and 3, 2023 for Counts III and IV. The parties submitted post-trial briefs.

On January 10, 2024, the lower court issued its decision and entered judgment in favor of McGovern on Count III and dismissed Count IV and denied McGovern's application for reimbursement of

attorney fees which McGovern made based on the "fund in court" rule. Pa0415a.

On January 12, 2024, the lower court entered a supplemental order clarifying that, as a result of the January 10, 2024, the conveyance of the Property from Township to Mita is void. Pa0461a.

On November 1, 2024, the lower court granted summary judgment in favor of McGovern on Count I and II. 0462a. This judgment disposed of all remaining claims thereby making it the final judgment.

On May 5, 2025, McGovern filed a motion seeking relief in the form of an order altering and vacating the January 10, 2024 order and directing Township to pay McGovern's attorney fees based on the "fund in court" rule. Pa0472a.

The defendants opposed the motion with briefs and did not submit sworn statements with facts that contradicted the facts McGovern provided in support of his motion.

The lower court conducted oral argument of the motion on June 6, 2025.[1]

[1] There is one transcript dated June 6, 2025 designated as "T".

On June 11, 2025, the lower court issued its decision and entered its order denying McGovern's motion. Pa0484a.

On July 22, 2025, McGovern filed a Notice of Appeal. Pa0502a. On July 30, 2025, McGovern filed an Amended Notice of Appeal. Pa0506a.

## STATEMENT OF FACTS

On June 8, 2016 and June 15, 2016, Township published a notice of public auction to take place on June 22, 2016 for the sale of the Property. Pa0440a

Mita was the successful bidder with a bid of $400,000. Pa0444a.

Mita thereafter obtained a use variance from Zoning. Pa0468a.

The sale from the Township to Mita took place on March 16, 2021. Pa0445a.

After the court below voided the March 16, 2021 sale by order dated January 10, 2024, Township sold the Property on March 17 2025 for $1,000,000. Pa0474a.

## LEGAL ARGUMENT

### I. THE COURT BELOW ERRED BY FAILING TO GRANT MCGOVERN'S MOTION FOR POST-JUDGMENT RELIEF. (Pa0494a-0497a)

The court below denied McGovern's first fee application by its order entered on January 10, 2024 (the "January Order") adjudicating the third and fourth counts of McGovern's third amended complaint. The January Order was an interlocutory order as it did not enter final judgment as to the first and second counts. The final judgment was entered on November 1, 2024 (the "Final Order") when the court below adjudicated a summary judgment motion which disposed of the first and second count of the third amended complaint.

McGovern's post-judgment motion seeking to vacate the January Order to the extent it denied his first fee application, relied in part on *R*. 4:50-1(b) which provides that the court may relieve a party from a final order based on "newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49."

In considering McGovern's second fee application made in May, 2025, the court below erroneously treated the January Order as a final order and ruled that McGovern could not seek relief under *R*. 4:50-1(b) because *R*. 4:51-2 imposes a deadline of one year from the date of a final order to file a motion for that relief.

Instead, the court below only considered whether McGovern was entitled to relief under *R*. 4:50-1(f) which provides that a court may grant relief for "any other reason justifying relief," There is no deadline set for a litigant to move under this rule.

The court below ruled that McGovern was not entitled to relief under *R*. 4:50-1(f) and denied McGovern's motion. This Court has explained that where a party seeks to vacate an interlocutory order, it may move any time before final judgment under *R*. 4:49-2; and within one year of final judgment under *R*. 4:50-1(a),(b) or (c). *Brandecker v. E&B Mill Supply Co.*, No. A-5733-14T4, 2018 N.J. Super. Unpub. LEXIS 437, at *13 (App. Div. Feb. 26, 2018).

The court below should have considered McGovern's motion under *R*. 4:50-1(b) because it was filed within a year of the Final Order. Had the court below considered McGovern's motion under

the standard set forth at *R.* 4:50-1(b), the motion would have been, or at least should have been, granted.

The 2025 $1 million sale of the Property had not taken place before entry of the January Order or the Final Order. The January Order gave birth to the possibility that there would be in the future a fund in court created by McGovern's successful litigation. The previously inchoate creature grew into a fully formed fund in court at the time the Property sold in March, 2025.

Certainly if McGovern's litigation had given rise to a $600,000 fund in court before entry of the Final Order, McGovern would have been entitled to have his fees reimbursed from the fund. The fact that the fund in court came into being after the Final Order makes McGovern no less worthy of entitlement to his claim. Certainly this the type of newly discovered evidence that could not have been discovered before final judgment because it did not yet fully exist.

In *Brandecker*, a party filed a post-judgment motion to vacate an interlocutory order that had been entered more than a year before the motion was filed, but less than a year from the entry of final judgment. The motion was based on newly discovered

evidence. The trial court denied the motion as procedurally being filed out of time. The appellate court reversed, ruling that the motion was timely filed as it was filed within one year of the final judgment and that the newly discovered evidence justified vacating the interlocutory order. *Id.* at 16.

The argument below sets forth exactly why McGovern is entitled to reimbursement from the fund in court and highlights the importance of the newly discovered evidence. This Court must find that McGovern timely filed his motion under *R.* 4:50-1(b) and that he is entitled to relief because the existence of the fund would alter the January Order that denied his claim.

## II. THE PLAINTIFF IS ENTITLED TO ATTORNEY FEES AS A MATTER OF LAW UNDER THE "FUND IN COURT" RULE. (Pa0497a-0501a)

A litigant who recovers a common fund for the benefit of persons other than himself, is entitled to reasonable attorneys' fees from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In New Jersey, this doctrine is expressly stated in *R.* 4:42-9(a)(2), which provides that attorney's fees are typically not recoverable except under certain limited exceptions—including the "fund in court" exception.

"Fund in court" is an equitable term of art. *Porreca v. City of Millville*, 419 N.J. Super. 212, 225 (App. Div. 2011), citing *Henderson v. Camden County Mun. Util. Auth.*, 176 N.J. 554, 564 (2003). "The fund in court exception generally applies when a party litigates a matter that produces a tangible economic benefit for a class of persons that did not contribute to the cost of the litigation." *Henderson, supra*; *Sarner v. Sarner*, 38 N.J. 463, 467 (1962); *Sunset Beach Amusement Corp. v. Belk*, 33 N.J. 162, 168 (1960). The "fund in court" exception to the American Rule generally applies "when it would be unfair to saddle the full cost upon the litigant for the reason that the litigant is doing more than merely advancing his own interests." *Henderson, supra*, 176 N.J. at 554 (quoting *Sunset Beach, supra*, 33 N.J. at 168). Accordingly, "when litigants through court intercession create, protect or increase a fund for the benefit of a class of which they are members, in good conscience the cost of the proceedings should be visited in proper proportion upon all such assets. A benefit to all should carry with it a proper charge to all." *Sarner, supra*, 38 N.J. at 469, 467. It is fundamentally an examination of the fairness of the outcome; one party who obtains a direct benefit for many

should not be required to bear alone the costs of achieving that result.

In pursuing this action, McGovern did not merely benefit his own interests, but produced a tangible economic benefit to the citizens of Lower Township. As a product of McGovern's diligence and at his personal expense, the public obtained the true, fair market value of the property, and prevented a windfall to Mita at the expense of Township and its citizens. McGovern's efforts created a $600,000 benefit for Township and its taxpayers. The cost of achieving this benefit was substantial as set forth in the Certification of Services Rendered filed by McGovern in the court below.

A. The Court Below Erred as a Matter of Law. (Pa0499a-055a)

The court below made its ruling primarily based on a statement taken out of context.

The court below found, as fact, that, "The Plaintiff, alone, pursued this litigation for reasons that were entirely personal; Plaintiff did not want a hotel parking lot across the street from his house." 0499a. The trial court then quotes the *Henderson* case, *supra*, out of context. "The 'fund in court' justifying an award of

attorney's fees 'does not apply when a party litigates a private dispute for its own personal gain' *Henderson*, 176 NJ at 564 (citations omitted). This was a private dispute." The omitted citations are "*See Sunset Beach*, *supra*, 33 N.J. at 169-70, 162 A.2d 834 *Janovsky, supra*, 11 N.J. at 7-8, 93 A.2d 1."

In *Henderson,* the Supreme Court approved the award of attorney fees out of a fund in court to the plaintiff who sued a utility to recover excess interest charged. The Supreme Court also ordered the utility to refund the plaintiff the excess interest paid. *Henderson*, 176 NJ at 563-565.

The *Henderson* court did make the comment cited by the court below – that the fund in court rule does not apply to a private dispute for personal gain. But in support of this proposition, the *Henderson* court cites to two other cases that give definition to the words "private dispute."

The *Henderson* court cites to *Sunset Beach*, *supra.* In *Sunset Beach,* a contract purchaser of real estate deposited money with a title company and then engaged in litigation with the contract seller. The title company placed the money it held in escrow on deposit with the court. The court disallowed any claim for

reimbursement to the successful litigant from the deposit moneys placed with the court:

> Where the litigant creates a fund which will benefit others, again it is just that the fund be charged. Included are actions by a stockholder on behalf of the corporation to recover assets diverted or withheld from it. Essentially in the same category are escheat actions where the State's attorney gathers the fund for the protection of unknown claimants or the State. See *State v. Otis Elevator Co., supra* (12 *N.J.*, at *pp.* 5, 9-12).
>
> ***
>
> Here plaintiffs sought to compel the buyer to perform the contract of sale. Plaintiffs sued solely to advance their own interests. Defendants defended to the same end. If the purchase price had not been deposited with the clerk of the court, nothing could distinguish the case from the ordinary adversary quarrel. See *State v. Otis Elevator Co., supra* (12 *N.J.*, at *p.* 27 (dissenting opinion)). Respondents do not suggest otherwise. Rather they seize upon the fortuitous circumstance that a part of the purchase price, which could well have remained throughout with the escrowee, happened to have been deposited with the clerk of the court. A fund was "in court" only in a *physical* sense. Absent are any of the equitable circumstances constituting the vitals of a "fund in court" within the reason for the rule.

*Sunset Beach*, 33 NJ at 169-170.

In *Janovsky*, *supra*, when a plaintiff received a workers compensation award, the plaintiff was required by law to

reimburse an insurance company that previously paid disability payments to the plaintiff. The plaintiff argued "fund in court" but the court denied the plaintiff's claim for attorney fees because the dispute did not result in a benefit to a group of others. *Janovsky*, 11 NJ at 7.

The *Henderson* court, by citing to *Sunset Beach and Janovsky*, in support of its statement that there will be no award from a fund in court in a private dispute brought for personal gain, was clearly referring to those matters where the result of the litigation benefited no one other than the prevailing party.

The court below erred in its analysis as to what constitutes the difference between a party who litigates a matter for his own personal gain and one whose litigation results in a benefit to a group that is not a party to the litigation.

Of course, every plaintiff litigates a claim for his own personal gain. The plaintiff in *Henderson* litigated the claim to get a refund of the extra interest she paid.

The rule is not binary. It is not one or the other. It is not either (a) McGovern is litigating exclusively for the benefit of others or (b) McGovern is litigating exclusively for his own

benefit. It is, instead, that when a plaintiff is litigating for his own benefit, and as a result, a fund in court is created that benefits others, then the plaintiff is entitled to fees from the fund in court.

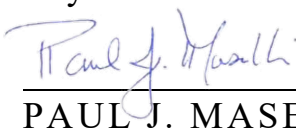
The court below made a finding that McGovern's subjective intent was to benefit himself. The court may very well be correct that in the heart of McGovern was only a desire to benefit himself and that he did not bring this lawsuit to benefit the good citizens of Lower Township. That is not the inquiry. The inquiry is whether the litigation objectively benefited a group of others, regardless of the subjective intent of McGovern.

It is undisputed that McGovern's litigation created a fund in court and that it benefitted the citizens and taxpayers of Lower Township. The court below should have granted McGovern's application for attorney fee reimbursement. This Court must reverse the decision of the court below.

## CONCLUSION

This Court must reverse the decision of the Court below.

**MASELLI, MILLS & FORNAL, P.C.**
Attorneys for Plaintiff

By: 
PAUL J. MASELLI

Dated October 27, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003681-24

| | | |
|---|---|---|
| FRANCIS J. MCGOVERN, JR.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>TOWNSHIP OF LOWER, TOWNSHIP OF LOWER ZONING BOARD OF ADJUSTMENT, ARCHISTAVEST PIER 6600, LLC, ACHRISTAVEST DIAMOND BEACH, LLC, & EUSTACE MITA,<br><br>Defendants-Respondents. | : | ON APPEAL FROM:<br>Superior Court of New Jersey, Law Division, Cape May County, Docket No. CPM-L-51-21.<br><br>Sat Below:<br>Hon. John C. Porto, J.S.C. |

# AMENDED BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, TOWNSHIP OF LOWER

Robert T. Belasco, Esquire
Attorney ID: 095782014
The Belasco Law Firm, LLC
Attorney-at-Law
111 East 17th Avenue, Suite 100
North Wildwood, New Jersey 08260
(609) 551-4139
rbelasco@belascolaw.com
Attorney for Defendant-Respondent,
Township of Lower

# TABLE OF CONTENTS

## TABLE OF JUDGMENTS



## TABLE OF AUTHORITIES

### CASES

## STATUTES



## NEW JERSEY COURT RULES

## PRELIMINARY STATEMENT

This appeal concerns the Trial Court's well-reasoned determination that no fund in court was created and that Francis J. McGovern, Jr. ("McGovern") was not entitled to an award of attorney's fees. The underlying matter was an Action in Lieu of Prerogative Writ under R. 4:69-1, in which McGovern challenged the Township of Lower's (the "Township") 2016 sale of real property located at 9600 Seaview Avenue, Cape May, New Jersey (the "Subject Property") to Defendant Achristavest Pier 6600, LLC ("Achristavest"), by way of an open public auction. After a three-day bench trial, the Trial Court issued a January 10, 2024 Order and Memorandum of Decision finding that the Township's public notices associated with the open public auction were defective, voiding the sale, directing the Township to return the purchase price to Achristavest, and further ordering Achristavest to Deed the Subject Property back to the Township.

At the same time, the Trial Court denied McGovern's request for attorney's fees with prejudice, expressly finding that his motivations were entirely personal and that any potential future increase in the property's value was speculative, and, irrelevant to the attorney fee analysis. The Court further held that, under the American Rule, McGovern was required to bear his own litigation costs because his action conferred no tangible benefit on the public or any identifiable class.

Following the recording of the deed reverting title to the Township, the

Township properly re-noticed and re-sold the Subject Property at a February 7, 2025 open public auction, at which Achristavest submitted a winning bid of $1,000,000.00. Closing occurred on March 17, 2025.

On May 20, 2025, McGovern filed a motion seeking to amend the January 10, 2024 Judgment under R. 4:49-1 and R. 4:50-1, arguing that the 2025 sale of the Subject Property and the increased sale price received by the Township constituted newly discovered evidence and warranted an award of attorney's fees. The Trial Court properly denied McGovern's motion, holding that it had already considered the possibility of a future resale and increase in the net proceeds received by the Township, and that the 2025 auction results were neither new nor material to the fee analysis.

The litigation initiated by McGovern produced no fund in court and conferred no benefit upon any class of persons who did not contribute to the costs of the action. McGovern pursued this matter solely to unwind the Township's 2016 sale of the Subject Property to Achristavest. The action did not generate any cognizable benefit to a broader class, nor did it create or preserve any pool of money or property for the Township or its taxpayers.

The sale price obtained by the Township at the 2025 public auction was the natural result of nearly nine years of appreciation in the real estate market, not the product of McGovern's litigation. Put simply, the lawsuit and the subsequent resale

of the property are entirely unrelated events, and the litigation did not create, enhance, or protect any fund for the Township. The litigation itself produced no tangible benefit to the municipality or its taxpayers.

Moreover, the Trial Court properly exercised its discretion in denying McGovern's request for attorney's fees. As set forth in the Court's detailed June 11, 2025 Order and accompanying Memorandum of Decision, the Court correctly determined that no basis existed for an award of attorney's fees as the litigation did not result in the creation of a fund in court.

For the reasons set forth herein, the Trial Court's decision must be affirmed.

## PROCEDURAL HISTORY

This matter was initiated as an Action In Lieu of Prerogative Writ by McGovern pursuant to R. 4:69-1. The matter involved McGovern's challenge of the sale of the Subject Property by the Township to Achristavest in 2016. Closing took place on March 16, 2021.

McGovern filed the Complaint in Lieu of Prerogative Writ on February 19, 2021 challenging the Township of Lower's Zoning Board of Adjustment's (the "Board") grant of a use variance to Archistavest to use the Subject Property as a parking lot, and alleging violations of the New Jersey Local Lands and Buildings Law (N.J.S.A. 40A:12-1 et seq.) by the Township. Pa0001a.

McGovern filed an Amended Complaint on March 21, 2021 to incorporate a

third Count alleging additional violations of the New Jersey Municipal Land Use Law. Pa0010a.

On March 30, 2021, Achristavest filed an Answer to McGovern's First Amended Complaint. Pa0019a.

On March 31, 2021, the Township filed an Answer to McGovern's First Amended Complaint. Pa0026a.

On January 4, 2022, McGovern, with leave of the Trial Court, filed a Second Amended Complaint alleging that the Township conveyed an illegal gift to Achristavest in violation of the New Jersey Constitution, Article VIII, Section III, Paragraph 3. Pa0043a.

On January 21, 2022, Achristavest filed a motion, which was joined by the Township, to dismiss Count IV of McGovern's Second Amended Complaint. Pa0055a.

On February 7, 2022, the Board filed an Answer to McGovern's Second Amended Complaint. Pa0100a.

On February 8, 2022, McGovern filed a cross-motion for partial summary judgment on Counts III, the alleged violation of the New Jersey Local Lands and Buildings Law, and IV, the alleged illegal gift claim, of the Second Amended Complaint. Pa0110a.

On May 22, 2022, the Trial Court issued an Order denying Achristavest and

the Township's motion to dismiss, and an Order denying McGovern's motion for partial summary judgment. Pa0323a.

On July 5, 2022, Achristavest filed an Answer to McGovern's Second Amended Complaint. Pa0351a.

On July 7, 2022, the Township filed an Answer to McGovern's Second Amended Complaint. Pa0362a.

On December 8, 2022, McGovern filed a motion to file a Third Amended Complaint in order to incorporate an additional Defendant, a related entity to Achristavest. The Third Amended Complaint was filed on January 26, 2023. Pa0374a.

Achristavest and the Township filed Answers to the Third Amended Complaint on February 8, 2023. Pa0387a, Pa0390a.

A trial on Counts III and IV of the Third Amended Complaint took place on May 1, 2, and 3, 2023. Pa0415a.

On January 10, 2024, the Trial Court entered Judgment in favor of McGovern on Count III which alleged violations of the New Jersey Local Lands and Buildings Law. The Court vacated the sale of the Subject Property. The Court dismissed Count IV, alleging an illegal gift in violation of the New Jersey Constitution. McGovern's request for attorney's fees was denied with prejudice as the Court found that no fund in court was created by virtue of the litigation initiated by McGovern. Pa0415a.

An Amended Judgment was entered on January 12, 2024, ordering the Township to refund the sum of $350,000.00 to Achristavest and Achristavest to convey the Subject Property back to the Township. Pa0461a.

On November 1, 2024, the Court issued an Order granting summary judgment to McGovern on Counts I and II of the Second Amended Complaint as said counts were void ab initio by virtue of the Court's decision to vacate the sale of the Subject Property. Pa0462a.

On November 6, 2024, Achristavest conveyed the Subject Property back to the Township and the Township refunded the sum of $350,000.00 to Achristavest. On February 7, 2025, the Township elected to reoffer the Subject Property for sale at an open public auction in accordance with the provisions of the New Jersey Local Lands and Buildings Law. Achristavest Diamond Beach, LLC was the winning bidder with a bid of one million dollars ($1,000,000.00). Closing took place on March 17, 2025, and a Deed conveying the property to Achristavest Diamond Beach, LLC was recorded with the Cape May County Clerk's Office on March 27, 2025. On May 20, 2025, McGovern filed a motion seeking relief from judgment and to amend the judgment in this matter pursuant to R. 4:50-1(b) and R. 4:49-1. Pa0472a.

Opposition was filed by the Township and Achristavest on May 29, 2025, and on June 11, 2025, the Court entered an Order denying McGovern's motion, again finding that the litigation initiated by McGovern and the subsequent resale of the

Subject Property did not establish a fund in court supporting an award of attorney's fees. Pa0484a.

McGovern filed the pending appeal on July 22, 2025. Pa0502a.

## STATEMENT OF FACTS

The Statement of Facts contained in Petitioner's brief is accurate and is adopted in full for purposes of this appeal.

## LEGAL ARGUMENT

McGovern's appeal hinges on the assertion that the Trial Court erred in concluding that its January 10, 2024 judgment did not create a "fund in court" within the meaning of R. 4:42-9(a)(2), and that the Township's March 17, 2025 sale of the Subject Property constituted new evidence warranting relief from the judgment and establishing a new basis for an award of attorney's fees.

The Trial Court's decision denying McGovern's post-judgment motion and request for attorney's fees was correct and should be affirmed. As demonstrated below, the Trial Court properly concluded that the underlying litigation, including the 2025 resale of the Subject Property, did not create a "fund in court" within the meaning of R. 4:42-9(a)(2), and thus no exception to the American Rule applied warranting an award of attorney's fees. The Trial Court also acted well within its discretion in rejecting McGovern's motion for relief from judgment under R. 4:49-1 and R. 4:50-1, correctly finding that the purported "new evidence," the Township's

eventual resale of the property, was immaterial, foreseeable, and incapable of altering the Court's prior analysis and decision to deny McGovern's request for attorney's fees. Because the Trial Court's factual findings are supported by the record and its legal conclusions are fully consistent with controlling authority, its decision should be upheld by this Court.

## POINT I

### THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT AND HIS RENEWED REQUEST FOR ATTORNEY'S FEES.

The Trial Court acted well within its discretion in denying McGovern's motion for relief from judgment under R. 4:49-1 and R. 4:50-1(b) and (f). The Court correctly found that the purported "newly discovered evidence," the Township's March 17, 2025 sale of the Subject Property, was not material, was anticipated by the Court when it issued its original decision, and would not have altered the judgment and decision to deny McGovern's request for attorney's fees.

To obtain relief under R. 4:50-1(b), a litigant must satisfy the three-part test established in Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 121 (1977). More specifically, a litigant must show (1) that the new evidence would probably alter the judgment; (2) that it could not have been discovered earlier through due diligence; and (3) that it is not merely cumulative or an effort to correct a belated realization of an adversary's inaccuracies. See also

DEG, LLC v. Township of Fairfield, 198 N.J. 242, 264 (2009).

Contrary, to McGovern's argument, the Trial Court considered these factors and correctly determined that McGovern failed to satisfy them. Moreover, the Trial Court did not treat the January 10, 2024 Order as a Final Judgment as McGovern contends. The Trial Court simply referred to its well-reasoned analysis and reiterated that the arguments raised by McGovern had been addressed, previously considered, and were deemed to be immaterial to the request for attorney's fees. In addition, the Trial Court conducted an analysis and determined that relief under R. 4:50-1(f) was not warranted.

The Trial Court had already considered and rejected the relevance of future sales of the Subject Property in its January 10, 2024 decision, expressly finding that such potential transactions had no bearing on whether attorney's fees were warranted. Consistent with Hodgson v. Applegate, 55 N.J. Super. 1, 16 (App. Div. 1959), and Fulmer v. Equitable Life Assurance Soc., 14 N.J. Misc. 407, 409 (1936), the Trial Court correctly held that the potential future sale could not change the result even if known at the time of the original judgment. The Trial Court also noted the finality of its judgment, entered after three days of testimony, and its finding that McGovern's litigation was motivated entirely by personal interests, and not for public benefit.

Given the Court's comprehensive analysis, adherence to the American Rule,

and correct application of R. 4:49-1 and R. 4:50-1, McGovern has not demonstrated any abuse of discretion, and the Trial Court's decision should be affirmed.

## POINT II

### THE TRIAL COURT CORRECTLY DETERMINED THAT NO "FUND IN COURT" WAS CREATED AND PROPERLY REJECTED PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES UNDER R. 4:42-9(a)(2).

Our Courts have routinely held that litigants are responsible for their own attorney's fees incurred in connection with the pursuit of litigation, a principle commonly referred to as the "American Rule." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). Although exceptions exist, as outlined in R. 4:49-2, and McGovern asserts that an award of attorney's fees is appropriate out of a "fund in court." As the Trial Court correctly held, and as the following argument demonstrates, no fund in court was created by virtue of McGovern's litigation, and his request for attorney's fees was appropriately denied.

The Trial Court properly concluded, in both the January 10, 2024 Judgment and the June 11, 2025 Order and Memorandum of Decision, that no "fund in court" was created within the meaning of R. 4:42-9(a)(2). The unwinding of the 2021 sale of the Subject Property merely restored the parties to their pre-sale positions: the Township returned the sale proceeds to Achristavest, and Achristavest reconveyed title to the Township. This result did not create, protect, or enhance a fund held by, controlled by, or established through the Court.

In addition, and contrary to McGovern's contention, the subsequent 2025 resale of the Subject Property by the Township for the sum of $1,000,000.00, resulting in an increase of $600,000.00 in sale proceeds, did not suddenly establish a fund in court. "The fund in court exception generally applies when a party litigates a matter that produces a tangible economic benefit for a class of persons that did not contribute to the cost of litigation. Henderson v. Camden Cty. Muni. Util. Auth., 176 N.J. 554, 564 (2003) *citing* Silverstein v. Shadow Lawn Sav. & Loan Ass'n, 51 N.J. 30, 45 (1968); and Sarner v. Sarner, 38 N.J. 463, 468 (1962). The Courts have held that an award of attorney's fees "… does not apply when a party litigates a private dispute for its own personal gain." Henderson at 564.

McGovern's reliance on Porreca v. City of Millville, 419 N.J. Super. 212 (2011), Henderson; Sunset Beach Amusement Co. v. Belk, 33 N.J. 162 (1960), and Janovsky v. American Motorists Insurance Co., 11 N.J. 1 (1952), is misplaced.

In Porreca an individual sued a municipality regarding its failure to correctly enforce an ordinance governing tax-abatement fee. The Court determined that proper enforcement would result in the prospective collection of fees that directly benefitted a class of persons, municipal taxpayers, thereby producing a tangible economic benefit for those who had not contributed to the cost of the litigation. McGovern's litigation produced no comparable class-wide benefit. His action merely vacated the 2021 sale of real property. The Township's subsequent business decision to resell

the property, and any financial benefit realized from that later transaction, bears no connection to the limited relief McGovern obtained.

Likewise, Henderson involved an individual's challenge to the method by which a municipal utilities authority calculated interest on delinquent customer accounts. That litigation resulted in a correction to the interest-collection process, conferring a direct economic benefit on a class of other ratepayers who did not fund the suit. By contrast, McGovern's lawsuit produced no tangible benefit for any class of individuals; its result was limited to unwinding a single sale.

The Sunset case involved a private real estate transaction and a request for specific performance. In discussing the fund-in-court doctrine, the Court explained that "… allowances are payable from a fund when it would be unfair to saddle the full cost upon the litigant for the reason that the litigant is doing more than merely advancing his own interests." Id. at 168. McGovern's litigation fits squarely outside that principle. His action sought to advance his own interests by invalidating a sale that would have allowed Achristavest to use an adjacent parcel to his property for parking, a use he opposed.

Finally, in Janovsky, the Court denied a request for attorney's fees out of a fund in court because the litigation produced no tangible economic benefit to any class of individuals. The circumstances here are no different. McGovern's lawsuit yielded no fund and no class-wide benefit.

Consistent with this precedent, the Trial Court correctly rejected McGovern's reliance on the March 17, 2025 resale of the property. The Court expressly found that potential or future sales were "not relevant to any award of attorney's fees and costs." The later sale did not result from the litigation or from the Court's judgment, conferred no class benefit, and did not create or enhance any fund. The Township retained full discretion to retain or resell the property independently of the litigation, and any proceeds from the resale were wholly unrelated to the limited relief McGovern obtained.

The record also established that the lawsuit was driven entirely by McGovern's personal concerns about the use of the adjoining lot. He testified that he did not want a parking lot adjacent to his property. His litigation sought no benefit for a class; rather, its objective was to undo a specific real estate transaction affecting his own property interests. Although taxpayers may have incidentally benefited from market appreciation reflected in the later sale price, that increase was attributable to outside economic factors, not to any litigation-generated fund or class-wide benefit. Unlike Porreca and Henderson, where litigation produced an actual financial gain for taxpayers through the collection of taxes, unpaid fees, or correct interest, McGovern's action yielded no comparable tangible economic benefit.

Because no fund was created, protected, or increased through the litigation, and because the matter conferred only a personal benefit upon McGovern, the Trial

Court correctly applied the American Rule and denied McGovern's request for attorney's fees. The American Rule prohibits fee shifting absent explicit statutory, rule-based, or contractual authorization. Boyle v. Huff, 257 N.J. 468, 478–79 (2024); Walker v. Giuffre, 209 N.J. 124, 127 (2012); Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). As the Court properly recognized, exceptions to the American Rule are construed narrowly and none applies here. See also Guarantee Ins. Co. v. Saltman, 217 N.J. Super. 604 (App. Div. 1987); First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419 (App. Div. 2007); Hirsch v. Tushill, Ltd., 110 N.J. 644 (1988). Moreover, even where R. 4:42-9(a)(2) applies, the rule provides that "[t]he court in its discretion may make an allowance out of such a fund," a discretion the Trial Court properly exercised in denying the fee request.

## CONCLUSION

For all the foregoing reasons, the Trial Court correctly determined that McGovern failed to satisfy the standards for relief under R. 4:49-1 and R. 4:50-1 and that no "fund in court" was created within the meaning of R. 4:42-9(a)(2). Because the Trial Court's factual findings are well supported by the record and its legal conclusions fully comport with controlling authority, this Court should affirm the decision below and deny McGovern's appeal and all requested relief.

Respectfully Submitted,

The Belasco Law Firm, LLC
*Attorney for Defendant-Respondent, Township of Lower*

By: 
ROBERT T. BELASCO, ESQUIRE

Dated: December 2, 2025

**IN THE SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

---

DOCKET NO. A-003681-24

Civil Action: On Appeal From An Order Of The Superior Court Of New Jersey, Law Division, Cape May County

Trial Court Docket: CPM-L-51-21
Sat Below: The Honorable John C. Porto, P.J.Civ.

FRANCIS J. MCGOVERN, JR.,

Plaintiff-Appellant

v.

TOWNSHIP OF LOWER, TOWNSHIP OF LOWER ZONING BOARD OF ADJUSTMENT, ACHRISTAVEST PIER 6600, LLC, EUSTACE MITA, AND ACHRISTAVEST DIAMOND BEACH, LLC;

Defendants-Respondents

---

# LETTER BRIEF PURSUANT TO R. 2:6-2(b)

---

FRANK L. CORRADO, ESQUIRE
ATTORNEY ID NO. 022221983
BARRY, CORRADO & GRASSI, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333 Phone (609) 522-4927 Fax
fcorrado@capelegal.com
Attorney for Defendants-Respondents Achristavest Pier 6600, LLC, Achristavest Diamond Beach, LLC, and Eustace W. Mita

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a), Respondents Achristavest Pier 6600, LLC, Achristavest Diamond Beach, LLC, and Eustace Mita (hereafter "Achristavest") submit this letter-brief in opposition to Appellant Francis J. McGovern's principal brief in this appeal.

## TABLE OF CONTENTS



## TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

## I. PRELIMINARY STATEMENT

This matter involves the sale of Lower Township-owned property to Achristavest. The property, a 100-by-150-foot lot, is in the Diamond Beach section of Lower Township; its street address is 9600 Seaview Avenue.

Achristavest owns and operates the Icona Diamond Beach Hotel, one block east of the property. In 2021, by public auction, Lower Township sold the property to Achristavest for $400,000, for use as a valet parking lot for the hotel.

McGovern, who lives across the street from the property, successfully challenged the sale on the ground that the public auction notice was defective.

Consequently, in 2024, Lower Township chose to re-auction the property and sold it to Achristavest for $1,000,000.

McGovern then sought reimbursement of his attorney's fees from the township. He claimed his successful challenge to the first sale increased the resale price by $600,000, and that this increase constituted a "fund in court" entitling him to fees under R. 4:42-9(a)(2).

On June 11, 2025, the trial court denied that application. This appeal followed.

For two reasons,[1] the Court should affirm the trial court's denial, and reject McGovern's appeal.

First, the $600,000 resale price differential does not constitute a "fund in court" within the meaning of R. 4:42-9(a)(2). McGovern's challenge to the sale was not brought on behalf of Lower Township's taxpayers; as the trial court correctly held, McGovern sued solely for his own benefit. That the increased resale price benefited the township is a necessary, but not a sufficient, condition to create a fund in court.

Second, R. 4:42-9(a)(2) makes allowance of attorney's fees discretionary with the trial court. In denying McGovern's application, the trial court did not act arbitrarily or abuse its discretion. To the contrary, it correctly and reasonably held that the increase in resale price – and subsequent benefit to the township – was not inevitable; it was wholly the result of a fortuitous rise in property values during the time between sales. McGovern was simply the fortunate beneficiary of that circumstance; he did not create it.

---

[1] Achristavest notes that McGovern seeks reimbursement solely from Lower Township. Nevertheless, Achristavest participated in the matter below, and McGovern has named it as a Respondent in this appeal. Achristavest adopts the arguments of Lower Township in this matter.

## II. PROCEDURAL HISTORY

Insofar as it bears on the order that is the subject of this appeal, Achristavest adopts the Procedural History set forth in Lower Township's brief.

## III. STATEMENT OF THE FACTS

Achristavest adopts the Statement of Facts set forth in McGovern's brief.

## IV. LEGAL ARGUMENT

The sole matter before this Court is the validity of the trial court's June 11, 2025, order. Achristavest believes that order presents two issues. First, does the resale price differential constitute a "fund in court" within the meaning of R. 4:42-9(a)(2)? Second, did the trial court abuse its discretion when it denied McGovern's application for attorney's fees? See Porreca v. City of Millville, 419 N.J. Super. 212, 227-228 (App. Div. 2011) (requiring this two-step analysis under the rule).[2]

The first issue raises a question of law, over which this Court has plenary, or de novo, review. See Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995). The second issue requires the Court to review for abuse of discretion,

---

[2] Achristavest does not object to the timeliness of McGovern's appeal. To the extent McGovern's application rests on the existence of "newly discovered evidence" under R. 4:50-1(b), Achristavest does not contest that the increased resale price may constitute such evidence, but asserts that, for the reasons set forth in its Argument, the evidence would not "probably alter" the trial court's order. See DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 264 (2009).

and reverse only if "it appears as if there has been a clear error of judgment" or "a manifest denial of justice." State v. Gonzalez, 249 N.J. 612, 633 (2022).

When it applies these standards, the Court must affirm the trial court's order.

### A. The Trial Court Correctly Held That Resale of the Property Did Not Create a "Fund in Court." (Pa497-501)

McGovern claims the increase in resale price creates a fund in court that entitles him to attorney's fees. As a matter of law, that claim fails.

"Fund in court" is an equitable term of art, intended to embrace situations where it would be unfair to saddle the full cost on a litigant because he is doing "more than merely advancing his own interests." Henderson v. Camden Cty. Muni. Util. Auth., 176 N.J. 554, 564 (2003). See also Sunset Beach Amusement Co. v. Belk, 33 N.J. 162, 168 (1960); Porreca v. City of Millville, supra, 419 N.J. Super. at 224-225.

McGovern seems to think that because Lower Township taxpayers received $600,000 more from the resale of the property, that "benefit," in and of itself, is sufficient to create a fund in court. That is not the case.

In every instance in which a court has determined that a fund in court exists, the plaintiff has sued not merely for himself, but on behalf of a class of beneficiaries, or in a fiduciary capacity.

In Henderson, for example, the plaintiff's successful claim – that the utility authority could not charge compound interest on delinquencies – redounded to the benefit of all utility customers, not just to plaintiff. Accord, Silverstein v. Shadow Lawn S&L Ass'n, 51 N.J. 30, 45 (1968) (treating plaintiff's complaint as a class action that benefited all defendant's mortgagors).

Similarly, in Porreca, the plaintiff, acting as a civic "watchdog," brought two lawsuits explicitly challenging city ordinances on the ground that they deprived all residents of additional municipal income. 419 N.J. Super. at 216-217.

Other decisions finding a fund in court are in accord. See, e.g., Sarner v. Sarner, 38 N.J. 463, 469 (1962) (derivative suit on behalf of all shareholders); Tabaac v. Atlantic City, 174 N.J. Super. 519, 537-538 (Law Div. 1980) (per Haines, J.)(plaintiff explicitly sued on behalf of all Atlantic City taxpayers).

That is not the case here. As the trial court correctly found, McGovern did not sue on behalf of all township taxpayers, or as a civic "watchdog" protecting the public fisc. He sued because he objected to a parking lot across the street from his property, and because the notice defect deprived him of the opportunity to bid. See Pa498-501; see also Pa458-460.

His position is therefore similar to those plaintiffs who have been denied relief under the "fund in court" doctrine. See Belk, supra, 33 N.J. at 169-170 (plaintiff sued only to obtain specific performance of a contract); Janovsky v.

American Motorists Ins. Co., 11 N.J. 1, 7-8 (1952) (prior version of rule; plaintiff sued on his own behalf, and not "for the benefit of a class which he represented").

In other words, McGovern sued not as a taxpayers' representative but on his own behalf. That his suit ultimately (and fortuitously) benefited the township's taxpayers was a necessary, but not a sufficient, condition to establish a fund in court.

Accordingly, this Court should reject McGovern's argument on this point.

### B. The Trial Court Did Not Abuse Its Discretion When It Denied McGovern's Motion for Attorney's Fees. (Pa497-501)

R. 4:42-9(a)(2) provides that "the court in its discretion may make an allowance" for fees out of a fund in court. (Emphasis supplied.) Here, even if one assumes that the resale price differential constitutes "a fund in court" under the rule, the trial court did not abuse its discretion when it denied McGovern's fee application.

That is so for a simple reason: the increase in the resale price was entirely fortuitous. It was the result of the operation of the real estate market, which happened to rise during the interval between sales, and had nothing to do with any action by McGovern or any "benefit" he ostensibly created by successfully suing to void the first sale.

The trial court's opinion recognizes that circumstance, and bases its denial upon it:

> The fact that the real estate market increased since the inception of this litigation was explained and testified to by all of the expert witnesses including the Plaintiff's expert as this Property is one and a half blocks from the beach. In fact, the Plaintiff's expert described the Property as "unique." The re-sale of the "unique" Property was foreseeable, in the sole discretion of the township, and was already considered and fully anticipated by this court. As this Court previously noted, "[t]he fact that there may be a public benefit is completely speculative and ancillary and not relevant to any award of attorney's fees and costs." This court can take judicial notice that real estate markets go up and go down. In this instance, the real estate market for this "unique" Property went up. The court now adds and finds that the increased market value of this Property and its resultant sale for $1,000,000 approximately fourteen months after the court's decision is not relevant or material to this consideration to deny Plaintiff's request for any award of attorney's fees on this post judgment application… .

Pa499, citing the trial court's prior January 10, 2024, decision, at Pa459.

In sum, the trial court's well-supported determination not to award attorney's fees did not reflect "a clear error of judgment" or create "a manifest injustice." It was therefore not an abuse of discretion, and comports with the standards embodied in R. 4:49-2(a).

For this reason as well, this Court should reject McGovern's appeal and affirm the decision below.

## V. CONCLUSION

For the reasons set forth above, the Court should affirm the trial court's denial of McGovern's motion for fees, and should dismiss McGovern's appeal.

Dated: December 3, 2025

Respectfully submitted,

BARRY, CORRADO & GRASSI, P.C.

By: _____
FRANK L. CORRADO, ESQ.
Attorney for Achristavest

Anthony J. Harvatt II, Esquire

Attorney-At-Law

Attorney ID No. 023221986

15 South Main Street, Suite 3
Cape May Court House, NJ 08210
(609)465-4880

Attorney(s) for: Lower Township Board of
Adjustment, Defendant/Respondent

| | |
|---|---|
| **FRANCIS J. MCGOVERN, JR.** | :SUPERIOR COURT OF NEW JERSEY |
| | :APPELLATE DIVISION |
| Plaintiff/Appellant, | :Appellate Docket No. **A-003681-24** |
| | :On Appeal From: |
| **TOWNSHIP OF LOWER, TOWNSHIP** | LAW DIVISION |
| **OF LOWER ZONING BOARD OF** | :CAPE MAY COUNTY |
| **ADJUSTMENT, ACHRISTAVEST** | :Docket No. CPM-L-000051-21 |
| **PIER 6600, LLC, ACHRISTAVEST** | : |
| **DIAMOND BEACH, LLC AND** | : |
| **EUSTACE MITA,** | : SAT BELOW |
| Defendants/Respondents. | HONORABLE JOHN C. PORTO, J.S.C. |

# AMENDED BRIEF PURSUANT TO R. 2:6-2(b) FOR RESPONDENT TOWNSHIP OF LOWER ZONING BOARD OF ADJUSTMENT

**Dated: December 22, 2025**

Attorney for Respondent, Township of
Lower Zoning Board of Adjustment
Anthony J. Harvatt II, Esquire
15 South Main Street, Suite 3
Cape May Court House, New Jersey 08210
Tel. No. 609-465-4880
Email: anthonyj.harvatt esquire@verizon.net
Attorney I.D. No.: 023221986

# TABLE OF CONTENTS

## TABLE OF JUDGMENTS, ORDERS AND RULINGS



## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**NEW JERSEY COURT RULES**

## PRELIMINARY STATEMENT

Francis J. McGovern, Jr. ("McGovern") sued the Township of Lower ("Township"), Achristavest Pier 6600, LLC, Acrhistavest Diamond Beach, LLC and Eustace Mita (collectively "Mita), and Township of Lower Zoning Board of Adjustments ("Zoning")

The litigation centered on a property known as Diamond Beach Park (the "Property"), which Township had sold to Mita for $400,000.00 via a public auction. The sale was finalized only after Mita secured a use variance from the Township of Lower Zoning Board of Adjustment.

After a three-day bench trial, the Lower Court voided the sale based on notice defects. In a summary judgment order entered after the trial, the Court below voided the zoning approvals as being void ad initio

McGovern sought an order requiring the Township to pay legal fees based on the "fund in court" rule. The Lower Court denied this application at the conclusion of the trial. In its decision, the Lower Court found that McGovern's motive for bringing the litigation was solely his own self-interest, not the interest of the class of persons who ultimately benefitted. The Court held that under the American Rule, McGovern was required to bear his own litigation costs as his

actions conferred no tangible benefit on the public or any identifiable class.

Fourteen months after the Lower Court voided the sale, the Township sold the Property for $1,000,000.00. Following this sale, McGovern moved to alter the final judgment and vacate the prior order denying his attorney fees. McGovern argued that the litigation he personally financed conferred a $600,000.00 benefit upon the citizens of the Township (the difference between the original $400,000.00 sale price and the $1,000,000.00 subsequent sale price). Appellant asserted that the "fund in court" had not existed at the conclusion of the trial but came into being fourteen months after the interlocutory order denying his first fee application.

The Lower Court denied McGovern's motion, relying on its previous finding that McGovern was ineligible for a fee award from a fund in court because his litigation intent was only for his own self-interest, and not that of a class of beneficiaries. Appellant appealed and argued that the Property's subsequent sale, and the resulting $600,000.00 collected by Township, constituted a fund in court that existed only because McGovern pursued the litigation.

Appellant then contended that the subsequent sale was new evidence that did not exist and could not have been presented at the time of trial, thus satisfying the requirement for altering the final judgment and vacating the order that denied McGovern's initial fee application.

The Appellate argues that the Lower Court erred as a matter of law by ruling that McGovern is barred from recovery because his intentions were solely for personal gain. He stated the test for attorney fees from a fund in court is not whether the litigant was motivated by self-interest as every litigant is, but whether the litigation resulted in the creation of a fund from which a class of others received a benefit. It was then argued that the court below erred in denying McGovern's motion made under R. 4:50-1(b) on procedural grounds. The Court below ruled that the motion was made more than one year from an order entered in January, 2024. However, that order was an interlocutory order and the final order as to all issues was entered in November, 2024. McGovern's motion was made within one year of November, 2024.

Respondent believes that the Lower Court properly exercised its discretion by denying McGovern's request for attorney's fees, as set forth in the detailed June 11, 2025 Order and accompanying Memorandum of Decision. The Lower Court correctly determined that no basis existed for an award of attorney's fees as the litigation did not result in the creation of a fund in Court. For those reasons the Lower Court's decision must be affirmed.

## PROCEDURAL HISTORY

On February 19, 2021, McGovern filed a Complaint in Lieu of Prerogative Writ pursuant to *R*.4:69-1. The matter involved McGovern's

challenge of the sale of the subject property of March 16, 2021 by the Township to Archristavest, naming as defendants, Township of Lower and Township of Lower Zoning Board of Adjustment, and Mita. Challenging the Township of Lower's Zoning Board of Adjustment's granting of a Use variance to Archistavest to use the subject property as a parking lot, and alleging violations of the New Jersey Local Lands and Buildings Law (N.J.S. 40A:12-1 et seq.) by the Township. Pa0001a.

On March 12, 2021, McGovern filed a First Amended Complaint. Pa0010a.

On March 30, 2021, Achristavest filed an Answer to McGovern's Frist Amended Complaint. Pa0019a.

On March 31, 2021, the Township filed an Answer to McGovern's Frist Amended Complaint. Pa0026a.

On December 17, 2021, the lower court entered an Order granting McGovern's Motion for Leave to File a Second Amended Complaint.

On January 4, 2022, McGovern filed a Second Amended Complaint. Pa0043a.

On January 21, 2022, Achristavest filed a Motion, which was joined by the Township, to dismiss Count IV of McGovern's Second Amended Complaint. Pa0055a.

On February 7, 2022, the Lower Township Zoning Board of Adjustment

filed an Answer to McGovern's Second Amended Complaint. Pa0100a.

On February 8, 2022 McGovern filed a cross Motion for partial summary judgment on Count III (An alleged violation of the New Jersey Local Lands and Buildings Law.) and Count IV (An alleged illegal gift claim of the Second Amended Complaint.) Pa0110a

On May 22, 2022 the Lower Court issued an Order denying Achristavest and the Township's Motion to dismiss, and an Order denying McGovern's Motion for partial summary judgment. Pa0323a.

On July 5, 2022 Achristavest field an Answer to McGovern's Second Amended Complaint, Pa0351a.

On July 7, 2022, the Township filed an Answer to McGovern's Second Amended Complaint. Pa0362a.

On December 8, 2022, McGovern filed a motion to file a Third Amended Complaint in order to incorporate an additional Defendant, a related entity to Achristavest. The Third Amended Complaint was filed on January 26, 2023. Pa0374a.

The Third Amended Complaint contained certain factual allegations regarding Township's sale of the Property, by way of public auction, to Mita for $400,000.00 and regarding approvals granted to Mita by the Lower Township Zoning Board of Adjustment.

The Third Amended Complaint had four counts:

Count I - Zoning's approval of the use variance was arbitrary, capricious and unreasonable and should be voided;

Count II - The notice of Mita's application for a use variance and site plan approval was defective and the resolution granting them should be voided;

Count III - The Agreement of Sale and the conveyance of the Property are void *ab initio* as the notice of public auction was deficient;

Count IV - Township made an illegal gift to Mita, allowing Mita use of the Property from 2016 to 2021 for no consideration. Pa0374a Pa0386a.

On February 8, 2023, Achristavest and Lower filed Answers to the Third Amended Complaint. Pa0387a, Pa0390a.

On February 16, 2023 the Zoning Board filed an Answer to the Third Amended Complaint. Pa0401a.

A bench trial was held on May 1, 2, and 3, 2023 for Counts III and IV. The parties submitted post-trial briefs. Pa0415a.

On January 10, 2024, the Lower Court issued its decision and entered judgment in favor of McGovern on Count III and dismissed Count IV and denied McGovern's application for reimbursement of attorney fees which McGovern made based on the "fund in court" Rule. Pa0415a.

On January 12, 2024, the Lower Court entered a supplemental order clarifying that, as a result of the January 10, 2024, the

conveyance of the Property from the Township to Mita is void, and to convey the subject property back to the Township. Pa0461a.

On November 1, 2024, the Lower Court granted summary judgment in favor of McGovern on Count I and II. Pa0462a. That judgment disposed of all remaining claims thereby making it the final judgment. Pa0462a.

On November 6, 2024 Achristavest conveyed the subject property back to the Township and the Township refunded the sum of $350,000.00 to Achristavest.

On February 7, 2025, the Township elected to reoffer the subject property for sale at an open public auction in accordance with the provisions of the New Jersey Local Lands and Building Law. Achristavest Diamond Beach LLC was the winning bidder with a bid of one million dollars ($1,000,000.00). the closing took place on March 17, 2025.

On May 5, 2025, McGovern filed a motion seeking relief in the form of an order altering and vacating the January 10, 2024 order and directing the Township to pay McGovern's attorney fees based on the "fund in court" rule. Pa0472a.

The defendants opposed the motion with briefs and did not submit sworn statements with facts that contradicted the facts

McGovern provided in support of his motion.

The Lower Court conducted oral argument of the Motion on June 6, 2025, and Appellant provided this Court with said transcript, entered the order dated June 11, 2025 denying McGovern's motion. Pa0484a.

On July 22, 2025, McGovern filed a Notice of Appeal, and on July 30, 2025, McGovern filed an Amended Notice of Appeal. Pa0506a.

## STATEMENT OF FACTS

On June 8, 2016 and June 15, 2016, Township published a notice of public auction to take place on June 22, 2016 for the sale of the Property. Pa0440a.

Mita was the successful bidder with a bid of $400,000.00. Pa0444a.

Mita thereafter obtained a use variance from Zoning. Pa0468a.

The sale from the Township to Mita took place on March 16, 2021. Pa0445a.

After the Lower Court voided the March 16, 2021 sale by order dated January 10, 2024, the Township sold the Property on March 17 2025 for $1,000,000.00. Pa0474a.

## LEGAL ARGUMENT

McGovern's appeal asserts that the Court sitting below erred when it rendered its decision on January 10, 2024, per judgment that found it did not

create a "fund in court" within the meaning of R. 4:42-9(a)(2). The Appellant also alleged that the Township's March 17, 2025 sale of the property in question constituted "new evidence" warranting relief from the judgment and forming a new basis for the previously requested attorney's fees. It is respectfully argued here that the Court sitting below is correct in its decision denying McGovern's post-judgment motion and request for attorney's fees, and it should be affirmed. For the reasons set forth in the record, the Court sitting below properly concluded that the result did not create a "fund in court" within the meaning of the above quoted Rule, and thus attorney's fees were not warranted.

It cannot be argued that the Lower Court acted outside its discretion in rejecting McGovern's motion for relief from judgment under R. 4:49-1 and R. 4:50-1, as the record clearly reflected findings of facts and conclusions of law in rejecting McGovern's Motion for relief from said judgment. Thus the Lower Court concluded the Township's resale of the property, was not only material, but foreseeable, and therefore would not alter the Court's prior analysis and decision in denying McGovern's requested relief. For the above stated reasons the Lower Court's findings of facts are amply supported by the record and its decision should be affirmed.

## POINT I

### THE LOWER COURT'S REFUSAL TO ENTER THE REQUESTED RELIEF WAS PROPER, AND BASED

**UPON THE EVIDENCE ADDUCED AT TRIAL.**

The Court sitting below appropriately denied McGovern's motion for relief from judgment under R. 4:49-1 and R. 4:50-1(b) and (f). The Court rejected McGovern's assertion that the increased sales price constituted newly discovered evidence pursuant to its March 17, 2025 sale of the subject property. The Court determined that it could have easily been anticipated when it issued its initial decision, and as such it would not have altered the judgment. This resulted in the decision to deny Appellant's second request for attorney's fees.

As set forth in Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 121 (1977), the litigant must satisfy the three-part test, which the Court found lacking in all respects. The Court specifically found that the new evidence would not alter the judgment, and that it was easily ascertainable that the property would increase in value, and that it was a belated attempt to point out what was obvious and reflected in the prior decision. See as sited in Township's Brief DEG, LLC v. Township of Fairfield, 198 N.J. 242, 264 (2009). All of the factors set forth in Appellants Brief were considered by the Court sitting below. The Court addressed each finding stating that the Appellant failed to satisfy them.

The Trial Court sitting below meticulously pointed out that the arguments had all been previously addressed and considered and in essence found to be immaterial to the request for attorney's fees.

Again, as set forth in the Township's Brief, and referenced herein. The Lower Court conducted an in-depth analysis over R. 4:50-1(f) and found Appellant's argument to be lacking and the relief sought unwarranted. Specifically, the issue of future sales of the subject property was discussed in the Lower Court's January 10, 2024 decision, and expressly found that such potential transactions had no bearing on whether attorney's fees were warranted. As pointed out in the Township of Lower's Responsive Brief, this is consistent with Hodgson v. Applegate, 55 N.J. Super. 1, 16 (App. Div. 1959), and Fulmer v. Equitable Life Assurance Soc., 14 N.J. Misc. 407, 409 (1936). The Lower Court's logic is irrefutable in that should potential sales in the future be considered it would represent a tautological circle wherein any appreciation of value would "flip the switch" which would allow McGovern to reassert an application which had been previously rejected for foreseeable circumstances.

The Court specifically found that McGovern's litigation was motivated entirely by personal interests, and did not in any way provide for public benefit in the proceeding.

For the reasons set forth above the Appellant's application for fees must fail.

## POINT II

### THE LOWER COURT WAS CORRECT IN ITS DETERMINATION THAT NO "FUND IN COURT" WAS

**CREATED, AND PROPERLY REJECTED McGOVERN'S CLAIM FOR ATTORNEY'S FEES UNDER R. 4:42-9(a)(2).**

Pursuant to the "American Rule" set forth in Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016) Courts have held routinely that litigants are responsible for their attorney's fees. Although there are exceptions, the Court found that none apply here. Succinctly put the Court determined that no fund in court was created by virtue of the litigation below, and his request for attorney's fees was denied. This is reflected in the Lower Court's Judgment of January 10, 2024, and the June 11, 2025 Order and Memorandum of Decision, that no "fund in court" was created within the meaning of R. 4:42-9(a)(2).

Having returned the parties to the pre-sale positions each party was free to pursue the matter as they chose. At that point no fund existed. Therefore logic proposes that the re-sale of the subject property in 2025 by the Township for the sum of $1,000,000.00, resulting in an increase of $600,000.00 in sale proceeds, did not suddenly establish a fund in court. It was a foreseeable result of the lapse in time and increase in property values. It has no tangible economic benefit for a class of persons that did not contribute to the cost of litigation and therefore McGovern's application was denied. The fund in court exception would apply when a party litigates the matter that produces tangible economic benefit for a class of persons that did not contribute to the cost of litigation. See Henderson v. Camden City Muni. Util. Auth., 176 N.J. 554, 564 (2003) citing Silverstein v. Shadow Lawn Sav. & Loan Ass'n, 51 N.J. 30, 45 (1968); and Sarner v. Sarner,

38 N.J. 463, 468 (1962). The Courts have held that an award of attorney's fees "... does not apply when a party litigates a private dispute for its own personal gain." Henderson at 564. McGovern's reliance on Porreca v. City of Millville, 419 N.J. Super. 212 (2011), Henderson; Sunset Beach Amusement Co. v. Belk, 33 N.J. 162 (1960), and Janovsky v. American Motorists Insurance Co., 11 N.J. 1 (1952), is misplaced. The Porreca case sited above was distinguished by the Court wherein Porreca successfully sued a municipality regarding its failure to correctly enforce an ordinance governing tax-abatement fees. The Court found that this direct collection of fees that directly benefitted a class of persons, municipal taxpayers, thereby producing a tangible economic benefit for those who had not contributed to the cost of the litigation. Applicant's litigation produced no comparable class-wide benefit or the tax payers of Lower Township. His action merely vacated the 2021 sale of real property. While the litigant below allowed the Township to resell the property, any financial benefit realized from that later transaction bears no connection to the limited relief McGovern obtained. Succinctly put, Appellant's law suit produced no fund and no class wide benefit. To this day Appellant has been unable to succinctly identify the same. Future or potential sales not being relevant, the Applicant should not be awarded attorney's fees or costs.

In the Janovsky case as sited above, the Court denied a request for attorney's fees out of a fund in court as the litigation produced no tangible

economic benefit to any class of individuals. The circumstances in the case at bar are no different. McGovern's lawsuit yielded no fund and no class-wide benefit, and because of same the Lower Court correctly rejected McGovern's reliance on the March 17, 2025 resale of the property. The Court expressly found that potential or future sales were "not relevant to any award of attorney's fees and costs."

The Court sitting below correctly applied the American Rule and denied McGovern's request for attorney's fees. The American Rule prohibits fee shifting absent explicit statutory, rule-based, or contractual authorization. See Boyle v. Huff, 257 N.J. 468, 478–79 (2024); Walker v. Giuffre, 209 N.J. 124, 127 (2012); Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). As the Court properly recognized, exceptions to the American Rule are construed narrowly and none applies here. See also Guarantee Ins. Co. v. Saltman, 217 N.J. Super. 604 (App. Div. 1987); First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419 (App. Div. 2007); Hirsch v. Tushill, Ltd., 110 N.J. 644 (1988). Moreover, even where R. 4:42-9(a)(2) applies, the Rule provides that "*the Court in its discretion may make an allowance out of such a fund*," a discretion the Lower Court properly exercised in denying the requested relief.

## CONCLUSION

For all of the reasons set forth above the Lower Court correctly denied the Motion by Appellant and the award of attorney's fees having found that no "fund

in court" was created within the meaning of R. 4:42-9(a)(2). This is based upon the factual findings set forth by the record and its conclusions of law which are amply set forth in the record below. For this reason the Court should affirm the decision below and deny McGovern's appeal and all requested relief.

Respectfully Submitted,

Anthony J. Harvatt II, Esquire

Dated: December 22, 2025

MASELLI, MILLS & FORNAL, P.C.
By: Paul J. Maselli, Esquire
Attorney No. 036101986
pmaselli@masellilaw.com
400 Alexander Park, Suite 101
Princeton, New Jersey 08540
(609) 452-8411
Attorneys for Appellant

FRANCIS J. MCGOVERN, JR.

Plaintiff/Appellant,

v.

TOWNSHIP OF LOWER, TOWNSHIP OF LOWER ZONING BOARD OF ADJUSTMENT, ACHRISTAVEST PIER 6600, LLC, ACHRISTAVEST DIAMOND BEACH, LLC, & EUSTACE MITA

Defendants/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appeal Docket No. A-003681-24

On Appeal From:
Superior Court of New Jersey
Law Division, Cape May County

Trial Docket No. CPM-L-000051-21

Sat Below:
Hon. John C. Porto, J.S.C.

# REPLY BRIEF OF APPELLANT, FRANCIS J. MCGOVERN, JR.

Dated: January 27, 2026

Of Counsel:
PAUL J. MASELLI, ESQUIRE

On the Brief:
PAUL J. MASELLI, ESQUIRE
LIZA SHERMAN, ESQUIRE

## TABLE OF CONTENTS



## TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

# TABLE OF AUTHORITIES

## PROCEDURAL HISTORY

Appellant restates and relies upon the procedural history set forth in his opening brief.

It is noted that Francis J. McGovern, Jr. ("McGovern") sued the Township of Lower ("Township"), Achristavest Pier 6600, LLC, Acrhistavest Diamond Beach, LLC and Eustace Mita (collectively "Mita), and Township of Lower Zoning Board of Adjustments ("Zoning"). The order on appeal is an order by which McGovern sought relief **only** as against Township.

## STATEMENT OF FACTS

McGovern restates and relies upon the facts set forth in his opening brief.

## LEGAL ARGUMENT

On appeal, there are two central issues: the timeliness of the appeal itself and the Trial Court's ruling that a windfall to a class of plaintiffs does not create fund in court from which a litigant's attorney fees should be paid. In this reply, McGovern also argues that the Court should not consider the arguments of Zoning and Mita raised in their respective respondent briefs.

## I. THE COURT BELOW ERRED BY FAILING TO GRANT MCGOVERN'S MOTION FOR POST-JUDGMENT RELIEF. (Pa0494a-0497a)

McGovern made a post-judgment motion seeking reimbursement of legal fees from Township (the "Fee Motion"). (Pa0427a). As pertains to the timeliness of the Fee Motion, there are two trial court orders that govern: the interlocutory order of January 10, 2024 ("January Order")(Pa461a) and the final order of November 1, 2024 ("Final Order") (Pa462a). Prior to the Final Order, the Court had not ruled on the first or second counts of the Third Amended Complaint. (Ab 8).

In adjudicating the Fee Motion (Pa0484a), the lower court erroneously treated the January Order as a final order and thus refused to consider McGovern's request for relief under *R*. 4:50-1(b) as time-barred by *R*. 4:51-2. *R*. 4:51-2 imposes a one-year deadline from the date of a final order to file a motion for the relief sought. The lower court should have evaluated the Fee Motion with respect to the Final Order which was entered less than one year from the date of the Fee Motion.

As a consequence of this error, the lower court only evaluated McGovern's claims under *R*. 4:50-1(f), the "catch-all" provision,

and not under the proper rule. The "catch-all" provision is reserved for truly exceptional circumstances, and not routinely granted. *DEG, LLC v. Twp. of Fairfield*, 198 N.J. 242, 269-70 (2009), citing *Court Inv. Co. v. Perillo*, 48 N.J. 334, 341 (1966) (citation and emphasis omitted)("[T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice."). The court below erred as a matter of law by failing to apply the proper analytical framework to McGovern's fee application.

*R*. 4:50-1(b) –the "newly discovered evidence" basis for relief from judgment—is applicable where, as here, there is material new evidence to support the existence of a fund in court. As Township correctly notes, to obtain relief under R. 4:50-1(b), a litigant must satisfy a three-part test and show: (1) that the new evidence would probably alter the judgment; (2) that is could not have been discovered earlier through due diligence; and (3) that it is not merely cumulative or an effort to correct a belated realization of an adversary's inaccuracies. *Manning Eng'g, Inc. v. Hudson County Park Commission*, 74 N.J. 113, 121 (1977) (Lower Br. at 8). The

court below erred as a matter of law in failing to consider the Fee Motion on the basis of the correct rule and in finding the matter to be time-barred. Both mistakes comprise reversible error and McGovern's Fee Motion should be adjudicated within the proper legal framework.

The trial court did not apply or consider the import of *R.* 4:50-1(b) and instead applied only *R.* 4:50-1(f). The court below ruled that McGovern was not entitled to relief under R. 4:50-1(f) and denied the Fee Motion.

It should be noted that Mita, in its respondent brief, does not object to the timeliness of McGovern's appeal, nor to the fact that the subsequent sale of the property for $600,000 more than the original contract price would comprise "newly discovered evidence" sufficient to satisfy *R.* 4:50-1(b). (Mita Rb 5, fn 2). Township incorrectly asserts that the "Court correctly found that the purported 'newly discovered evidence,' the Township's March 17, 2025 sale of the Subject Property, was not material, was anticipated by the trial court when it issued its original decision, and would not have altered the judgment and decision to deny

McGovern's request for attorney's fees." (Township Rb 8). Zoning joins in this argument. (Zoning Rb 2-13).

However, there is no evidence in the record to support Township's claim that the court below anticipated a 250% increase in value or a windfall of $600,000 to Township as a consequence of the McGovern action.

Because the lower court issued its ruling based on an incorrect determination of timeliness, the rest of its opinion is dicta and not holding. Accordingly, the matter should be reevaluated under the correct legal framework, namely whether the actual sale price comprised new evidence relevant to the determination of the Fee Motion. Because that information was not knowable at the time of the Final Order, and because its weight is significant, the Fee Motion should be reviewed by this Court under the proper standard and in light of all information, as opposed to being based on non-binding speculation that the final price was of no import to its determination that a fund in court was created.

## II. MCGOVERN IS ENTITLED TO ATTORNEY FEES AS A MATTER OF LAW UNDER THE "FUND IN COURT" RULE. (Pa0497a-0501a)

The concept of a "fund in court" is rooted in equitable principles, allowing for the allocation of costs when a litigant's efforts benefit others beyond themselves. *Sarner v. Sarner*, 38 N.J. 463 (1962), *Henderson v. Camden County Mun. Util. Auth.*, 176 N.J. 554 (2003), *Trimarco v. Trimarco*, 396 N.J. Super. 207 (App. Div. 2007). The term "fund in court" is one of art. It is applied where plaintiff's actions "have created, preserved or increased property to the benefit of a class of which he is a member." *Sarner* at 467-468, *citing Sunset Beach Amusement Corp. v. Belk*, 33 *N.J.* 162 (1960), at *pages* 168-69; Hornstein, "The Counsel Fee in Stockholder's Derivative Suits," 39 *Colum. L. Rev.* 784 (1939); Note, "Allowance of Attorney's Fees From a Fund in Court," 35 *Colum. L. Rev.* 740 (1935).

Note: the rules governing a fund in court do not require altruistic motivations. The lower court denied McGovern's fee application on the grounds that he was merely advancing his own interests. Yet the requirement looks at the result of the litigation—not the motivation of the litigant. In reality, very few litigants, no

matter how kind, generous or selfless they may be, would bear the cost of litigation to benefit only other people. That is why, if the litigation merely advances the litigant's personal interests without benefiting a broader class, the fund cannot be considered a "fund in court" for these purposes. *In re Probate of Alleged Will of Landsman*, 319 N.J. Super. 252, 272 (App. Div. 1992)

Two things can be simultaneously true and, in this case they are: McGovern *both* sought to protect Township and its taxpayer's assets *and* he wished to protect his own interests as a member of the class of taxpayers who stood to be harmed by the improper sale of township assets at a fire sale price.

On the Fee Motion, the lower court noted that, "On this extensive record, this Plaintiff, McGovern, was not found to be a 'watchdog' that was looking out for the public benefit and did not pursue a class action litigation." (Pa0500a). However, the January Order stated, "Plaintiff's interest in this litigation was in ensuring that the Township conducted the land sale in a manner that complied with state law." (Pa0424a).[1] Compelling a government

[1] This statement appears to negate the trial court's later statement that "The court finds the Plaintiff pursued this litigation for reasons that were entirely personal; Plaintiff did not want a hotel parking lot across the street from his property." (Pa0459a). Thus, even if McGovern's

agency to comply with the law is the ultimate "watchdog" behavior.

Even if McGovern's motivation were personal, the benefit to a class of people other than himself is undeniable. First, compliance with the law protects the Township from subsequent litigation. If all McGovern's litigation had succeeded in doing was making sure that Lower Township acted scrupulously and legally in all future transactions, that alone would have conferred a wide-ranging benefit to all Township tax payers.

Second, this benefit was not an amorphous psychic benefit: it culminated in the legal sale of the property as a significantly higher price, thus inuring to the benefit of all taxpayers in a very finite way.[2]

The facts demonstrate that the litigation initiated by McGovern benefited *all* taxpayers of Township and did so in equal measure. The Township accrued a $600,000 benefit as a

---

motivations were relevant to the award of fees, the lower court's own conclusions negate that his motivation was purely personal.

[2] Even if the property had been sold at the proper price in the same time period as the original sale, the Court found that the proper sale price was approximately $675,000—not $400,000. ("Accordingly, the court finds the value of the property at the time of the sale was $675,000.00, as opined by Jones) (Pa0431a). That alone was sufficient to create a fund in court from which Plaintiff should be able to recover fees as the increase in value was not a "fortuitous" product of the rise in real estate values but a reflection of the flaws inherent in very transaction that was vacated. (see Zoning Rb 14).

consequence of McGovern's action to void the sale of Diamond Beach Park and to void the improper zoning approvals that paved the way for this benefit to accrue. The reasons that McGovern was compelled to file the initial action are irrelevant; the probative question is whether his conduct created a benefit to a class of people.

The argument that "the later sale did not result from the litigation of from the Court's judgment, conferred no class benefit, and did not create or enhance any fund" is simply factually and logically incorrect. (Township Rb 13). Newton's Third Law of Motion states that for every action there is an equal and opposite reaction. New Jersey law holds similarly: when a legal action sets into motion a chain of events that produce a windfall for a class of persons who are not part of the litigation, that windfall creates a fund in court. Where a fund in court exists, the party responsible for creating a benefit to a class of persons may recover his attorney fees as a narrow exception to the American Rule. But for

McGovern's choice to litigate the underlying transaction, a choice which vacated the improper sale of Township assets for a below-market price in a way that was against state law thus

enabling a future sale by the Township, Township would not have accrued a $600,000 benefit.

## III. THIS COURT SHOULD NOT CONSIDER THE ARGUMENTS OF MITA AND ZONING.

New Jersey courts have established clear requirements for standing that apply to all judicial proceedings, including appeals. Standing refers to a party's ability or entitlement to maintain an action before the court. *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73 (App. Div. 2001). To be entitled to participate in litigation, a party must have a sufficient stake and real adverseness with respect to the subject matter of the litigation. *Id.* at 81. Additionally, a substantial likelihood of some harm visited upon the party in the event of an unfavorable decision is needed for the purposes of standing. *Id.*

While New Jersey courts have historically applied liberal rules of standing, *Courier-Post Newspaper v. Cty. of Camden*, 413 N.J. Super. 372 (App. Div. 2010), the fundamental requirements remain unchanged. Courts accord standing to a litigant who has a sufficient stake and real adverseness with respect to the subject matter of the litigation and a substantial likelihood of some harm in

the event of an unfavorable decision. *Id.* at 381. A litigant with a financial interest in the outcome of the litigation will ordinarily have standing. *Id*. at 382.

*Lack of Sufficient Stake and Real Adverseness*

Zoning and Mita who were not subject to the Fee Motion lack the requisite sufficient stake and real adverseness with respect to the subject matter of this appeal. The motion sought relief only against one defendant, Township, and the resulting order affects only that defendant. The two non-affected defendants, Zoning and Mita, have no direct involvement in the underlying dispute that forms the basis of this appeal.

Under New Jersey law, entitlement to participate in litigation requires a sufficient stake and real adverseness with respect to the subject matter of the litigation. *In re Adoption of Baby T*, 160 N.J. 332 (1999). Here, the subject matter of the appeal is the denial of the Fee Motion made against Township. Zoning and Mita have no stake in whether that motion should have been granted or denied, as they were never parties to that particular dispute.

*Absence of Substantial Likelihood of Harm*

The standing analysis also requires examining whether the two non-affected defendants face a substantial likelihood of harm from an unfavorable decision. A substantial likelihood of some harm visited upon McGovern in the event of an unfavorable decision is needed for the purposes of standing. *Baby T, supra.*

If this Court were to reverse the trial court's denial of the Fee Motion, only Township, who was the subject of the Fee Motion would be affected. Zoning and Mita would suffer no harm whatsoever from a reversal, as the order being appealed does not concern them. Conversely, if this Court affirms the denial, Zoning and Mita gain no benefit, as the *status quo* regarding them remains unchanged regardless of the appeal's outcome.

*No Financial Interest in the Outcome*

New Jersey courts recognize that a financial interest in the outcome ordinarily is sufficient to confer standing. *Lopresti v. Wells Fargo Bank, N.A.*, 435 N.J. Super. 311 (App. Div. 2014). However, Zoning and Mita have demonstrated no financial interest

in the outcome of this specific appeal. The Fee Motion and resulting order did not seek any relief from them, impose any obligations upon them, or affect their legal or financial position in any way.

*Policy Considerations*

Even though New Jersey courts have considered the threshold for standing to be fairly low, *Triffin and Courier Post, supra,* allowing parties with no stake in an appeal to file briefs would undermine fundamental principles of judicial economy and adversarial proceedings.

Permitting non-affected parties to participate as respondents could lead to unnecessary multiplication of briefs, increased costs, and potential confusion of the issues on appeal. The adversarial system functions best when only parties with genuine stakes in the outcome present arguments to the court.

In summary, Zoning and Mita, who were not subject to McGovern's Fee Motion, lack standing. They have no sufficient stake or real adverseness with respect to the subject matter of the litigation, face no substantial likelihood of harm from an

unfavorable decision, and have no financial interest in the outcome. This court should decline to consider their respondent briefs and limit its consideration to the brief filed by McGovern and Township, the two parties actually affected by the order being appealed.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court below and enter its order granting the Fee Motion.

MASELLI, MILLS & FORNAL, P,C.
Attorneys for Appellant

By: _____
PAUL J. MASELLI

Dated: January 27, 2026