GEORGE HAFFERT and TERESA DOWNEY, Plaintiffs/Appellants/Cross-Respondents, v. BELL TOWER CONDOMINIUM ASSOCIATION, CAROL BARNOSKY, MARTIN J. MEHL, TARA MEHL, PAUL GLODEK, JILL GLODEK, DOUGLAS MORRISON and GLORIA MORRISON, Defendants/Respondents/ Cross-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003853-23 **On Appeal From:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION DOCKET NO. CPM-L-478-17 Sat Below: Hon. James H. Pickering, Jr., J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS/CROSS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

TABLE OF TRANSCRIPTS

PRELIMINARY STATEMENT

Plaintiffs/Appellants/Cross-Respondents, along with Defendants/ Respondents Barnosky, Mehl, Glodek, and Morrison, comprise the members of Respondent/Cross-Appellant Bell Tower Condominium Association. The Association and the Individual Defendants have been in disputes with the parties for the better part of almost fifteen (15) years. Plaintiffs believed that they had resolved their disputes when they received an arbitration award in 2013 in a prior litigation. Unfortunately, *Plaintiffs were wrong*.

Plaintiffs/Appellants were then forced to file a new litigation in 2017, and they then thought that they had resolved the disputes by entering into a settlement agreement in the present litigation in 2018. Once again, unfortunately *Plaintiffs were wrong*. The Association chose to ignore the specific terms of the settlement agreement, as did the Court-appointed Receiver.

The settlement agreement required that the Receiver review "all Association finances back to 2010," making certain that the Respondent Unit Owners provided the Receiver and his own selected Accountant with "all financial and other relevant documents," and provided that each party, "for this litigation," bear their own costs and fees. Ultimately, the appointed Accountant simply issued a woefully deficient two-page report in which he admitted that he failed to review any financial records for 2010, 2011 and most of 2012, and the four individual Respondents alleged that

they produced "all financial and other relevant documents" simply by producing the documents in their possession. The decision of the Trial Judge resulted in yet another appeal being filed.

Subsequently, Plaintiffs/Appellants thought that their rights would finally be vindicated when the Appellate Division vacated the Orders challenged and remanded the matter with specific instructions for the Trial Court to: (1) instruct the Receiver as to "how to complete his work in accordance with" the settlement agreement; (2) "give effect to" the settlement agreement; and (3) "reconsider anew" Plaintiffs' motion to compel documents under the settlement agreement. *Plaintiffs were wrong once again*.

On remand, the Trial Court entered a February 6, 2024 Order and Decision denying Plaintiffs' motion to compel and granting the Receiver's motion to enter judgment in the amount that the Accountant claimed that Plaintiffs owed in his deficient report, based principally on the Trial Court's improper acceptance of: (1) the Receiver's naked assertion that the requirement to review all Association finances back to 2010 was "unenforceable"; and (2) the Individual Defendants' belief that "all documents" means "all documents in their possession."

Likewise, the Trial Court entered its July 30, 2024 Amended Decision and Order granting the Association's motion for counsel fees, despite the fact that: (1) the settlement agreement barred entitlement to any fees; (2) the motion was

supported by nothing other than woefully non-descriptive invoices; and (3) the Association, in stark contrast to the arbitration award and the counterclaim that it previously agreed to dismiss without costs, sought 12% rather than 10% interest.

At every turn, the Association, the Individual Defendants, the Receiver and his Accountant failed to comply with the clear and unambiguous terms of the arbitration award, the settlement agreement, and the Appellate Division's prior decisions. Instead, they have attempted to re-write those terms, supplement them with more favorable language, and selectively determine which requirements with which to comply. Unfortunately, in its now-challenged Orders and Decisions, the Trial Court, in a seeming attempt to end this litigation at any costs, engaged in this same exact type of erroneous interpretation and selective enforcement.

The law mandates a different result.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. The Prior Litigation and Arbitration

Bell Tower Condominium (the "Condominium") is located in Sea Isle City, New Jersey, and consists of five (5) units in a single building. Defendant/Respondent/Cross-Appellant Bell Tower Condominium Association ("Association") is an unincorporated entity charged with the operation and

[1] Appellants have combined the procedural history and statement of facts sections, as the contents of both are largely duplicative.

maintenance of the Condominium's common elements. Pa2. The Condominium is governed by a Master Deed and By-Laws, and the Association is administered and managed by a Board of Trustees ("Board") consisting of five (5) persons. Pa2.

Plaintiffs/Appellants George Haffert ("Haffert") and Teresa Downey ("Downey") (collectively, "Plaintiffs") are the owners of Unit #5, which is the largest unit, representing a twenty-eight percent (28%) interest in the common elements. Pa2. Defendants/Respondents Carol Barnosky, Martin J. Mehl, Tara Mehl, Paul Glodek, Jill Glodek, Douglas Morrison and Gloria Morrison (collectively, the "Individual Defendants") own the other four (4) units, with each possessing an eighteen percent (18%) interest in the common elements. Pa2.

In 2010, the Defendants filed a lawsuit against Plaintiffs seeking to have them pay a portion of an $80,000 special assessment that was purportedly passed in January 2010. Pa29. In 2012, the Appellate Division determined that the matter should have first gone to Alternative Dispute Resolution (ADR). Pa32-37. Following the 2012 Appellate Division decision, the parties participated in binding arbitration before the Hon. L. Anthony Gibson, J.S.C. (Ret.) ("Judge Gibson"). Pa38-92.

B. The Arbitration Award

On June 13, 2013, Judge Gibson issued an arbitration award ("Arbitration Award"), Pa38-92, wherein, among other things, Judge Gibson upheld the $80,000

special assessment and concluded that Plaintiffs were responsible to pay 28% of that amount ($22,400), plus interest. Pa92. In addition, Judge Gibson found that every unit owner had the right to reasonable access to the Association's corporate records, including financial information. Pa91-92. Judge Gibson also found that, although the Association incurred $131,489 in arbitration-related legal fees, that amount was not reasonable and was to be reduced for purposes of a fee award to $66,355. Pa88. Of that amount, Judge Gibson found that Plaintiffs were only responsible for 28%, ($18,585), plus "interest at 10% per annum[.]" Pa88.

C. The Post-Arbitration Award Disputes

Subsequently, the Association commenced an action in the Superior Court to affirm the Arbitration Award, and Plaintiffs counterclaimed to vacate it. Pa94. The trial court affirmed the Arbitration Award and awarded the Association an additional $20,450 in attorneys' fees. Pa94. The Appellate Division affirmed the Arbitration Award but remanded the issue of attorneys' fees, retaining jurisdiction. Pa98.

The Trial Court re-affirmed the award and the amount of attorneys' fees. Pa107. The Appellate Division reviewed their decision, assumed original jurisdiction and reduced the amount of the fees owed by Plaintiffs to $5,217.91. Pa107. Plaintiffs paid just over $69,000 to the Association in January 2016, $18,585.00 of which constituted payment of attorneys' fees for the arbitration. Pa101.

In June 2016, the Association sought to file a lien against Plaintiffs' unit for unpaid assessments. Pa102. Plaintiffs requested in May and June 2016 that these disputes be considered in an ADR proceeding and the Association refused. Pa158. It refused to provide Plaintiffs with any financial documents. Pa158. Plaintiffs filed the current lawsuit against the Association and the Individual Defendants on May 10, 2017, and the Association in turn filed a Counterclaim. Pa1-28; Pa640-658.

D. The Current Litigation and its Putative Settlement

In its Counterclaim, the Association alleged that Plaintiffs owed $42,474.93 in assessments as of March 31, 2017, and that the By-Laws authorized the Association to bring suit to recover those assessments along with reasonable attorneys' fees and costs. Pa640-658. In October 2017, the Hon. Joseph L. Marczyk, P.J.Cv., appointed Alan I. Gould, Esq. ("Gould" or the "Receiver") to mediate the parties' dispute. Pa659-663. The parties participated in mediation on April 20, 2018, which resulted in a settlement. Pa113.

E. The Settlement Agreement

i. The Term Sheet

At the conclusion of mediation, the parties entered into a term sheet (the "Term Sheet"). Pa124-126. The parties agreed that Gould would be appointed the Receiver for the Association. The Term Sheet provided that the Receiver would appoint an independent CPA to review all Association finances back to 2010,

determining in part what was owed by each unit owner and whether Plaintiffs' share of the Association's legal fees had been paid as part of a prior Judgment. Pa124.

Paragraph 3 of the Term Sheet provided that the "CPA and Receiver shall make the final decision as to what, if anything, is owed by each unit." Pa124. In Paragraph 9, the parties agreed that "[e]ach party shall bear their own costs and fees, with the exception that Plaintiffs are only responsible for $2,500 of the Association's fees for this litigation CAM-L-478-17." Pa125. Paragraph 15 of the Term Sheet provided that the current Board members were to "provide all financial and other relevant documents to the Receiver and/or CPA"; and "[a]ll unit owners shall be entitled to review any documents provided to the Receiver and/or the CPA." Pa125.

ii. The Stipulation of Settlement

On July 10, 2018, the Court entered an Amended Stipulation of Settlement and Consent Order of Dismissal with Prejudice and Without Costs ("Stipulation"), by which the parties further memorialized their settlement. Pa127-134.

The parties did clarify certain provisions of the Term Sheet in the Amended Stipulation, but the parties did not "clarify" Paragraphs 2 (requiring the Accountant to review "all Association finances back to 2010"), 9 (requiring each party to "bear their own costs and fees" "for this litigation"), or 15 (requiring the Individual Defendants to provide "all financial and other relevant documents" to the Receiver and Accountant). Pa132-134. In Paragraph 3, the parties agreed that "[a]ll claims

brought by and between the Parties against each other in the above-captioned action" – including the Association's Counterclaim against Plaintiffs for allegedly unpaid assessments plus attorneys' fees – be "dismissed with prejudice and without costs." Pa132. In Paragraph 10, the parties confirmed that the Stipulation and Term Sheet represented the entire integrated agreement among the Parties for the matters asserted in this action." Pa132.

iii. The Appointment Order

On July 5, 2018, the Trial Court entered an Order Appointing Gould as Receiver ("Appointment Order"). Pa185-190. Paragraph 13 provided that the Receiver "may apply to this Court at any time, on proper notice to all parties in the case, for further or other instructions and for further authorization necessary to enable the Receiver to properly fulfill its duties hereunder or to terminate the receivership." Pa189.

F. The Stauffer Report

In October 2018, Gould retained George A. Stauffer, Jr., CPA ("Stauffer" or the "Accountant") to serve as the Accountant contemplated by the Term Sheet, Stipulation of Settlement and Appointment Order (collectively, the "Settlement Agreement"). Pa132-134. On August 14, 2019, nearly a year after he was engaged, Stauffer issued a two-page report, exclusive of exhibits (the "Stauffer Report"). Pa138-139.

The Stauffer Report failed to take into consideration any financial records for years 2010 and 2011, and part of 2012, despite the fact that Paragraph 2 of the Term Sheet expressly required Stauffer to "review all Association finances back to 2010." Pa135-146. Instead, Stauffer simply stated "[t]he Association's bank, 1st Bank of Sea Isle City, does not maintain copies [of financial statements] past seven years." Pa138. Stauffer also did not determine what, if anything, was owed to the Association by the Individual Defendants, despite the obligation in Paragraph 2 of the Term Sheet. Pa135-146.

Ultimately, despite the insufficiency of Stauffer's report, Gould insisted that Plaintiffs accept Stauffer's report, with a few minor adjustments, and pay the $55,414.36 that Stauffer had determined Plaintiffs owed. Pa150.

G. Motion Practice Regarding the Stauffer Report and Plaintiffs' Access to Financial Documents

Plaintiffs requested that Gould schedule an ADR proceeding in accordance with N.J.S.A. 46:8B-14(k) and N.J.S.A. 45:22A-44. Pa199-200. After denying Plaintiff's request for ADR, on April 9, 2020, Gould filed a motion seeking, among other things, to compel Plaintiffs to pay the $55,414.36 calculated in the Stauffer Report, plus ten percent (10%) interest. Pa149-Pa150. Significantly, Gould did not make any request for attorneys' fees as part of its application. Pa150. Plaintiffs cross-moved and, on May 26, 2020, the Trial Court entered an Order that, in relevant

part, denied Gould's request to compel payment of the $55,414.36. Pa151-153; Pa171-172.

On November 18, 2020, Plaintiffs filed a motion to enforce the portion of the Settlement Agreement that obligated the Association's board members to provide all financial and other relevant documents to the Receiver and Accountant, and entitled all unit owners, including Plaintiffs, access to those documents. Pa173-175. The Association opposed the motion, and the Individual Defendants filed a cross-motion seeking approval of the Stauffer Report. The Trial Court entered an Order on December 22, 2020. Pa205-206.

H. The 2023 Appellate Division Decision

On September 1, 2021, Plaintiffs filed a Notice of Appeal appealing several Orders, including the May 26, 2020 Order, in response to Gould's motion to enter judgment, and the December 22, 2020 Order denying Plaintiffs' motion to compel. Pa207-214.

On September 6, 2023, the Appellate Division issued a decision (the "Appellate Division Decision") that "affirm[ed] in part and vacate[d] in part the challenged Orders, and remand[ed] for further proceedings." Pa215-259. The Appellate Division vacated the challenged Orders and remanded the case so that the Trial Court could "[g]ive Gould the instructions requested; permit Gould to complete his work and make all the final decisions for which the parties authorized him to do

so, including addressing deficiencies in Stauffer's report claimed by the parties; and give full effect to the parties' agreement and term sheet, which give Gould final decision-making authority." Pa258. The Appellate Division stated that it was remanding "so that the court may: to the extent necessary, instruct Gould regarding how to complete his work in accordance with the terms of the [Settlement Agreement]; give effect to the parties [Stipulation of Settlement] and term sheet; and reconsider anew plaintiffs' motion to compel the production of documents under the term sheet." Pa258.

Nowhere in the Appellate Division's Decision did the Court provide that the Association could pursue a fee application as part of the remand. Pa215-259. Further, the Appellate Division observed that it did not have "jurisdiction to disturb the arbitration award," including the finding in the award that 10% interest applied. Pa256.

I. The Receiver's Motion to Enter Judgment

On September 7, 2023, counsel for Gould sent a letter to the Trial Court advising that the Appellate Division had issued its decision the day before. Pa260-262. Counsel for the Association acknowledged in that letter that the Settlement Agreement required Mr. Stauffer to review the records starting in 2010 and that "[a] resolution of that issue is then necessary for you to provide Gould with instructions on how to proceed." Pa260-262.

Before receiving any instructions from the Trial Court, Gould filed a motion seeking entry of judgment in the $55,414.36 amount originally determined by Stauffer, plus interest. Pa263-264. In his motion, Gould claimed that he had already addressed any deficiencies in the Stauffer report and asked the Trial Court to enter judgment against Plaintiffs for the $55,414.36 calculated by Stauffer plus 12% interest. Pa664-667.

Gould's prior motion to enter judgment only sought 10% interest. Pa147-150. Gould claimed in his new motion that a 12% interest rate was authorized by Article VI, Paragraph 1 of the By-Laws. Pa664-667.[2]

Plaintiffs opposed the motion given that the Trial Court had not yet instructed Gould as to how to complete his work in accordance with the Settlement Agreement or considered anew Plaintiffs' motion to compel documents.

J. The First Oral Argument on the Motion to Enter Judgment

On October 20, 2023, the parties appeared for oral argument before the Trial Court on Gould's motion to enter judgment.[3] Judge James Pickering interpreted the Appellate Division Decision to mean that, although "Mr. Gould has the authority to

[2] The Appellant/Cross-Respondent includes Mr. Gould's 3-page Letter Brief in the accompanying Appellate Appendix because whether the issue of Mr. Gould seeking 12% interest was raised (timely and appropriately) in the trial court is germane to the appeal. R. 2:6-1(a)(2).

[3] The Transcript of Hearing of the October 20, 2023 Oral Argument before the Hon. James H. Pickering, Jr., J.S.C. is attached hereto as 1T.

make the decision that the Stauffer report was adequate," the Trial Court, before entering any judgment, was required to "make sure that Mr. Gould has found… that the Stauffer report gave full effect to the stipulation and terms sheet, that there are not any deficiencies in the Stauffer report," and that it was up to Mr. Gould to decide the interest. 1T 16:3-15; 38:21-24.

Ultimately, Judge Pickering decided to adjourn the return date of the motion to allow Gould "to certify that he has reviewed the Stauffer report, that [he] finds this report gives full effect to the stipulations in the terms sheet and the order," and that "he has addressed any deficiencies in the Stauffer report claimed by the parties." 1T 41:4-21. Judge Pickering, however, stressed that "one deficiency which is pretty glaring" was "the review of financial records back to 2010." 1T 41:22-25.

K. The Order Compelling Compliance with the Settlement Agreement

On October 23, 2023, the Trial Court entered an Order memorializing its decision for Gould to "act in accordance with" the Settlement Agreement, without instructing him how. Pa265-267. In addition, the Trial Court ordered Gould to provide a certification that he had (1) reviewed the Stauffer Report and found that it gave full effect to the Settlement Agreement; (2) addressed any deficiencies in the Stauffer Report claimed by the parties; and (3) found that the requirement to review financial records back to 2010 was an "unenforceable provision" of the Settlement Agreement; and directed Gould to provide a calculation of interest. Pa265-267.

L. Gould and the Individual Defendants Produce Certifications

The four (4) Individual Defendants filed identical certifications, containing only three paragraphs, and stated, "I hereby certify that any papers, documents and other materials affecting the finances and operation of the Condominium, or any part or parts thereof, which I had in my possession I turned over to Martin Mehl, in compliance with the [Stipulation of Settlement] and the [Term Sheet]." Pa268-298. The Individual Defendants did not identify what documents they turned over, when, or the diligence of their search.

On November 2, 2023, Gould filed his certification, expressing that he was satisfied with the "documents provided to [him] by Martin Mehl." Pa299-330.

Gould certified that "it was apparent that the Settlement Agreement terms could not be met with regard to [Stauffer's] review of financial records and assessments and payments dating back to 2010," and found that Stauffer's report "gave effect to the [Settlement Agreement]." Pa300. Gould certified that he "addressed any deficiencies in the Stauffer Report claimed by the plaintiffs," without specifically addressing any of Plaintiffs' claimed deficiencies. Pa299-301.

Concerning interest, Gould certified that Judge Gibson's arbitration determination was "clearly a mistake." Pa301. Gould certified that he previously "was willing to waive the difference of 2%," but he now arbitrarily decided that he is "no longer willing to do so" and applied the 12% interest rate. Pa301-302.

M. Plaintiffs Review and Respond to the Certifications

On November 14, 2023, Plaintiffs stressed that Gould, in violation of his authority as a Receiver under N.J.S.A. 14A:14-5, failed to review or rectify multiple glaring deficiencies in Stauffer's report. Pa333-342. The first deficiency was the failure to credit Plaintiffs with a payment of $69,076.33 from 2016 that Stauffer labeled on the final exhibit page of his report as "Unidentified." Pa334-336. A November 14, 2023 certification was filed by Plaintiffs, in which it was certified that Plaintiffs had "paid $69,076.33 to the Association in January 2016." Rather than attribute this amount to Plaintiffs, Stauffer arbitrarily allocated that amount to various expenses, without any explanation. Pa334-336. The second deficiency was that Stauffer falsely claimed that Plaintiffs stopped paying maintenance and special assessments, despite the fact Stauffer's report indicated that Plaintiffs had paid a total of $8,776.71 in monthly fees from May 2010 to September 2013. Pa334-336. The third deficiency was that Stauffer falsely claimed that Plaintiffs were responsible for 50% of the legal fees for the arbitration when Judge Gibson, in fact, ordered that Plaintiffs were responsible for 50% of the arbitrator's costs but only 28% of the approved amount of legal fees. Pa334-336.

Plaintiff Downey certified that Individual Defendant Carol Barnosky maintained the physical records of the Association until September 2011, when Martin Mehl assumed that role. Pa419. Plaintiffs argued that Gould could not have

truthfully certified that the requirement to review records back to 2010 was unenforceable simply because the bank did not have those records, because they did exist. Pa336-337.

Since the Term Sheet required the Individual Defendants to provide all financial and other relevant documents, whether in their possession or not, and neither the certifications of Gould nor the Individual Defendants addressed the specific categories of documents.

N. The Second Oral Argument on the Motion to Enter Judgment

On November 17, 2023, at oral argument, Gould's counsel attempted to explain away each of the deficiencies claimed by Plaintiffs, but nothing he said was in any of the certifications.[4] 2T 24:3-6. First, Gould's counsel claimed that Stauffer did credit the $69,076.33 to Plaintiffs for what she owed through 2014. 2T 12:2-17. Second, Gould's counsel shared his belief that Stauffer credited Plaintiffs from the $69,076.33 payment the $8,776.71 paid in monthly fees from May 2010 to September 2013. 2T 14:3-19. Third, Gould's counsel conceded that, on Schedule 4 of Stauffer's report, "Mr. Stauffer did, in fact, make a mistake" because he divided the total legal fees from the arbitration of $132,750 evenly among the Individual Defendants and the Association. 2T 16:10-25. Schedule 4 to the Stauffer report

[4] The Transcript of Hearing of the November 17, 2023 Oral Argument before the Hon. James H. Pickering, Jr., J.S.C. is attached hereto as 2T.

incorrectly indicated that the total legal fees from the arbitration of $132,612.84 were to be split evenly at $66,306.42 each between the Association and the Individual Defendants, but this is not what Judge Gibson ordered. 2T 25:25-26:11.

O. The February 6, 2024 Order Denying Plaintiffs' Motion to Compel

On February 6, 2024, the Trial Court entered an Order and Decision: (1) denying Plaintiffs' motion to compel documents; and (2) granting Gould's motion for judgment in the amount of $84,692.85. Pa462-497.

Based on the certifications produced by the Individual Defendants, the Trial Court was satisfied that the Individual Defendants "provided to Gould all financial and other relevant documents, and any and all papers, documents and other materials affecting the finances and operation of the Condominium, or any part or parts thereof, that were in their possession." Pa473. The Trial Court concluded that, based on these certifications alone, any additional fact finding about what is "relevant" for purposes of Paragraph 15 of the Term Sheet was "unnecessary." Pa473. The Trial Court concluded, without referencing any legal authority, that "relevant documents means financial documents and operational documents necessary to carry out the settlement." Pa473. The Court also concluded that "relevant" documents could include "documents created after the settlement date" because "[s]uch documents would not be necessary to carry out the settlement." Pa473.

i. Grant of Motion to Enter Judgment

The Trial Court acknowledged that the Appellate Division vacated the previously challenged orders and remanded so that the Trial Court could "instruct Gould regarding how to complete his work in accordance with the terms of the" Settlement Agreement, including by "addressing any deficiencies in Stauffer's report claimed by the parties," and to "give effect to the" Settlement Agreement. Pa485; Pa492-493.

By the Trial Court's estimation, it sufficiently instructed Gould how to complete his work in accordance with the terms of the Settlement Agreement, simply by instructing Gould to certify that: (1) he had carried out his obligations; (2) found the Stauffer's report to give full effect to the Settlement Agreement; (3) he addressed any deficiencies in the Stauffer report; and (4) he found reviewing financial records back to 2010 to be an unenforceable provision based on Stauffer's "requirement" that he could only rely on records in the possession of the bank. Pa492-493.

With respect to the interest dispute, the Trial Court concluded that it was forced to adopt the 12% interest rate applied by Gould since the Trial Court had no "authority to review" Gould's claimed interest rate. Pa497.

The Trial Court further found that it was "unfair" to claim deficiencies in a letter brief, and Gould had addressed those deficiencies by virtue of his counsel opining at oral argument. Pa495-496.

P. The Association's Motion for Counsel Fees

On February 8, 2024, the Association filed a motion seeking entry of a judgment requiring Plaintiffs to pay $97,718.27 in counsel fees to the Association. Pa343-344. The Association argued that the By-Laws entitled the Association to recover reasonable attorney's fees from a unit owner for enforcing payment of assessments.

In support of the motion, the Association submitted a Certification from its counsel, attached to which were copies of all of his bills from the time that Gould retained him on April 9, 2020 through February 6, 2024. Pa345-455. The Appellate Division had recognized that the issues before the Court were premised solely on the obligations set forth in the Settlement Agreement, not the By-Laws dealing with assessments made by the Association. Nowhere in the Settlement Agreement was there a provision that Plaintiffs would be responsible for attorneys' fees incurred by the Association. Pa127-134. The Association also failed to satisfy the reasonableness requirement that applies to fee awards because the Association's counsel did nothing more than produce 107 pages of legal invoices and the activity entries on the invoices lacked specificity, by which the Trial Court could not possibly conclude that the fees sought were reasonably incurred. Pa345-455.

Q. March 28, 2024 Oral Argument

On March 28, 2024, the Trial Court held Oral Argument on the motion for entry of a judgment for fees.[5] As pointed out at that Oral Argument, nowhere in the Appellate Division's Decision did it "discuss or decide or direct on the remand for [the Trial Court] to be hearing from the Association as to attorneys' fees and costs that would be claimed" (3T 9:15-19), nor did the Court remand on issues that involved the By-Laws (rather than contract enforcement involving the Amended Settlement Stipulation and Term Sheet). 3T 10:6-17.

R. <u>The July 30, 2024 Order Partially Granting the Association's Fee Motion</u>

On July 30, 2024, the Trial Court entered an Amended Order and Decision, partially granting the Association's motion and awarding it $55,830.00 in attorneys' fees. The Trial Court relied on Section 1 of Article VI of the By-Laws of the Association that any assessment exists in favor of the Association and includes interest and reasonable attorney's fees for enforcing payment or collection. Pa607-631. In the Trial Court's view, the Settlement Agreement "did not preclude the recovery of attorneys' fees for future efforts to collect assessments" simply because it did not expressly "nullify the By-Laws," and "[n]othing in the Appellate Division decision nullified the Bylaws." Pa614.

[5] The Transcript of Hearing of the March 28, 2024 Oral Argument before the Hon. James H. Pickering, Jr., J.S.C. is attached hereto as 3T.

The Trial Court attempted to address each deficiency claimed by Plaintiffs. Pa615-620. It found that "a billing entry is not required to include an explanation as to why and how correspondence relates to a matter," and "[i]t is enough that the correspondence is between counsel, or clients, or others who are involved in the litigation" for the court to determine that the fees associated with the task were reasonable. Pa617.

With regard to invoices for "legal research" failing to specify the nature of the research, and the invoices for "telephone conferences" failing to explain why the conferences occurred, the Trial Court asserted, without any legal support, that this "level of detail" is "not required by the Rules or any case law." Pa619. With respect to invoices that simply identify the other party involved in correspondence and telephone calls by their initials rather than full name, the trial court, without providing any reasoning whatsoever, concluded that "initials offer sufficient detail." Pa619. With respect to the necessity for correspondence between Mr. Greenblatt and Sanford Schmidt, the Association's predecessor counsel ("Schmidt"), the Trial Court concluded that such correspondence "could have been necessary." Pa619.

The Trial Court determined that the Association was not entitled to: (1) any costs and expenses, because these are not recoverable under the By-Laws; (2) fees incurred for construction and engineering issues between approximately June 2023 through October 2023; or (3) fees incurred during the appeal from September 2021

through September 2023. Pa626-627.[6] The Court, therefore, deducted these amounts, totaling $45,780, from the claimed fee total of $102,543.27, and awarded the Association the remaining $55,414.36 and determined that this amount was reasonable. Pa628-629.

Concerning reasonableness, the Trial Court acknowledged that RPC 1.5(a) "requires that a fee be reasonable in all cases and requires a reviewing court to consider the eight factors listed" in RPC 1.5(a). Pa629-630. The Trial Court conceded that Mr. Greenblatt's certification did not comply with RPC 1.5(a) or that there was any "evidence before the court" as to the second factor, "not any evidence" regarding the fifth factor, and "not any evidence" regarding the sixth factor, of RPC 1.5(a). Pa629-630.

Nevertheless, the Trial Court concluded that the "factors weigh in favor of the fee of $55,830 being reasonable." Pa631. The Court, therefore, entered into an amended judgment in the amount of $140,522.85 ($84,692.85 plus $55,830.00). Pa631.

On August 8, 2024, Plaintiffs filed the present Notice of Appeal challenging: (1) the February 6, 2024 Order and Decision denying Plaintiffs' motion to compel

[6] Presumably the decision of the Trial Court to deny any fees in connection with the Appellate Division proceedings will be the subject of the Association's Cross-Appeal.

documents and granting Gould's motion to enter judgment in the amount of $140,522.85 against Plaintiffs and in favor of the Association. Pa632-638.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY DENYING THE MOTION TO COMPEL DOCUMENTS. (Raised below; Pa473-484)

"[T]he settlement of litigation ranks high in our public policy," and courts "strain to give effect to the terms of a settlement wherever possible." Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008) (citations omitted). The interpretation of a settlement agreement is "governed by basic contract principles." Capparelli v. Lopatin, 459 N.J. Super. 584, 603 (App. Div. 2019). "[A]bsent a demonstration of 'fraud or other compelling circumstances,' a court should enforce a settlement agreement as it would any other contract." Id. at 603-04 (citation omitted).

Plaintiffs' request for documents was based upon Paragraph 15 of the Term Sheet, which clearly and unambiguously provides that the "current Board members shall provide all financial and other relevant documents to Receiver and/or CPA" and "[a]ll unit owners shall be entitled to review any documents provided to the Receiver and/or CPA." Pa132-134.

The categories of documents sought in accordance Term Sheet included:

> (1) all documentation provided to Gould or Stauffer; (2) all correspondence among Schmidt, Gould, Stauffer,

> the property manager, the Association's counsel, and the Individual Defendants; (3) all documents provided to Gould by one of the Individual Defendants, Mehl; (4) correspondence and agreements among Schmidt, the Association, and the Individual Defendants regarding Schmidt's fees; (5) correspondence and agreements between Cooper Levenson regarding its representation of the Association in the arbitration; (6) correspondence and agreements relating to Steven Scherzer's representation of the Individual Defendants that he had found someone to pay for part of the litigation, including the identity of the person; (7) documents that the Association received from the bonding company relating to Plaintiffs' payment in 2016, including tax forms; and (8) documents relating to the procurement of Director and Officer insurance.

Pa181-182.

A. Prior to the Remand, the Appellate Division Could Not Determine Whether the Board Members' Production to Mehl Included "All Financial and Other Relevant" Documents

When Gould first opposed Plaintiffs' motion, he certified that Mehl delivered "four banker boxes" to Gould in September 2018, which Mehl represented contained "all of the documents available from the [Association's board] affecting the finances and operation of the condominium." Pa299-303. Gould certified that, because Downey was able to examine those boxes, the documents that Plaintiffs sought to compel had either "long ago been" provided to them, or were "not documents which . . . plaintiffs are entitled to review pursuant to" the Term Sheet. Pa299-303.

On appeal, the Appellate Division determined that the Trial Court "did not make the requisite findings supporting its denial of Plaintiffs' motion" and remanded

for "reconsideration of plaintiffs' motion anew." Pa253-254. The Appellate Division found that it was not enough that Plaintiffs were able to review the documents that the Board members provided to Mehl in 2018 because Plaintiffs lacked assurance that those documents constituted "all financial and other relevant documents," as required by Paragraph 15 of the Term Sheet. Pa253-255. The Appellate Division directed the Trial Court to "consider[] whether the board members complied with that provision," and to engage in "further factfinding" to determine what constitutes a "relevant document." Pa255.

Certifications were provided by the Individual Defendants on November 2, 2023, but they did nothing to explain whether the specific categories of documents that Plaintiffs requested were included in the banker box production. Pa268-298. Nor did the certifications address whether the documents produced were "relevant." Pa268-298. Instead, the Individual Defendants certified to the production of "any papers, documents and other materials affecting the finances and operation of the Condominium, or any part or parts thereof, which I had in my possession I turned over to Martin Mehl[.]" (Emphasis added.) Pa268-298.

B. The Trial Court Provided No Support For its Naked Conclusion of What Constitutes a "Relevant Document" For Purposes of the Term Sheet

The Trial Court failed to comply with the Appellate Division's directive that it engaged in further fact finding regarding what constitutes a "relevant document." Instead, the Trial Court found that the production of the Individual Defendants'

certifications indicating that they turned over everything in their possession made "further fact finding unnecessary." Pa473. The Trial Court erroneously developed its own definition of "relevant" without referencing any legal authority whatsoever. Specifically, the Trial Court arbitrarily defined the term "relevant" to mean "financial documents and operational documents necessary to carry out the settlement," but not any "documents created after the settlement date." Pa473.

The Trial Court's failure to engage in adequate fact-finding or provide a detailed statement of reasons as to the legal authority that it relied upon in defining the term "relevant" for purposes of Paragraph 15 of the Term Sheet violated Rule 1:7-4. There is a multitude of legal authority that defines the term relevant, but none of them fall within Judge Pickering's dispositions. See, e.g., Longobardi v. Chubb Ins. Co. of N.J., 234 N.J. Super. 2, 21 (App. Div. 1989) (citation omitted), rev'd on other grounds, 121 N.J. 530 (1990) (defining "relevant" as "[a]pplying to the matter in question; affording something to the purpose," and being synonymous with "'germane' and 'pertinent'"); Relevant, Black's Law Dictionary (19th ed. 2019) (defining "relevant" as "[l]ogically connected and tending to prove or disprove a matter in issue" or "having appreciable probative value"); N.J.R.E. 401 (defining "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action"). Instead, the Trial Court

improperly relied on none of these. See Curtis v. Finneran, 93 N.J. 563, 570 (1980); Heinl v. Heinl, 287 N.J. Super. 337, 347 (App. Div. 1996).

C. The Trial Court Misinterpreted Paragraph 15 of the Term Sheet

The Trial Court concluded that, because the Individual Defendants certified that they provided all documents that they had in their possession, to the extent that the outstanding categories of documents that Plaintiffs sought were not included in Mr. Mehl's banker box production, those documents were determined by the Trial Court to go beyond the scope of Paragraph 15.

That, however, is not what Paragraph 15 said. Paragraph 15 makes it clear that the "current Board members shall provide all financial and other relevant documents to Receiver and/or CPA." Pa127-134. The Trial Court erred by attempting to rewrite this provision to include the phrase "in their possession." See, Quinn, 225 N.J. at 45. In fact, the other documents comprising the Settlement Agreement confirm that this is not what the parties intended.

Paragraph 10 of the Stipulation makes it clear that the Term Sheet, Stipulation and Appointment Order comprise one "integrated agreement." Pa127-134. When interpreting an integrated agreement, like the Settlement Agreement, "[n]o one element stands alone and can be read without reference or consideration of the others." Glass v. Glass, 336 N.J. Super. 357, 373 (App. Div.), certif. denied, 180 N.J. 354 (2004); Savarese v. Corcoran, 311 N.J. Super. 240, 248 (Ch. Div. 1997).

In Paragraph 1 of the Stipulation, the parties incorporated the Term Sheet by reference and clarified some of its provisions in Paragraphs 1(a) through 1(f). Pa127-134. The parties did not, however, clarify or amend Paragraph 15. This evidences an intent not to limit the production obligation in Paragraph 15 only to those documents in the Board members' possession. Paragraph 9 of the Appointment Order expressly required the Board members to produce only those documents "which they may have in their possession." Pa185-190. However, the parties were aware of this phrase at the time they entered into the Settlement Agreement but chose not to include it in the Term Sheet.

POINT II

THE TRIAL COURT ERRED BY GRANTING GOULD'S MOTION BEFORE GIVING ADEQUATE INSTRUCTION AND WITHOUT GIVING EFFECT TO THE SETTLEMENT AGREEMENT.
(Raised below; Pa492-497)

In the Appellate Division Decision, the Court made it clear that it was remanding the case so that the Trial Court could: (1) "give full effect" to the Settlement Agreement; (2) "permit Gould to complete his work" by "addressing any deficiencies in Stauffer's report claimed by the parties"; and (3) "to the extent necessary, instruct Mr. Gould regarding how to complete his work in accordance with the terms of the Settlement Agreement." Pa239-240, 258. Because the Trial Court failed to adequately perform any of these tasks before it entered its February

6, 2024 Order granting the Receiver's motion to enter judgment, that decision must be reversed as well. Pa462-497.

At the October 20, 2023 oral argument on Gould's motion to enter judgment, the Trial Court found that Plaintiffs' claimed deficiency of Stauffer's failure to review financial records back to 2010, as the Settlement Agreement required, was a "glaring" one. 1T 41:22-25. As such, the Trial Court directed Gould to certify, if possible, that he addressed any claimed deficiencies in the Stauffer Report, including the deficiency that Stauffer failed to review records back to 2010. Pa265-267. Gould failed to certify that he or Stauffer reviewed any financial records back to 2010; but rather he certified that this requirement was "unenforceable" because Stauffer purportedly required that he could only rely upon records from a bank and "such records predating May 2012 did not exist." Pa299-330. Based on this disjointed reasoning, Gould certified, incorrectly, that he addressed all deficiencies claimed by Plaintiffs.

In its February 6, 2024 Order granting Gould's motion to enter judgment, the Trial Court, despite its prior finding that Stauffer's failure to review all financial records back to 2010 was a "glaring" deficiency, 1T 41:22-25, found that "Gould addressed all alleged deficiencies in the Stauffer report," notwithstanding Stauffer's

failure to review all financial records back to 2010.[7] Pa496. Based on this finding, the Trial Court concluded that full effect had been given to the Settlement Agreement and granted Gould's motion. Pa497.

When settlement agreement language "is clear and unambiguous, a court must enforce the agreement as written." Quinn, 225 N.J. at 45. Here, the Settlement Agreement clearly and unambiguously required Stauffer to "review all Association finances back to 2010" so that he could evaluate what, if anything, was owed by each unit owner. Pa127-134. The Settlement Agreement did not, as Gould and Stauffer would prefer, only require Stauffer to review "official bank records" of the Association finances. In the absence of any evidence that Stauffer reviewed all Association finances back to 2010, the Trial Court erred by granting Gould's motion to enter judgment.

Similarly, the Trial Court erred by adopting Gould's contention that the requirement in the Settlement Agreement to review all Association finances back to 2010 was "unenforceable" simply because Stauffer had a supposed "requirement" to only consider official bank records. Pa494-495.

Courts should "strain to give effect to the terms of a settlement wherever possible." Brundage, 195 N.J. at 601 (citation omitted). Courts should "honor and

[7] The Association never asserted that the records that did exist for the period from 2010 to 2012 were improper or unreliable.

enforce" settlement agreements "[a]bsent a demonstration of 'fraud or other compelling circumstances[.]'" Id. "[T]he party seeking to set aside the settlement agreement has the burden of proving . . . extraordinary circumstances sufficient to vitiate the agreement[,]" Jennings v. Reed, 381 N.J. Super. 217, 227 (App. Div. 2005), by clear and convincing evidence. Smith v. Fireworks by Girone, Inc., 380 N.J. Super. 273, 291 (App. Div. 2005), certif. denied, 186 N.J. 243 (2006).

Compelling circumstances that may warrant setting a settlement term aside include "coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntary consent[.]" Id. As a matter of law, a preference for official bank records does not present a "compelling circumstance" to set aside the requirement that Stauffer review all finances back to 2010. If the parties intended never to rely on bank records, they could have said so in the Term Sheet. The Trial Court erred by concluding otherwise.

A. The Trial Court Erred by Determining That It Was Powerless to Supervise Gould's Work

The Trial Court's February 4, 2024 Order and Decision granting Gould's motion to enter judgment evidences the Trial Court's mistaken belief that it was powerless to supervise Gould's conduct or provide him with instructions on how to comply with the Settlement Agreement. This position ignored both the Appellate Division Decision, the Appointment Order and controlling law.

After previously indicating at oral argument that Stauffer's failure to review all finances back to 2010 was a "glaring" deficiency, the Trial Court stated that, "whether there were deficiencies in the Stauffer Report" was not "within this court's authority to review," and "[i]t is not this court's position to question Gould's determinations . . . even if this court disagrees with Gould's decision." Pa497. Gould's authority as Receiver derived from the Appointment Order. The Appointment Order vested in Gould "the same authority as N.J.S.A. 14A:14-5[.]" The same is true of Stauffer, given the Appointment Order's requirement that the Accountant perform its assigned tasks "within the jurisdiction of the Receiver."

N.J.S.A. 14A:14-5 makes clear that the powers of a receiver (and by extension, those sharing in its jurisdiction) are "[s]ubject to the general supervision of the Superior Court," as well as any "specific order where appropriate." N.J.S.A. 14A:14-5 (emphasis added). Moreover, a statutory receiver acts in a fiduciary capacity and, as such, the receiver must "act consistently with the Condominium Act and its own governing documents and [ensure] that its actions be free of fraud, self-dealing, or unconscionability." Kim v. Flagship Condo. Owners Ass'n, 327 N.J. Super. 544, 554 (App. Div.) (citations omitted), certif. denied, 164 N.J. 190 (2000). In addition, the receiver "must act reasonably and in good faith." Id.

The trial court erred when it concluded that it had no authority to supervise Gould or evaluate whether he complied with these legal obligations.

In its Decision granting Gould's motion to enter judgment, the Trial Court found that it had complied with its obligation to "instruct Gould regarding how to complete his work in accordance with the terms of the Settlement Agreement," the Trial Court reached this conclusion simply because it had ordered Gould "to carry out his obligations" and "act in accordance with," the Settlement Agreement and did nothing else. Pa494. Stated somewhat differently, the Trial Court believed that it had adequately instructed Gould simply by directing Gould *to* complete his work in accordance with the Settlement Agreement.

The Appellate Division required more than this. It is axiomatic that "where the plain terms of a court order unambiguously apply, . . . they are entitled to their effect." Travelers Indem. Co. v. Bailey, 557 U.S. 137, 150 (2009). "Court orders are constructed in the same manner as other written documents and contracts." See, e.g., 56 Am. Jur. 2d Motions, Rules, and Orders § 48 n.11 (2024).

In the Appellate Division Decision, the Court unambiguously directed that it was remanding so that the Trial Court could "to the extent necessary, instruct Gould regarding how to complete his work in accordance with the terms of the Settlement Agreement." Pa258. This procedure was consistent with the language of the Appointment Order, which authorizes the Receiver to "apply to [the court] at any time . . . for further or other instructions and for further authorization necessary to enable the [r]eceiver to properly fulfill its duties hereunder[.]" Pa185-190. It was

also consistent with New Jersey law. See, Tuttle v. State Mut. Liability Ins. Co., 2 N.J. Misc. 973, 974 (Ch. 1924) ("A receiver, as an officer of this court, is of course entitled to the assistance and instruction of the court as to matters arising in the administration of his trust.").

Gould's counsel had filed a letter to the effect that he was "seeking [the Court's] advice as to the procedure [it would] follow to satisfy [the Appellate Division's] court's orders" and asking for "instructions on how to proceed." Pa260-262.

Providing instructions "to" do something, is plainly different than providing instructions as to "how to" do something. See Flanigan, 175 N.J. at 606. The Trial Court failed to give effect to the Appellate Division's mandates. See Travelers Indem. Co., 557 U.S. at 150.

B. The Trial Court Erred By Imposing a 12% Interest Rate

The Trial Court also erred by adopting the 12% interest rate that Gould requested in lieu of the 10% interest rate that Judge Gibson applied to the Arbitration Award. Pa88; Pa497. As the Appellate Division Decision made clear, there is no basis to disturb the Arbitration Award, which the Trial Court had confirmed in 2013 and the Appellate court partially upheld in two separate appeals in 2015. Pa246. The same holds true in the present instance.

In granting Gould's request for 12% interest, the Trial Court erroneously adopted Gould's speculative contention that Judge Gibson make a "mistake" in setting interest at 10%. Pa491-Pa497. Such conjecture is not a basis. See, McHue Inc. v. Soldo Const. Co., 238 N.J. Super. 141, 147-48 (App. Div. 1990); N.J.S.A. 2A:23B-23.

The Trial Court should have estopped Gould from claiming 12% interest on the ground that it violated his duty of good faith. The doctrine of equitable estoppel exists "to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 193 (2013) (citation omitted). It applies to preclude a party from "repudiat[ing] a course of action on which another party has relied to his detriment." Id. at 194.

At no time prior to 2021 did Gould ever indicate that he would be seeking 12% interest. In fact, Gould admitted that he was previously willing to recognize the 2% difference in interest but seemingly decided to retaliate against Plaintiffs and, thus, "change his mind." Pa299-303. This is inconsistent with the duty of good faith that applies to receivers. See Kim, 327 N.J. Super. at 554 (the receiver "must act reasonably and in good faith."); Id. The Trial Court, therefore, erred by awarding 12% interest simply because it thought that this was "solely within the province of Gould." Pa497.

POINT III

THE ATTORNEYS' FEE AWARD MUST BE OVERTURNED.
(Raised below; Pa605-606, 631)

The Trial Court's partial award of attorneys' fees should be reversed, and no attorneys' fees should be awarded. The Association moved for entry of Judgment plus attorneys' fees and costs, on February 8, 2024, seeking $97,718.27 ($96,870.00 in attorneys' fees and $848.27 in costs).[8] Pa343-347. The Trial Court erroneously awarded a portion of the fees sought. Pa605-606. The fee award was not authorized under the Appellate Division Decision, the American Rule, the terms of the Settlement and Term Sheet, or pursuant to any other statute, case law or rule.

An Appellate Court reviews an award of counsel fees based upon an abuse of discretion. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)). The court will overturn a counsel fee decision upon a showing of an abuse of discretion involving a clear error in judgment. Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010). See also Occhifinto v. Olivo Constr. Co., LLC, 221 N.J. 443, 453 (2015).

"In the field of civil litigation, New Jersey courts historically follow the 'American Rule,' which provides that litigants must bear the cost of their own

[8] Subsequently, Gould sought additional attorneys' fees purportedly incurred after February 8, 2024. Pa672-677.

attorneys' fees." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). A prevailing party can only recover those fees if they are expressly provided for by "statute, court rule, or contract.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001)). Judge Pickering in his Memorandum of Decision dated July 26, 2024, recognized that courts generally disfavor award of attorneys' fees. Pa609-631.

In conformance with the strong public policy against shifting counsel fees, Rule 4:42-9(a) provides that "[n]o fee for legal services shall be allowed in the taxed costs or otherwise, except" in the following eight areas: 1) in a family action; 2) out of a fund in court; 3) in a probate action; 4) in an action for foreclosure of a mortgage; 5) in an action to foreclose a tax certificate; 6) in an action upon liability or indemnity policy of insurance; 7) as expressly provided by rules in any action; and 8) in all cases where attorneys' fees are permitted by statute. See also In re Est. of Folcher, 224 N.J. 496, 516 (2016) (listing statutes "that allow for fee shifting for the public good").

The only basis upon which the Association might be entitled to recover attorneys' fees is by contract. The Appellate Division previously ruled in its decision rendered on September 6, 2023 that the April 2018 Settlement Agreement and Term Sheet, entered into by the Plaintiffs and the Association governs their interactions. Pa239, 244, 258. It is a "contract," and should be honored and enforced like any

other contract. Pa308-11, 325-326. "When examining the terms of a settlement agreement, [courts] are guided by the rules of contract construction." Globe Motor Co. v. Igladev, 436 N.J. Super. 594, 601 (App. Div. 2014). Courts "examine the plain language of the contract[.]" Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 115-16 (2006). In doing so, courts should "read the document as a whole and in a fair and common sense manner." Harder ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009) (citation omitted). The Appellate Division held that it was "not the function of the Court to rewrite or revise an Agreement when the intent of the parties is clear." Id. "The Court cannot make a new and better contract for [the parties] than they made for themselves." Pa239.

At the outset of this litigation in 2017, the Association filed a Counterclaim against Plaintiffs for allegedly unpaid assessments plus attorneys' fees in accordance with the By-Laws. Pa640-658. The 2018 Settlement and Term Sheet provided that each party was to bear its own costs and fees, "with the exception that Plaintiffs are only responsible for $2,500.00 of the Association's fees for this litigation." Pa127-134. The parties confirmed in the Stipulation that "[a]ll claims brought by and between the Parties against each other in the above-captioned action," including the Association's counterclaim seeking the unpaid assessments and attorneys' fees in accordance with the By-Laws, "be and hereby are dismissed with prejudice and without costs." Nowhere in the Settlement Agreement or the Term Sheet is there

language to the effect that Plaintiffs were responsible for attorneys' fees incurred by the Association related to the enforcement of the Settlement Agreement and the Term Sheet beyond that agreed by the parties. Pa127-134.

The Trial Court erroneously adopted the Association's contention that nothing in the Settlement Agreement "nullified" the fee provision in the By-Laws for purposes of the Association's application. In general, "a subsequent contract covering the same subject matter made by the same parties" will "supersede[]" the "earlier contract and become[] the only agreement on the part of the parties on the subject matter." Rosenberg v. D. Kaltman & Co., 28 N.J. Super. 459, 463-64 (Ch. Div. 1953) (citation omitted); see also, 13 Corbin on Contracts § 71.1 (rev. ed. 2021) (stating that a court considering a "substituted contract" claim must construe "the two contracts . . . together" and, "[i]nsofar as they are inconsistent, the later one prevails; the remainder of the first contract, if consistent with the second in substance and in purpose, can be enforced").

By the September 6, 2023 Appellate Division decision, the Trial Court was remanded to consider certain issues, Pa239-240, *but did not remand for consideration of attorneys' fees incurred in connection with either the Trial Court proceedings or the Appellate Court proceedings*. Based upon the terms of the Settlement Agreement and Term Sheet, the Receiver was only to review all of the Association's finances and engage a Certified Public Accountant to determine the

amount of each unit owner's financial obligation under the Settlement Agreement. Pa127-134. The Appellate Division decision was premised solely upon the obligations set out in the Settlement Agreement and Term Sheet. At no time while this matter was pending before the Trial Court and before Plaintiffs filed its Notice of Appeal -- and/or any time before the Appellate Division remanded the case -- did the Defendant ever make an application for attorneys' fees in connection with any of these proceedings. The original application was filed by the Receiver on April 9, 2020. Pa147-150. Nowhere in that application did the Receiver seek to have the Trial Court award attorneys' fees, nor did his form of Order or Certification seek attorneys' fees. See Pa147-150. The Order for Judgment entered by Judge Pickering on February 6, 2024 denied Plaintiffs' Motion to enforce the terms of the Settlement Agreement and granted the Receiver's Motion for Judgment as follows:

> "Judgment be and the same is hereby entered in favor of Bell Tower Condominium Association and against George Haffert and Teresa Downey, jointly, severally and in the alternative in the amount of $84,692.85."

Pa462-497. Entering an attorney fee award in that circumstance was improper.

Due to the long history of this dispute, the prior Appellate Division decisions , and the Arbitration Award by retired Judge Anthony Gibson provide extensive guidance on the possible award of attorneys' fees and the necessity for a rigorous examination of those fees. Pa93-98; Pa107-110; 38-92. The award by the Trial Court did not comport with this guidance.

After the Appellate Division sent the matter to ADR before Judge Gibson, see Bell Tower Condo. Ass'n v. Haffert, 423 N.J. Super. 507 (App. Div. 2012), Pa10-15, Judge Gibson found that the Association's request for attorneys' fees in connection with the arbitration was unreasonable and "grossly disproportionate to the amounts in controversy." Pa82-83. Judge Gibson noted that case law and the Rules of Court required that a claim for attorneys' fees "pass the test of reasonableness" and therefore denied the award. Pa82-83. Judge Gibson's explained in his award:

> "the fact that an association is entitled to be reimbursed for the reasonable fees and costs…does not mean that every choice that an association makes to fulfill that right is automatically reasonable and/or justifies an award of attorneys' fees."

Pa82-83. In the case of the arbitration, Judge Gibson noted that the total fees and costs incurred by the Association, of $131,489.00, was disproportionate. Id. at 86-89. The same is true here; Plaintiffs' request for attorneys' fees is excessive and unreasonable.

In 2015, in yet another decision in the continuing dispute between the parties, the Appellate Division explained the critical importance of the Trial Court making adequate findings with respect to attorneys' fee awards, which the Trial Court did not do here. Pa93-98. In that 2015 Opinion, the Appellate Division remanded the matter back to the Trial Court to make findings supporting its award of $20,450.00

in attorneys' fees. The Appellate Division specifically directed the Trial Court as follows:

> Certainly, the Judge was empowered to make an award of fees (citation omitted), but the Judge was also required to make adequate findings about the quantum of the award of sufficient content and clarity as to permit the parties' understanding of his rationale and to promote our informed review of the determination. This he failed to do.[9]
>
> In his written decision, the Trial Judge first stated that "the primary aim" of any fee award "is to approve a reasonable attorney's fee that is not excessive."
>
> ***
>
> The Judge then cited the various factors contained in RPC 1.5(a) to be considered in assessing the reasonableness of the fee, (citation omitted) but he did not expressly apply any of those factors to circumstances presented…

Pa97-98.

RPC 1.5(a) states that a "lawyer's fee shall be reasonable" and notes various factors that must be considered in determining reasonableness, including: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time

[9] The facts in the present case vary from the facts in 2015 since no Settlement Agreement and Term Sheet existing until 2018.

limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent."

Following remand and six (6) months later in 2015, the Appellate Division issued a second opinion regarding the attorneys' fees issue, finding the Trial Court's opinion on remand was again inadequate on the issue of attorneys' fees. Pa107-110. Indeed, the Appellate Division exercised its original jurisdiction and decreased the Plaintiffs' obligation to pay attorneys' fees from $20,450.00 to $5,217.91. Pa107-110. The Appellate Division took notice of the fact that the Trial Judge did consider reasonableness but also found that the Trial Judge did not expressly apply any of the factors found in Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004), instead only "generally concluded that 'when reviewing all of the factors to be considered'…", that Defendants were required to pay the same amount originally ordered. The Appellate Division considered the determination by the Trial Court to constitute only "naked" conclusions and then determined that "the amount of time incurred to be excessive…."

In Rendine v. Pantzer, 141 N.J. 292, 335 (1995), the Supreme Court of New Jersey directed trial courts "not [to] accept passively" attorneys' submissions relating to purported legal fees but instead, to "evaluate carefully and critically the

aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application"; see also Szczepanski v. Newcomb Medical Center, 141 N.J. 346, 366 (1995) (explaining that a trial court should carefully and closely examine fee requests to discern whether hours were reasonably expended). Indeed, the inquiry involves more than just "[c]ompiling raw totals of hours spent," as "[i]t does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended." Id.

In Rendine, supra, at 335, the Supreme Court further explained that focus must be on "the amount of time reasonably expended" rather than merely "actually expended." (Emphasis added). The Supreme Court has also explained that "[f]ee-shifting cases are not an invitation to prolix or repetitious legal maneuvering. Courts should consider the extent to which a defendant's discovery posture, or a plaintiff's, has caused any excess expenses to be incurred." Szczepanski, 141 N.J., supra, at 366. Therefore, a reduction may be appropriate if "the hours expended, taking into account the damages prospectively recoverable, the interests to be vindicated, and the underlying statutory objectives, exceed those that competent counsel reasonably would have expended." Rendine, 141 N.J. at 336.

In Ultimate Force v. Zoning Board of Rochelle Park, 2023 WL 3400426 (App. Div. 2023), the Court vacated an award of attorneys' fees and remanded for reconsideration. Pa668-671. The Court reiterated that in setting an award for

attorneys' fees, a trial court must ensure, above all, that the award is reasonable. (Citing Furst, supra,182 N.J. at 21-22). The Court noted that to facilitate that review, Rule 4:42-9(b) requires counsel for the prevailing party to submit a certification of services sufficiently detailed to permit accurate calculation—that is, with "fairly definite information as to the hours devoted to various general activities ... and the hours spent by various classes of attorneys." Walker v. Giuffre, 209 N.J. 124, 131 (2012) (quoting Rendine, supra, 141 N.J.). Here, like in Ultimate Force, the Court is not permitted to accept the entries blindly.

Rule of Professional Conduct 1.5(a) "commands that '[a] lawyer's fee shall be reasonable' in all cases[.]" Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004) (quoting RPC 1.5(a)). RPC 1.5(a) "requires courts to consider" eight (8) enumerated factors. Litton, 200 N.J. at 387. The Trial Court's most recent attorney fee award runs afoul of all of this prior guidance. The Trial failed to abide by the Appellate Division decisions and case law that a trial court must consider in determining whether to grant attorneys' fees. It cannot make such an award based upon "naked" conclusions but must make a thorough determination of whether the time spent is appropriate or excessive. In Furst, supra, 182 N.J. at 21-22, the Supreme Court reiterated what was required to be set forth by a party seeking attorneys' fees. It is clear that counsel for the Association failed to satisfy those specific requirements.

The 107 pages of invoices attached to Mr. Greenblatt's Certification lack any detail relating to the services alleged rendered by its attorney. Pa345-455. It was impossible for the Trial Court to "evaluate carefully and critically" the hours claimed to have been expended with regard to the Superior Court proceedings. The invoices provided in support of the claim are extraordinarily vague, reference unknown individuals, fail to explain the nature of any legal research, and fail to explain how or why they relate to the matter at hand. Furthermore, there is no allowance for the fact that reflects a substantial portion of the legal services rendered by the Association prior to the filing of the Notice of Appeal related to the failure on the part of the Individual Defendants to make their required payments.

The invoices were not sufficiently detailed as to allow the court to determine whether the fees incurred by the Association were reasonable. These deficiencies included, among other things:

> (1) references to receipt and review of correspondence without any explanation as to why and how they related to this matter and why the time should be billed to Plaintiffs; (2) legal research without any explanation as to the nature of that research; (3) telephone conferences without any explanation as to why; (4) entries relating to correspondence, telephone calls, etc., to persons who are unidentified, such as "SS", "J", "MB", "TD", "PG", "CB", etc.; (5) block billing for which there is no breakdown of time expended on each task; (6) entries related to engineering and construction work; and (7) entries that are totally unrelated to this matter, such as the invoices dated August 27, 2021 and September 30, 2021.

The invoices are replete with extraordinary vagueness. Intertwined within the invoices are entries which appear to be duplicates for which counsel did not seek compensation from the Plaintiffs. No explanation is provided as to why these entries which sound like duplicates are not being charged and the others are being charged.

Judge Pickering found that the Settlement Agreement did not deal with any attorneys' fees incurred after the April 2018 settlement date, yet the Appellate Division found that the Settlement Agreement was binding on all of the parties related to the settlement instructions. The determination by the Trial Court that the Settlement Agreement "resolved all fees up until the date of the Settlement Agreement and Term Sheet," Pa614, cannot be found anywhere in that document or in the Appellate Division Decision.

Judge Pickering found that "a billing entry is not required to include an explanation as to why and how correspondence relates to a matter." Pa617. It was Judge Pickering's opinion that correspondence between counsel or clients is sufficient to evidence that the entries relate to the matter. Judge Pickering found that he had "no reason to suspect that Greenblatt is a liar or fraudster." Pa617. That is not part of the consideration by a court in determining the reasonableness of attorneys' fees and upon this argument alone, the attorneys' fees should be denied.

As it relates to the entries which Mr. Greenblatt denoted as "no charge", Judge Pickering simply accepted Mr. Greenblatt's response that "he chose not to bill

certain entries." Pa618. As it relates to the issue of block billing, Judge Pickering simply found that this was somehow an advantage to the client, but nowhere explains how that could be the case. Pa619-620.

Due to the vagueness in Defendants' submission, it was impossible for the Trial Court to "evaluate carefully and critically" the hours claimed by the Association's counsel to have been expended regarding the Superior Court proceedings.

CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that their appeal be granted and the Trial Court's Judgment be reversed.

Respectfully submitted,

GREENBAUM, ROWE, SMITH & DAVIS LLP
Attorneys for Plaintiffs/Appellants/Cross-Respondents

/s/ *Dennis A. Estis*

By: _____
DENNIS A. ESTIS

Dated: November 26, 2024

Superior Court of New Jersey
Appellate Division

Docket No A-003853-23

GEORGE HAFFERT AND TERESA DOWNEY

Plaintiffs,

vs.

BELL TOWER CONDOMINIUM ASSOCIATION, CAROL BARNOSKY, MARTIN J. MEHL, TARA MEHL, PAUL GLODEK, JILL GLODEK, DOUGLAS MORRISON and GLORIA MORRISON

Defendants.

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION, CAPE MAY COUNTY Docket CPM-L-478-17

Sat Below:
Hon. James H. Pickering, Jr., J.S.C.

BRIEF OF RESPONDENT/CROSS APPELLANT
BELL TOWER CONDOMINIUM ASSOCIATION

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TABLE OF CONTENTS OF BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This is the third appeal taken by the plaintiffs since settlement of their dispute in 2018. Based on the terms of settlement, the receiver, Alan I. Gould (Gould), hired a CPA to calculate the amount owed by the plaintiffs to Bell Tower Condominium Association (Association). That amount was $55,414.36. When demand to pay was made, the plaintiffs threatened legal action against the receiver and so he applied to the court for instructions. Instead of enforcing the terms of the settlement, the trial judge considered the report of an accountant obtained by the plaintiffs and engaged the services of a third accountant to examine the records. After two more years of litigation, the trial judge himself calculated that the plaintiffs owed $12,047.50. Unsatisfied with the outcome, the plaintiffs appealed and the receiver cross appealed. On September 6, 2023, the Appellate Division, in a 45 page opinion (Pa215), reversed almost every order of the trial court, concluding that the trial judge should never have second guessed the receiver and should have simply enforced the terms of the Settlement Agreement as written. The Appellate Division remanded to the trial court, instructing that it "to the extent necessary" instruct the receiver on how to complete his work in accordance with the Settlement Agreement. The appellate court also instructed the trial court to reconsider the plaintiffs' motion to compel the production of

documents, having opined that it might concern a matter of interpretation of settlement contract which may require further fact finding, and that the trial court opinion did not comply with R.1:7-4(a).

In June 2023, the plaintiffs appealed an order of the trial court as being inconsistent with the Settlement Agreement which appeal they withdrew shortly after this Court's decision of September 6, 2023.

In further proceedings before the trial court, that court followed the directions of the Appellate Division to the letter, ultimately issuing a 34 page opinion outlining the bases for the court's rulings and entering judgment for the Association against the plaintiffs for $84,692.85. Thereafter, with attorney fees added pursuant to statute and the bylaws of the Association, judgment was amended to $140,522.85. In doing so, the trial court deducted the cost of legal services in the Appellate Division that is the basis of the cross appeal.

LEGAL ARGUMENT

POINT I

The Trial Court Complied With the Remand Instructions Of the Appellate Division to Reconsider Plaintiffs' Motion. (Pa464)

In its decision of September 6,2023 (Pa215), the Appellate Division concluded that the trial judge's bench oral opinion, denying the plaintiff's motion to enforce the settlement agreement by producing various documents fell short of that which was required by R.1:7-4(a) and therefore, was not amenable to appellate review. The Court then vacated the order of the trial court dated December 22, 2020 to the extent that it denied the motion and remanded, directing that the trial court reconsider the motion and comply with R.1:7-4(a). The Court provided guidance to the trial court by noting that to the extent the motion presented a request for discovery, it should be denied, but to the extent that it sought enforcement of a term of the settlement, it should be considered by the court as a contract issue. The appellate court focused on the provision that the board members "provide all financial and other relevant documents" and was unsure of what the trial court had decided and why it had reached its decision. The Court stated that what was to be considered a relevant document was a matter of contract interpretation and therefore an issue for the trial court to decide.

On February 6, 2023, the trial court issued a written opinion in which the judge devoted the first 21 pages to the plaintiffs' motion. (Pa464) For the reasons expressed by him, he denied the motion and the plaintiffs now complain that the trial judge failed to comply with the requirements of R.1:7-4.

First, (Pb25) they claim that he found that "further fact finding is unnecessary," despite the fact that the Appellate Division directed him to conduct further fact finding to determine what constitutes a "relevant document." Actually, the Appellate Division did no such thing. The Court simply observed that a determination of what constitutes a "relevant document" was "an issue of contract interpretation which may require further fact finding." (Pa255) (*emphasis supplied*) That decision was left to the trial court. In fact, the trial court did conduct further fact finding in the form of certifications submitted by each of the unit owners and the receiver. The statement of the trial judge in his opinion of February 6, 2023 that any further fact finding was unnecessary was his exercise of his judgment, consisted with the directive of this Court that he "may require further fact finding."

The plaintiffs complain that "the trial court developed its own definition of relevant without referencing any legal authority." (Pb26) What legal authority must the trial judge cite to support the definition of "relevant?" The plaintiffs cite to

various cases defining "relevant" as "germane," "pertinent" or "tending to prove or disprove a matter in issue." If the trial judge had cited and adopted any of the definitions quoted by the plaintiffs as his own, it would have been consistent with his conclusion that, "This court finds that relevant in this context means documents necessary to carry out the settlement agreement." (Pa473)

The plaintiffs complain (Pb27) that the trial judge erroneously considered the phrase "in their possession," contained in the Consent Order Appointing Receiver (Pa185) of July 5, 2018. The plaintiffs then immediately make a point of the fact that pursuant to the Stipulation of Settlement (Pa113), the Term Sheet (Pa124), and the Appointment Order (Pa185), they "comprise one integrated agreement." (Pb27) They then state that when interpreting an integrated agreement, "no one element stands alone and can be read without reference or consideration of the others." (citing) That is exactly what the trial judge did. The plaintiffs claim that "the parties were aware of this phrase (¶9 of the Appointment Order) at the time they entered into the Settlement Agreement but chose not to include it in the Term Sheet." In fact, the Term Sheet was prepared at the conclusion of the mediation, the Stipulation of Settlement was then prepared by the plaintiff's attorney and lastly, the Appointment Order was consented to and entered by the court.

Judge Pickering considered the Appellate Division opinion and what was required of him. He requested further certifications from the parties as a fact finding process. He then, in a careful, thoughtful, thorough and detailed opinion, analyzed the facts and concluded that the documents demanded by the plaintiffs were not relevant as not being necessary to carry out the terms of the settlement, *i.e.*, the task of the CPA, Stauffer. Furthermore, he found that the integrated agreement of the parties limited documents to those in existence at the time of settlement and in the possession of the Board Members. In 21 pages, he produced what might serve as a model for compliance with R.1:7-4(a).

The argument of the plaintiffs is totally without merit.

POINT II

The Trial Court Properly Granted the Receiver's Motion and Entered Judgment. (Pa484)

The plaintiffs state that the Appellate Division made it clear that the remand was to allow the trial court to (1) give full effect to the Settlement Agreement, (2) permit Gould to complete his work by addressing any deficiencies in the Stauffer Report and (3) to the extent necessary, instruct Gould in how to complete his work in accordance of the Settlement Agreement. (Pb28) The Appellate Division was telling the trial court that it should not have interfered and injected itself into the decisions concerning

the settlement. Gould had asked for instructions to confirm that he was entitled to rely on the Stauffer Report if he decided to do so. That is what the appellate court said and that is what the trial judge then instructed Gould to do.

The plaintiffs complain that Gould never certified that he or Stauffer reviewed records back to 2010. (Pb29) It was Gould's decision that records before 2012 which qualified for review by Stauffer did not exist. It was the position of the Appellate Division that Gould make the decision. That was what the trial judge then instructed Gould to do. The plaintiffs contend that it is based on "disjointed reasoning," but fail to explain that statement. They claim (Pb30) that there was no explanation concerning records from 2010 to 2012 that were available. We assume that they must be referring to some bank statements in their possession. Mr. Stauffer did not rely solely upon bank statements. More importantly, to compute the amounts owed, he relied on deposit slips and canceled checks that were maintained by the bank from May 2012 on and that provided the full financial picture. We cannot know what went before May 2012 and whether, if the full bank records were available back to 2010, the plaintiffs would owe more or less than they do. Logically, unless they had paid in more than they were requested to pay, they would have owed the same or more than the amount of the judgment.

The plaintiffs then argue that the trial judge erred by concluding that Gould could decide to find the term of the agreement concerning records from 2010 to 2012 unenforceable, citing a number of case decisions. (Pb31) A reading of those decisions discloses that they stand for the proposition that courts should strain to give effect to a settlement agreement, not to a particular term of a settlement agreement that may be impossible to perform. Likewise, the plaintiffs' citation to Smith v. Fireworks by Girone, Inc., *380 N.J. Super. 273, 291 (App. Div. 2005)* to support their claim that any "compelling circumstance that may warrant setting a settlement term aside include coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent," is misleading. That quotation in the court opinion applied to the enforcement of the settlement, not one term of the contract.

In subsection A of POINT II of the plaintiffs' brief (Pb31), the plaintiffs conflate the trial court's supervision of Gould as a receiver and its ability to second guess his decisions according to the Settlement Agreement. This Court made it abundantly clear that the trial judge had no authority to do the latter. The plaintiffs cite to a case standing for the proposition that a receiver's actions must be "free of fraud, self-dealing, or unconscionability" and he or she "must act reasonably and in good faith." What fraud, self-dealing, unconscionability or bad faith

do the plaintiffs claim? They point to none. The trial court never claimed it had no authority to generally supervise Gould. Contrary to the assertion of the plaintiffs (Pb33), the trial court was justified in believing "that it had adequately instructed Gould simply by directing Gould to complete his work in accordance with the Settlement Agreement." That is exactly what the Appellate Division had told him. The plaintiffs claim that "(t)he Appellate Division required more than this." (Pb33) To support that statement, the plaintiffs quote the Appellate Division (Pb33) which remanded so the trial court could "to the extent necessary, instruct Gould regarding how to complete his work in accordance with the terms of the Settlement Agreement." (Pa258) (*emphasis supplied*) The trial judge did just that. He instructed Gould to make the decisions with regard to any claims of inadequacy of the Stauffer report. That is exactly what Gould had initially sought years before and were the instructions given by the trial court "to the extent necessary."

The plaintiffs then complain in section B of POINT II that the trial judge erred in applying a 12% interest rate, contending that he should have applied the 10% rate applied by Judge Anthony L. Gibson, when arbitrating a separate matter years before. (Pb34) Contrary to the assertion of the plaintiffs, Judge Pickering did not "adopt" Gould's belief that Judge Gibson made a mistake and did not rely on such for his final determination.

The plaintiffs attempt to rely on the doctrine of estoppel based on Gould's earlier claim to 10% interest. Quoting the law of estoppel as requiring that a party has relied upon a representation to his detriment, the plaintiffs failed to say how that was so in this case. The certification of Gould (Pa299) clearly sets out the facts concerning the rate of interest and why he had earlier thought to gratuitously forgo charging the full amount. The fact remains that the statute provided that interest may be charged if included in the bylaws, the bylaws provided for 12% and Gould charged 12% interest. That was his decision that he believed was consistent with his fiduciary obligations.

POINT III

With the Exception Of the Issue On Cross Appeal, the Judgment Awarding Fees Should Be Affirmed. (Pa609)

Appellate review of an award of attorneys' fees is deferential, Packard-Bamberger & Co. v. Collier, *167 N.J. 427, (2001)*, a "fee determination by trial courts will be disturbed only on the rarest occasions and then only because of a clear abuse of discretion." Rendine v. Pantzer, *141 N.J. 292, 317 (1995)*.

"Although New Jersey generally disfavors the shifting attorney's fees, a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard - Bamberger & Co. v. Collier, *Supra*, at 440. R.4:42-9

allows awards of attorneys' fees in specific situations, including "[i]n all cases where attorney's fees are permitted by statute." R. 4:42-9(a)(8).

N.J.S.A. 46:8B-15(e) of the Condominium Act provides that the Association may levy and collect assessments, together with interest, late fees, and reasonable attorneys' fees, if authorized by the master deed or bylaws. Here, the bylaws provided for reasonable attorneys' fees. Bylaws of a corporation are a contract and are to be interpreted as such. Highland Lakes Country Club and Community Club Asso. v. Franzino, *186 N.J. 99 (2006)*.

The plaintiffs begin their criticism of the trial court's opinion by pointing to a provision in the Term Sheet limiting the plaintiffs' responsibility for Association legal fees to $2,500.00, thereby suggesting that it has some application to this matter. (Pb38) Not surprisingly, nothing more is said by the plaintiffs with regard to that provision. The implication suggested is disingenuous. The plaintiffs know full well that the provision was to compromise an amount for fees already incurred by the date of settlement and had no relation to future fees. To be sure, the parties had settled and further litigation was not anticipated. (Certification of Sanford Schmidt, Esq., Da1)

The plaintiffs would have us believe that the bylaws do not apply since obligations of the plaintiffs were based upon the Settlement Agreement and Term sheet and not the assessments made

by the Association. The litigation that settled sought payment by the plaintiffs of money owed by them, which amount was in dispute. The terms of the settlement were a vehicle by which the amount owed by them for assessments past due would be established. All were subject to the bylaws of the Association. There have been assessments made since the settlement, paid by the other owners, but deliberately not paid by the plaintiffs.

The plaintiffs' argument continues with the same theme, that there was no provision in the Settlement Agreement for the payment of attorneys' fees for the enforcement of the Settlement Agreement and Term Sheet. The plaintiffs totally disregard the fact that the terms of the Settlement Agreement and Term Sheet were entirely based upon the enforcement of the Association's right to be paid assessments. The bylaws of the corporation were not negated as a result of the parties having agreed on the process by which the amount would be determined.

The plaintiffs then point to the fact that at no time before the remand by the Appellate Division did the defendant apply for attorneys' fees and that nowhere in the application filed by the receiver on April 9, 2020, did he seek attorneys' fees. (Pb40) The receiver was not seeking a judgment against the plaintiffs. It was an application by the receiver for instructions. At that point in time, the receiver was unrepresented and had incurred no attorneys' fees.

Only a prevailing party may be entitled to attorney's fees. Packard -Bamberger & Co. v. Collier, *Supra*, at 440. Only after this Court remanded for further proceedings and those proceedings resulted in a judgment for the Association was the Association a prevailing party and entitled to attorneys' fees pursuant to the statute and bylaws. Within 2 days of the entry of judgment, the Association moved for the entry of judgment for fees. Having granted the motion, the trial judge amended the prior judgment. See Ricci v. Corporate Exp. of the East, Inc., *344 N.J. Super. 39 (App. Div. 2001)*.

The plaintiffs then (Pb40) suggest that the arbitration award of Judge Anthony Gibson in 2013 should have guided Judge Pickering in various respects. They claim that Judge Gibson found the fees sought by the Association to be grossly disproportionate to the amounts in controversy and that he therefore denied the fee application based on his requirement that a claim for attorneys' fees "pass the test of reasonableness." (Pb41) That assertion is somewhat disingenuous. Judge Gibson did not find that the fees of the Cooper Firm were unreasonable.

At the bottom of page 49 of his opinion, (Pa87) Judge Gibson stated that he did "not question that the charges reflected in those invoices were legitimate, that is, that the time listed was actually spent and that the rate was commercially reasonable." He simply excluded all charges made for the wrongly filed Superior

Court action and, of the remaining sum, given that each side prevailed on about one half of the issues, cut the baby in half.

The plaintiffs then seek to analogize opinions of this Court (Pa546, Pa107) in 2015 concerning the same parties to the matter presently before the Court, referring to the requirement that a trial court make adequate findings. (Pb41-43) The plaintiffs make no effort to show how the opinion by Judge Pickering fell short of the required detail nor do they provide any description of the 2015 trial court opinions found to be lacking which fell far short of the opinion by Judge Pickering. In fact, Judge Pickering undertook to conduct an extensive review of the billings and in detail, after a review pursuant to RPC 1.5 (a) and going so far as to examine some of the documents on eCourts, he explained in a 23 page opinion the bases for his conclusions.

The plaintiffs then again raise the matter of proportionality, questioning the number of hours expended versus the prospective damages recoverable. (Pb44) In Judge Anthony Gibson's Arbitration Award (Pa39), he did say that the fees on both sides of the matter before him were "grossly disproportionate to the amounts in controversy," but went on to say that "there are times when such results cannot be avoided." (Pa82) This case is a prime example of such a time. The litigious nature of the plaintiffs has been painful to the other owners who have suffered both economically and emotionally. The Appellate Division said

that the receiver has been right from the beginning. Should the Association then be penalized because to reach that end it was forced to defend and assert its position? The fact that the fees incurred by the Association are so high is the result of the persistent and unreasonable efforts of the plaintiffs which led to error by the trial court and prolonged litigation. The fees incurred are high in relation to the size of the judgments, but as Judge Gibson said, there are times when that cannot be avoided.

From the very beginning of the legal services performed for the Association, only twice did counsel for the Association file motions other than the fee motion, once on June 30, 2023 and once on September 14, 2023. Both were to seek the entry of judgments and both motions were granted. All services rendered were for the purpose of furthering the attempt to collect assessments which had been the subject of the settlement. Defense efforts were in response to the ongoing efforts by the litigious plaintiffs to avoid payment and maintain litigation which has been bleeding the other unit owners for over ten years.

The plaintiffs then assert that a "substantial portion" of the legal services rendered related to failure by the individual defendants to make required payments. (Pb46) That bald statement is unsupported and we do not know to what it refers. Importantly, to our knowledge, it was never raised below. The individual defendants have always made their required payments and, in fact,

have been credited for overpayments based on the Appellate Division opinion and remand.

The plaintiffs provide a laundry list of alleged deficiencies that they presented to the trial judge (Pb46), all of which he thoroughly addressed. Since the several years of litigation at the trial level were entirely upon motions filed, the trial judge was intimately familiar with the identity of the players and had no problem identifying them by their initials used on the bills to the client. Any question as to the nature of work done was available to the judge on eCourts and he availed himself of that resource. Charges related to engineering and construction work were specifically excluded by him. The entry for August 27, 2021 was excluded as an admitted error. (Da4) The contested entry for September 30, 2021 simply did not exist. As to block billing, although our courts have consistently approved of it, there is no reported opinion. As explained to the court below, a block of uninterrupted time applied to a file is more accurate and almost always to the benefit of the client. Considering minimum time charges, such as 1/10th of an hour, multiple tasks performed within 1 hour often result in a lesser charge than if billed separately.

The plaintiffs then question how Judge Pickering could find that the Settlement Agreement resolved the matter of fees to only the date of the settlement. (Pb47) A fair reading of the documents and a consideration of the history of the dispute provided the

basis for construction of the contract by the court. In addition, the court had the certification of facts submitted by Sanford Schmidt Esq. (Da1)

Finally, the plaintiffs then question how the trial judge could conclude that correspondence between counsel and other counsel or his client could be presumed to relate to the matter. (Pb47) As the plaintiffs know, the entire file was available to the court if it questioned what would otherwise be a compelling conclusion, especially given no contradictory evidence submitted by the plaintiffs.

Contrary to the closing statement of the plaintiffs, the trial judge did "evaluate carefully and critically" the hours claimed by the Association's counsel to have been expended, exercising judicious discretion.

CROSS-APPEAL

The Trial Court Had Authority to Award Fees For Legal Services On Appeal. (Pa609)

When considering the application for fees (Pa343), the trial court concluded that it was without authority to award fees for legal services rendered on appeal based upon its reading of R.2:11-4 and the case law. Counsel for the Association erroneously interpreted R.2:11-4 as not applying to fees based upon a contract but thereafter could not support that conclusion with case

citations. The trial judge undertook his own research of the law (Pa622), concluding that R.2:11-4 applied to contracts for the payment of fees and that absent a referral by the Appellate Division to the trial court to consider the award of fees, the trial court had no authority to award fees for services in the appellate court.

The Association was caught in what may be called a "Catch-22." Pursuant to the Rule, the Association was given 10 days after the Appellate Division decision to apply to the Appellate Division for fees. But the Association at that time was not entitled to fees. At that point in time, it was not a prevailing party. There was no provision in the Rule for application to the Appellate Division once the Association became a prevailing party and so, the only avenue left to it was the application to the trial court. Before the entry of final judgment on February 6, 2024 (Pa462), the Association had not established its right to an award of fees. Accordingly, on February 8, 2024 it filed its motion. (Pa343) The conundrum faced by the Association had been addressed by the New Jersey Supreme Court in 2023, a fact undiscovered by Association counsel and by the trial judge. In the case of Hansen v. Rite Aid Corp., *253 N.J. 191 (2023)*, the Court considered the situation in which an appellate court remands for further proceedings that results in a final judgment, establishing the party as a prevailing party. Noting that R.2:11-4, as written, forced one to apply to

the Appellate Division within 10 days of the Appellate Division opinion, the Court observed that it was "impractical and inequitable in certain settings." *Id.* at 223. In that case, on a remand for further proceedings and after entry of final judgment, the trial court had refused to award fees for services provided on appeal, as did Judge Pickering here. The Supreme Court acknowledged that the trial judge enforced the express language of R.2:11-4 to bar the application for fees on appeal, but went on to say that the situation demonstrated the impracticality and inequity of the Rule in a situation exactly as in the instant case. Borrowing from the federal system, the Supreme Court requested that its Civil Practice Committee propose an amendment to R.2:11-4, analogous to the Federal Rule, stating that

> *such an amendment would apply only to fee-shifting cases in which an appellate court reverses and remands for further proceedings, such that the party that has succeeded in the appeal is not yet a prevailing party entitled to an award of fees and costs. In such a setting, a party that later becomes a prevailing party by virtue of a determination on remand should be permitted to seek appellate legal fees directly from the trial court. Pending the Civil Practice Committee's recommendation of an amended Rule and the Court's consideration of that recommendation, courts, parties and counsel should proceed in accordance with the procedure for applications for appellate fees set forth above. Id. at 225.*

Unfortunately, Judge Pickering was not aware of that statement by the New Jersey Supreme Court when he ruled. He did have the authority to award the fees that he deducted. On July

15, 2024, the Rule was amended to become effective September 1, 2024, providing for the procedure followed by the Association in the present case. Accordingly, at the time Judge Pickering ruled on fees, the law was as stated by the New Jersey Supreme Court and the appellate court fees should not have been excluded.

CONCLUSION

For all of the forgoing reasons, subject only to the issue raised on cross appeal, the orders below should be affirmed, and the matter should be remanded to the trial court to reconsider the award of fees incurred between September 2021 and September 2023 for opposing and pursuing appeal.

Respectfully submitted,

GREENBLATT AND LAUBE, P.C.
Attorneys for Respondent/Cross-Appellant
Bell Tower Condominium Association

JAY H. GREENBLATT, ESQUIRE

Dated: December 17, 2024

GEORGE HAFFERT and TERESA DOWNEY, Plaintiffs/Appellants/Cross-Respondents, v. BELL TOWER CONDOMINIUM ASSOCIATION, CAROL BARNOSKY, MARTIN J. MEHL, TARA MEHL, PAUL GLODEK, JILL GLODEK, DOUGLAS MORRISON and GLORIA MORRISON, Defendants/Respondents/ Cross-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003853-23 **On Appeal From:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION DOCKET NO. CPM-L-478-17 Sat Below: Hon. James H. Pickering, Jr., J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS AND BRIEF ON BEHALF OF PLAINTIFFS/RESPONDENTS IN RESPONSE TO DEFENDANTS/RESPONDENTS' CROSS-APPEAL SUBMITTED PURSUANT TO RULE 2:6-4(e)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Plaintiffs/Appellants/Cross-Respondents George Haffert and Teresa Downey ("Plaintiffs"), two members of the Respondent/Cross-Appellant Bell Tower Condominium Association (the "Association"), submit this reply brief and brief as to the Cross-Appeal in response to the Association's Responsive Brief and Cross-Appeal Brief, dated December 18, 2024 ("Association Brief"), and the one-page Brief of the Individual Defendants/Respondents Carol Barnosky, Martin and Tara Mehl, Paul Glodek, and Douglas and Gloria Morrison ("Individual Defendants"), dated January 9, 2025 ("Individual Defendants' Brief").

Plaintiffs' appeal focuses on the clear errors made by the Trial Court in failing to abide by the directives contained in the Appellate Division's Decision of September 6, 2023 ("Appellate Decision"). Pa215. The Appellate Decision "affirm[ed] in part and vacat[ed] in part the challenged orders [of the Trial Court], and remand[ed] for further proceedings," Pa216, with specific instructions that the Trial Court failed to follow.

First, Plaintiffs appeal the clear error by the Trial Court in failing to abide by the terms of the Settlement Agreement and Term Sheet, Pa113, the terms of which were agreed to by Plaintiffs and the Individual Defendants, including that the Individual Defendants were required to turn over all financial and other relevant documents to the Receiver and/or CPA. "All Unit Owners shall be

entitled to review any documents provided to the Receiver and/or the CPA." Pa125. The Appellate Decision instructed the Trial Court to make requisite findings to confirm whether **all** such documents were provided, which the Trial Court failed to do, instead relying on pro-forma copy-paste Certifications that the Trial Court stated made "further fact finding unnecessary." Pa473. Trial Court's Initial Decision dated February 6, 2024 ("Initial Decision"). Pa462.

Second, Plaintiffs appeal from the Initial Decision granting the Receiver's motion to enforce the Settlement Agreement, Pa463, without giving effect to the terms of the Settlement Agreement and Term Sheet, overlooking glaring deficiencies in the methodologies and conclusions reached by the Receiver and/or the CPA, including a failure to review almost two (2) years of bank records which the parties had explicitly agreed had to be considered. Pa125.

Third, Plaintiffs appeal from the Trial Court's second Order, dated July 26, 2024 ("Second Order"), partially granting the request of Defendants/Respondents for attorneys' fees, since the Settlement Agreement expressly excluded attorneys' fees awards from the terms of the parties' Settlement agreement, and, as the Appellate Division recognized, that Agreement is the binding contract between the Parties. See Pa233-239.

LEGAL ARGUMENT[1]

POINT I

The Trial Court Erred By Failing to Compel Production of Documents

At the time of its remand, the Appellate Division observed in the Appellate Decision that the Trial Court had failed to make the requisite findings regarding production of certain documents, and in vacating the Trial Court's prior Order as inadequate, remanded for the Trial Court to "reconsider anew," Pa328, and confirm that all documents required under the Settlement Agreement and Term Sheet were provided.[2] Pa329. The Appellate Division had further found that the Trial Judge had made its determination regarding document production "without finding facts or rendering conclusions." Pa327. The Appellate Division held that, pursuant to Rule 1:7-4, the Trial Judge was required to make factual findings and render legal conclusions. See Terranova v. Gen Elec. Pension Tr., 457 N.J. Super. 404, 409 (App. Div. 2019) (citing R. 1:7-4(a)).

[1] The Individual Defendants' Brief joined in the Association's Opposition to the Appeal and in support of the Association's Cross-Appeal. See January 9, 2025 Letter from Judith A. Schneider, Esq., to Ms. Denise L. Koury.

[2] All capitalized terms not defined herein shall have the same meaning as set forth in the Plaintiffs' original Brief, dated November 26, 2024 ("Original Brief").

When Plaintiffs initially moved for production of various documents, Plaintiff, Teresa Downey, certified that certain specific categories of documents were not provided as required by the Term Sheet and Settlement Agreement and identified the "missing categories of documents," to include:

> All documentation provided to Gould or Stauffer, all correspondence among Schmidt, Gould, Stauffer, the property manager, the Association's counsel, and the individual defendants; all documents provided to Gould by one of the individual defendants, Martin J. Mehl, 'correspondence and agreements' among Sandford Schmidt, the Association and the individual defendants regarding Schmidt's fees; 'correspondence and agreements between Cooper Levenson and Bell Tower,'… 'correspondence and agreements relating to Steven Scherzer's representation to the [individual defendants] that he had found someone to pay for part of the litigation, including the identity of the person'; 'documents…the Association received from the bonding company relating to plaintiffs' payment in 2016, including tax forms,' and 'documents relating to the procurement of D&O [Director and Officer] insurance.' Pa248-249.

Ms. Downey certified on November 18, 2020, at Paragraph 18, that she and her attorneys "requested on numerous occasions that Mr. Gould provide us access to the documents required by the Term Sheet." See Pa180-182, at Paragraphs 17-22; See also Pa337-338. The categories of documents were sought unsuccessfully by Plaintiffs despite the Term Sheet's clear requirement for access of all documents to all unit owners. Pa336-339, at Paragraphs 18 to 27.

The Trial Court's Initial Decision, Pa462, was unduly motivated by an apparent interest in bringing the matter to a close, rather than carefully scrutinizing Mr. Gould's determination. Mr. Gould had certified on November 2, 2023 that

Martin J. Mehl, one of the Individual Defendants, had turned over "four boxes of documents" to Mr. Gould and that Mr. Mehl represented that those boxes were "all financial and other documents provided to me by Marty Mehl." Pa300, at 4. Mr. Gould "was satisfied with that representation, and it was my [Gould's] decision to rely upon it." Id. There was never any specificity as to what was contained in those boxes.

On October 23, 2023, the Trial Court had entered an Order which set out that Ms. Schneider was representing "that each of her clients would be submitting an affidavit/certification which "*addresses the production of various documents sought by Plaintiffs in their Motion.* Said affidavits/certifications shall be provided by October 31, 2023." Pa272-273 (emphasis added).

Instead, making a mockery out of the Appellate Decision, all the Individual Defendants submitted were form (stock) certifications from the Individual Defendants (Carol Barnosky, Martin Mehl, Paul Glodek, Douglas Morrisson and Gloria Morrison), containing the copy-pasted uniform language for all of the Individual Defendants:

> I hereby certify that any papers, documents and other materials affecting the finances and operation of the Condominium, or any part or parts thereof, which I had in my possession I turned over to Martin Mehl in compliance with the July 10, 2018 Amended Stipulation of Settlement and Consent Order of Dismissal with Prejudice and Without Costs and the April 20,2018 Term Sheet dated July 5, 2018.

See Pa268-298. Putting form over substance and merely regurgitating legalese in order to pass the Appellate Division review was woefully insufficient.

It was clear error for the Trial Court to rely on these wholly inadequate, pro forma Certifications in response to the Appellate Division's directive. In its Initial Decision, the Trial Court stated, "This court finds that the Board Members/unit owners provided all the documents they had in their possession. First, each certified that they did. There is no fact in this record that could lead the court to conclude that the unit owners lied…" Pa474. The Court held that "additional Certifications of Gould and each Unit Owner makes further fact finding unnecessary." Pa473. There was absolutely nothing more than a completely pro forma attempt to "rubber stamp" and resolve the issue as quickly as possible.

In the Initial Decision, the Trial Court found that Ms. Downey had "reviewed the documents in all four boxes," and that the Plaintiffs "never contested that there were four boxes of documents." Pa470. Judge Pickering ignored the Certification of Ms. Downey, dated November 14, 2023. In that Certification, Ms. Downey first identifies herself as a Certified Public Accountant by profession, Pa333, and then makes it clear that "all four boxes in their entirety were never provided to me or my husband." Pa337-338, at Paragraph 23. She further stated that she and her husband had made repeated requests to inspect the Association's "financial and business records" and these requests were ignored and she, on "numerous occasions" had

sought access to the documents required by the Term Sheet, but Mr. Gould had "failed to provide the documents as the Receiver." Pa338, at Paragraphs 24-26.

Ms. Downey, by her Certification of November 2023 believed that Judge Pickering would perform his own review of these four boxes. The Trial Court chose only to rely on the bare bones Certification in question.

In light of the Appellate Decision having chastised Judge Pickering for reviewing the Settlement Agreement and Term Sheet and determining whether Mr. Gould and Mr. Stauffer had properly analyzed the documentation, it is somewhat understandable why Judge Pickering would have been reluctant to undertake more specific analysis of the documents in question and the Certifications. Pa236-237.

Judge Pickering erred in denying Plaintiffs' request for production of documents because he determined that erroneous Certifications stated that the documents had been made available for Plaintiffs' review. By the language of the Term Sheet, Plaintiffs were entitled to access and review the documents. This provision was handwritten into the Term Sheet and was a crucial component of the settlement. The Certifications provided by the Individual Defendants on November 2, 2023 did nothing to explain whether the specific categories of documents that Plaintiffs requested were included in the banker box production per the Appellate Decision. Pa268-298.

Defendants in the Association Brief claimed that Judge Pickering had concluded that the documents demanded by Plaintiffs were not "relevant" as being necessary to "carry out the terms of the settlement, i.e. the task of the CPA, Stauffer." Db4-5. The Certifications provided by the Individual Defendants did not address in any way whether the documents produced were "relevant." Pa268-298. No Individual Defendant provided any certainty or detail about what documents they did or did not have that they did or did not provide to Martin Mehl, nor was there any fact-finding to ascertain whether the categories of documents noted by Ms. Downey at length in her Certifications and in the Appellate Division Order were provided. Certifications from the Individual Defendants should have encompassed those specific categories and did not. The fact that Plaintiffs may have had the opportunity to review some documents does not equate to the Association and the Individual Defendants' full compliance with the Settlement Agreement and Term Sheet.

The interpretation of a settlement agreement is "governed by basic contract principles." Capparelli v. Lopatin, 459 N.J. Super. 584, 603 (App. Div. 2019). Plaintiffs were entitled to review these documents under the terms of the Settlement Agreement, and the Trial Court should have enforced its terms as written.

POINT II

The Trial Court Erred in Granting Gould's Application

As noted in the Original Brief, the Appellate Decision remanded the case so that the Trial Court could: (1) "give full effect" to the Settlement Agreement; (2) "permit Gould to complete his work" by "addressing any deficiencies in Stauffer's report claimed by the parties"; and (3) "to the extent necessary, instruct Mr. Gould regarding how to complete his work in accordance with the terms of the Settlement Agreement."[3] Pa239-240, 258. The Trial Court failed to perform any of these tasks in accordance with these directives before it entered the Initial Order granting the Receiver's motion. Accordingly, that decision must be reversed. Pa462-497.

The Settlement Agreement and Term Sheet clearly provided that the parties had agreed that the "Receiver shall appoint an independent CPA who will review *all Association finances back to 2010*" to: "(a) Evaluate what is owed by each unit owners; (b) Evaluate special assessments imposed subsequent to 2014 to determine whether Plaintiff's share of the Association's legal fees were paid as part of a prior Judgment, which was paid by Plaintiffs in January 2016; (c) Evaluate special assessments to determine if used for their intended purpose and if subsequently imposed special assessments were proper; (d) Review Cooper Levenson's legal bills

[3] The original Motion and supporting Certifications and exhibits, all dated April 9, 2020, were included in Plaintiffs' Appendix. Pa557.

and Stipulation of Payment and correspondence with Cooper Levenson and CPA and Receive shall determine pre-arbitration and arbitration amounts and impact, if any on monies owed by unit owners, and (e) determine and set monthly assessments for each unit." Pa583 (emphasis added).

The Appellate Division remanded the matter so the Trial court may, "give Gould the instructions requested; permit Gould to complete his work and make all the final decisions for which the parties authorized him to do so, including addressing any deficiencies in Stauffer's report claimed by the parties; and give full effect to the parties' agreement and term sheet, which give Gould final decision-making authority." Pa239-240. Defendants claim that "Gould could decide to find the term of the agreement concerning records from 2010 to 2012 unenforceable," and that a number of cases stand for the proposition that courts could strain to give effect to a settlement agreement, but "not to a particular term of a settlement agreement that may be impossible to perform." Db8. Yet there is nothing suggesting that the terms of the Settlement Agreement were impossible to perform. Rather, it was Mr. Stauffer's "preference" not to review records from all of the years explicitly set out in the Settlement Agreement and Term Sheet. While Mr. Stauffer took the position that he could only use bank statements delivered to him by the bank, the justification for this assertion is totally unclear. Pa336-337 at 18-21. Stauffer cannot simply and irrationally refuse to abide by the Settlement Agreement

and Term Sheet and "only use bank records," which are not available, wholly ignoring two (2) entire years of Association's finances that were explicitly referenced in the parties' Settlement Agreement as having to be reviewed and available to Mr. Stauffer.

Defendants downplay in the Association Brief that Stauffer completely omitted reliance on records from 2010-2012, claiming that "*We cannot know what went before May 2012 and whether, if the full bank records were available back to 2010, the plaintiffs would owe more or less than they do*." Db7. Defendants' interpretation of this glaring oversight is unduly kind. It is an absolute failure on Mr. Gould's part to abide by the terms of the Settlement Agreement and Term Sheet. In her November 14, 2023 Certification, Ms. Downey explained that Carol Barnosky maintained the deposit records of the Association until in or about September 2011 when Mr. Mehl took over the role, and that those records would have reflected the payments and deposits between 2010 and 2012. Pa336-337. Review of the financial records back to 2010 was <u>not</u> an unenforceable provision of the Settlement Agreement and Term Sheet since as Ms. Downey certified "Carol Barnosky maintained the deposit records of the Association until in or about September 2011, when Martin Mehl was elected as Treasurer and thereafter maintained such records." Pa336-337.

In addition, as noted in Ms. Downey's Certifications, Mr. Stauffer failed to credit her unit, Unit 5, with a $69,076.33 deposit that she and her husband made to the Association on January 7, 2016. Pa334. Stauffer also claimed without basis that Plaintiff stopped paying maintenance and special assessments, even though it was clear from the records of the Association that the Plaintiffs paid $8776.71 in monthly fees from May 2010 to September 2013. Pa335. Mr. Gould as the Receiver cannot simply rubber stamp the accountant's unwillingness to review more than two (2) entire years of the financial records, based upon the accountant's preference without at least first reviewing the two (2) years plus of records.

The Trial Court clearly did not comply with the Appellate Decision remanding the case so that the Trial Court could: (1) "give full effect" to the Settlement Agreement; (2) "permit Gould to complete his work" by "addressing any deficiencies in Stauffer's report claimed by the parties"; and (3) "to the extent necessary, instruct Mr. Gould regarding how to complete his work in accordance with the terms of the Settlement Agreement." Pa313-314.

Because remanding these issues back to Judge Pickering would be yet another delay, Plaintiffs believe that the Appellate Division should take original jurisdiction of these issues. See Conclusion relating to original jurisdiction.

POINT III

The Trial Court Erred by Imposing a 12% Interest Rate

The Association asserts that the ten (10%) percent interest rate claimed by the Plaintiffs as it relates to the Judgment entered against them was only there because Retired Judge Anthony L. Gibson had utilized that rate in determining the amount owed by the Plaintiffs in connection with the arbitration. Db9. The Association ignores the fact that the Receiver always sought only a ten (10%) percent interest rate when making its application for instructions and for "collection of fees and/or assessments" from the Plaintiffs when the Receiver submitted his application on April 9, 2020. Pa557-565. When applying for instructions from the Court in April 2020, the Receiver stated:

> 17. I originally advised the owners including Unit 5 that $45,946 was owed by Unit 5. That number was erroneously made, failing to include the ten percent (10%) per annum interest which accrues until the amount is paid in full. The amount has been computed to $55,414.36, as of March 31, 2020 with the interest at ten percent (10%) still accruing. (Emphasis added). Pa563.

In support of the Receiver's 2020 application, Mr. Gould attached the calculations prepared by George Stauffer, the CPA chosen by Mr. Gould, as Exhibit F to his application, which represented the amount due from the

Plaintiffs only.[4] Pa593. In the Association Brief, Defendants claimed that "[Gould] had earlier thought to gratuitously forgo charging the full amount." Db10. At no time prior to November 2, 2023, had Gould advised the Court that the charge of ten (10%) percent was a gratuitous determination on his part. The applications before Judge Pickering and subsequently before the Appellate Division relied solely on the original application of the Receiver to Judge Pickering. Pa557.

Mr. Gould previously had sought interest at a rate of ten (10%) percent but apparently decided to retaliate against Plaintiffs for having disputed the amount owed by them and, thus, "change his mind." Pa299-303. This was at odds with the Receiver's duty of good faith. See Kim v. Flag Ship Condo. Ass'n, 327 N.J. Super. 544, 554 (App. Div.), certif. denied, 164 N.J. 190 (2000). The Trial Court erred in its Initial Decision when it accepted Gould's representation that the interest rate was "solely within the province of Gould." Pa497.

POINT IV

The Attorneys' Fee Award Must be Overturned

A. The Settlement Agreement and Term Sheet are Devoid of any Obligation for Attorneys' Fees.

[4] The Settlement Agreement and Term Sheet required that the CPA determine what was owed by each of the five (5) unit owners. Pa583. Mr. Stauffer failed to make this determination, but the Trial Court's independent expert did make such a determination and Judge Pickering identified this in his Order dated July 23, 2021. Pa512. All of the Individual Defendants paid these amounts.

When the Association moved on February 8, 2024 for entry of Judgment plus attorneys' fees and costs, the Trial Court deviated from both the Settlement Agreement and Term Sheet and long established case law relating to an award of attorneys' fees.[5]

The original proceedings upon which this Appeal is based commenced with the Receiver in April 2020 filing an application for instructions and for collection of fees and assessments. Pa557. In the Appellate Decision, the Court upheld the Receiver's right to seek instructions, and that application provided the guiding light for this entire proceeding. Pa238-239. Specifically, the Appellate Division vacated eight (8) Orders previously entered by the Trial Court in 2020 and 2021 and remanded the case "so the court may: give Gould the instructions requested; permit Gould to complete his work and make all the final decisions for which the parties authorized him to do so." Pa239. The Order submitted by Mr. Gould with the Motion filed in April 2020 required Plaintiffs to pay the sum of $55,414.36, plus interest accruing at ten (10%) percent per annum until the date of payment with no mention of seeking attorneys' fees. Pa565, at 21.

The Association stated in the Association Brief that the Receiver, when he filed this application, was not seeking a Judgment against the Plaintiffs. Db12. This

[5] Pa343-347; Pa672-677.

is totally contrary to the terms of the Receiver's Notice of Motion and the form of Order submitted. Pa553-556. The Association claimed in its Brief that the Court should rely on the "fact" that the Receiver was unrepresented when he filed the April 9, 2020 Motion. Id. Conveniently, the Association ignored the fact that (1) the Receiver is an attorney, Pa557; (2) the Certification of the Association's counsel, dated February 8, 2024, submitted in support of the Judgment stated in Paragraph 7 that Mr. Gould had retained him on April 9, 2020, the same date that the Motion was filed, Pa346 at Paragraph 7; and (3) counsel's invoice for the month of April 2020 revealed that Mr. Greenblatt, the Association's counsel, as part of his effort to have the Plaintiffs pay his fees, included total fees of $270 for April 9, 2020, for receiving and reviewing Mr. Gould's Motion and attached documents. Pa348.

It is clear that Mr. Gould knew what he was doing when he filed the application and purposely did not seek attorneys' fees. Otherwise, he would have asserted such a claim in his application. If Mr. Gould believed at the time when the application was filed that the Association was permitted to seek attorneys' fees, he would have made such a request and it is clear that his counsel reviewed this submission. Paragraph 21 of Mr. Gould's application sets out exactly what he was seeking when he filed the Motion:

> 21. This application is made for instructions concerning the approval of accountant's report of George A. Stauffer, Jr., C.P.A., and payment of fees and/or assessments by Unit 5 in the sum of $55,414.36 plus interest to accrue after March 31, 2020, at ten (10%) percent per annum.

Pa565, at Paragraph 21.

The only basis upon which the Association could conceivably be permitted to recover attorneys' fees is by contract. See Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). Nowhere in the Association Brief filed in Opposition to Plaintiff's original appeal, dated September 1, 2021, did the Association or the Individual Defendants ever indicate an intention to seek attorneys' fees. The first time was after the Judgment was entered on February 6, 2024.[6] Pa464. In Judge Pickering's decision, he sets out at length the Motion for Judgment which was filed on September 15, 2023. See Pa486-490. The Trial Court then proceeds to describe the oral argument that took place on November 17, 2023. Id. Nowhere in Judge Pickering's decision is there any reference to attorneys' fees being required on the part of the Plaintiffs.

Mr. Gould in not seeking attorneys' fees, recognized that the Appellate Division had determined that the controlling document was the Settlement Agreement and Term Sheet. The Appellate Decision found that the Settlement Agreement was a "contract" and was to be honored and enforced like any other contract. Pa308-311, 325-326. The Supreme Court and the Appellate Division have

[6] Judge Pickering's Memorandum of Decision was rendered on February 6, 2024; however, there is a typographical error on the first page of his Memorandum and should have read 2024, and not 2023.

been clear that it should not "rewrite or revise an Agreement" nor "make a new and better contract for [the parties] than they made for themselves." Pa239.

The Settlement Agreement provided that each party was to bear his/her own costs and attorneys' fees, "with the exception that Plaintiffs are only responsible for $2,500.00 of the Association's fees for this litigation." Pa127-134. If the parties had intended that one of the parties or the Association could recover attorneys' fees arising from the Settlement Agreement and Term Sheet, such a provision would have been included within those documents, which it was not. The Association has submitted its own Appendix in opposition to the present Appeal, which includes the Certification of Sandford F. Schmidt, Esq., dated March 8, 2024. Da1. As identified in Mr. Schmidt's Certification, he had represented the Association at the time that the mediation was concluded, and the Term Sheet was memorialized. For the first time after the passage of almost six (6) years since the settlement was reached, Mr. Schmidt claimed that the recovery of future attorneys' fees was not part of the settlement.

If one follows the logic of the Appellate Decision, the parties were obligated to include a reference to recovery of future attorneys' fees in connection with the Settlement Agreement and Term Sheet, if they so intended. The documents are devoid of any such reference, including any language that made the Settlement Agreement subject to the Bylaws of the Association. The parties clearly knew the

Bylaws to the Condominium existed and were in place at the time the parties set out the explicit terms of their Agreement, which stated that legal fees would not be allocated to the parties, other than as set forth in the Agreement. Mr. Schmidt certainly knew the By-laws, having served as counsel for the Association and never insisting that language be included in the Settlement Agreement or Term Sheet regarding additional attorneys' fees. Defendants cannot have it both ways; they are either bound by the terms of the Settlement Agreement and Term Sheet or they are subject to the original decision by Judge Pickering issued in July 2021.

The Trial Court determined that the Settlement Agreement "resolved all fees up until the date of the Settlement Agreement and Term Sheet." Pa614. This opinion cannot be found anywhere in the Settlement Agreement or in the Appellate Decision.

B. The Invoices are Totally Inadequate and Cannot Justify an Award of Attorneys' Fees.

Judge Pickering's comments relating to the vagueness of the billing entries are at odds with Supreme Court precedent. Judge Pickering's comments that "a billing entry is not required to include an explanation as to why and how correspondence relates to a matter," Pa617, is nonsensical. The vagueness in Defendants' submission is an independent basis for the denial of fees, as the Trial Court could not possibly "evaluate carefully and critically" the fee claimed. Even if it did not, as set forth in the Original Brief, prior Appellate Division decisions relating to the same parties, and the Arbitration Award by Judge Gibson provide

extensive guidance on the possible award of attorneys' fees and the necessity for a rigorous examination of those fees. Pa93-98; Pa107-110; 38-92.

Even though Mr. Gould did not originally seek to have Mr. Stauffer determine how much was owed by the other four (4) unit owners, notwithstanding the clear language of the Settlement Agreement and Term Sheet, which required Mr. Stauffer to "evaluate what is owed by each unit owner" (emphasis added), Pa583, no interest was ever charged to any of those four (4) unit owners and no attorneys' fees were ever charged to any of them. The amount paid by these four (4) unit owners is in contrast to the claim by the Association that the Individual Defendants "have always made their required payments..." Db15.

The award of attorneys' fees by the Trial Court did not comport with the specifics of what Mr. Gould sought throughout this process. Mr. Gould has placed great emphasis on the decision authored by Justice Patterson in Hansen v. Rite-Aid Corp., 253 N.J. 191 (2023).[7] The Receiver ignored that portion of the Hansen decision, which discussed what was required of an applicant for attorneys' fees. In that case, the Trial Court "carefully scrutinized the fee application." Id. at 202. The Trial Court went on to exclude "many of the time entries and disbursements set forth

[7] The significance of this decision as it relates to the Association's Cross-Appeal will be discussed under Point V.

in the application on the grounds that they were unsubstantiated, inaccurate, or represented legal work that was unnecessary." Id.

In Hansen, the Supreme Court noted that the Trial Court had performed an in-depth analysis of the time entries and had issued a 73-page decision and a 54-page spreadsheet. The Trial Court in the within action did none of the above but merely accepted that the attorney for Mr. Gould would not deviate from the requirements for seeking attorneys' fees. Pa617. Justice Patterson stated that an Appellate Court "may reverse a trial court's award of fees and costs for abuse of discretion when the court's decision was based on irrelevant or inappropriate factors or amounts to a clear error in judgment." Hansen, supra, at 212.[8]

Finally, counsel for the Receiver barely attempted to satisfy the requirements of RPC 1.5(a). The fact that Judge Pickering was familiar with Mr. Gould's counsel did not justify the Trial Court not carefully scrutinizing Mr. Greenblatt's invoices. Furst v. Einstein Moomjy, Inc., 182 N.J. 1 (2004). With regard to the factors set out in RPC 1.5, the Court in Furst instructed Trial Judges and counsel for parties seeking attorneys' fees that those factors "must inform the calculation of the reasonableness of a fee award in this and every case." Id. at 22. The Trial Judge has "a positive and

[8] We invite the Court's attention to the fact that Hansen was a fee shifting case, which this is not, and in such an instance three (3) essential purposes must be considered. None of those purposes come within the four (4) corners of the present action. Id. at 212.

affirmative function…, not merely a passive role." Where a party "lodges a sufficiently specific objection to an aspect of a fee award, the burden is on the party requesting the fees to justify the size of its award." "It is necessary that the Court 'go line by line by line' through the billing records supporting the fee request." Interfaith Cmty. Org. v. Honeywell Int'l Inc., 426 F.3d 694, 713 (3d Cir. 2005).

The Association in its Brief had claimed that Judge Pickering performed an extensive review of the billings by Mr. Greenblatt. Db14. There is no evidence in the Initial Decision of this having occurred. In fact, the Association acknowledges that the "entire file was available to the Court if it questioned what would otherwise be a compelling conclusion…" Db17. But Judge Pickering chose not to review any of the "entire file."

Courts in New Jersey require review of all of the required factors. Rendine v. Pantzer, 141 N.J. 292, 335 (1995) (focus must be on "the amount of time reasonably expended" rather than merely "actually expended"). The parties agreed to $2,500 in legal fees, and the attorneys' fees award by the Trial Court was at odds with the Settlement Agreement and Term Sheet.[9]

[9] Notably, the Association might have avoided most of the legal expense incurred in this matter had Mr. Gould simply acquiesced to the repeated requests for ADR by the Plaintiffs, which were routinely refused without any justification, despite this Court's clear directives in this very case, Bell Tower v. Haffert, 423 N.J. Super. 507 (App. Div. 2012). Pa32.

POINT V

The Cross Appeal Should Be Denied

Defendants/Cross-Appellants claim that the Cross-Appeal should be granted because the Trial Court had the authority to award fees for legal services on appeal. However, the Trial Court correctly declined to award fees for legal services rendered on appeal based upon R. 2:11-4 and the case law. Pa621-624.

The Trial Court in its Second Order refused to allow any attorneys' fees for the time incurred on Appeal, specifically between September 2021 and September 2023. The Trial Court relied on Rule 2:11-4, which requires an application for fees for time incurred during an appeal must be made by motion to the Appellate Division within ten (10) days of the decision. The Trial Court noted that, during oral argument, Greenblatt had offered to provide a list of numerous cases that he claimed would demonstrate that Rule 2:11-4 did not prevent recovery of attorneys' fees on the Appeal. Pa621-624. The Court noted that Greenblatt never provided the list of cases, and the Trial Court had performed its own research.

Mr. Greenblatt waived his claim for legal services on appeal when he represented to the Court that he could provide cases that he claimed would convince the Trial Court to award fees on appeal. He failed to do so. The Trial Court determined that having "never received any such list of cases," Greenblatt had left the Court "to its own research." Pa623-624.

The Trial Court stated that its research had indicated "clearly and persuasively" that even in a case where fees are allowed to the prevailing party, "the Law Division is to consider fees incurred while the matter was before the Law Division, and the Appellate Division is to consider fees incurred while the matter was before the Appellate Division." Pa622. Viceroy Equity Int., LLC v. Mount Hope Dev. Assoc., 350 N.J. Super. 1 (App. Div. 2002) (application for fees and costs associated with appeal were appropriately brought before the Appellate Division, not the Law Division, in case involving an Agreement of Guarantee which provided for fees and costs that the lender incurred in collecting on note). See Tooker v. Hartford Accident & Indem. Co., 136 N.J. Super. 572, 578 (App. Div. 1975), certif. denied 70 N.J. 137 (1976); see also Pressler v. Verniero, 2024 N.J. Court R., Cmt. 2, 2:11-4, p. 620 (Gann) ("[I]t has been held that the appellate court may also award fees for appellate services where contractually provided for and is, indeed, the proper forum for the award of such fees.")

The Association claims that it was caught in a "Catch 22" because it had ten (10) days after the Appellate Decision to apply to the Appellate Division for fees, but states "the Association at that time was not entitled to fees. At that point in time, it was not a prevailing party." Db18. Based upon those claims, the Association attempted to apply to the Trial Court for Appellate Division fees because it had not been a prevailing party in the Appellate Division. Therefore, the Association was

not entitled to fees. Mr. Gould and its counsel ignore the fact that the application filed in April 2020 sought an award of $55,414.63 from which the Receiver might have been able to seek attorneys' fees. Pa555.

The Trial Court's decision was proper and should be upheld. The Trial Court found appropriately that "the Association [could not] be awarded attorneys' fees incurred for pursuing and opposing an appeal at the Appellate Division." Pa624. Accordingly, the Court noted that it would "deduct all such bills incurred between September 2021 and September 2023." Id.

Defendants/Cross-Appellants admit they were not successful on the Appeal and could not seek fees in the time referenced in the rule because it was not a prevailing party. Db18; see Packard-Bamberger & Co., supra, at 440. The Association is not entitled to two (2) years of legal fees sought in connection with that appeal.

Defendants/Cross-Appellants further state that Judge Pickering could not have been aware of the 2024 Amendments to R. 2:11-4 at the time that he ruled on the fee motion in July 2024. Defendants/Cross Appellants claim that when Judge Pickering ruled in July 2024, the Supreme Court had only proposed an amendment to R: 2:11-4, but it was not adopted until September 2024. The current Rule states:

> **(b)** Where the disposition on appeal results in a remand for further proceedings in the trial court or administrative agency, ***and when the award of counsel fees abides the event***, a party who may be eligible for attorney's fees on appeal after prevailing on the merits upon remand

> shall request any attorney's fees sought for the appeal after completion of the remand.

The award of counsel fees does not abide the event here. In fact, counsel fees were not raised in the Appellate Division nor discussed at all in the Court's remand order. The comments to the Rule are clear that "[e]xcept for the limited authority granted to the trial court to determine appellate fees on remand, the trial court and the appellate court must each determine the fee allowance issue for its own proceedings." Tahan v. Duquette, 259 N.J. Super. 328, 335-336 (App. Div. 1992). Accordingly, the Trial Court correctly held that the Appellate Division was the appropriate forum to have requested fees related to the Appeal.

The analysis of the 2024 Amendments explicitly references the Appellate Division remanding for an award of fees, which did not occur here. See Gann, History and Analysis of Rule Amendments, R. 2:11-4, stating:

> Before September 2024 amendment of the rule all requests for attorneys' fees were to be filed with the appellate court within 10 days of determination of the appeal. That remains the case except, in accordance with Hansen v. Rite Aid Corp., 253 N.J. 191, 224-225 (2023), the September 2024 amendment eliminated the 10-day motion requirement to the appellate court for fee-shifting cases in which an appellate court remands for further proceedings in which an award of attorneys fees will abide the event. (Emphasis added.)

This is a different situation than in Hansen v. Rite Aid, supra, which involved a Law Against Discrimination claim where the prevailing party is statutorily entitled to legal fees under N.J.S.A. 10:5-27.1. Hansen, 253 N.J. at 201. Furthermore, in

that case Plaintiff sought more than $5 million in legal fees, which the court scrutinized, finding many were "unsubstantiated, inaccurate, or represented legal work that was unnecessary." Hansen, 253 N.J. at 202. The Trial Court in the present action did none of the above.

Even if the Court were to determine that the Trial judge could grant attorneys' fees in connection with the appeal process, the invoices rendered during that two year period were no different than the invoices rendered in connection with the trial proceedings. The invoices were still vague and did not satisfy the requirements of RPC 1.5(a).

CONCLUSION

Plaintiffs/Appellants respectfully request that the Appellate Division vacate the Trial Court Orders of February 2024 and July 2024.

Under normal circumstances, it would be appropriate to remand this case back to the Trial Court to consider anew the issues and engage in appropriate fact finding consistent with the Appellate Decision and the decision rendered in connection with this Appeal. The present situation is no different than what was facing the Appellate Division in Bell Tower Condominium Association v. Haffert, et al., 2014WL10094155 (App. Div. 2015). Pa107. In that case, the Appellate Division remanded the attorneys' fees issue to the Trial Court to make adequate findings after awarding counsel fees to the Association. The Appellate

Division had remanded for further finding on the discreet issue of fees. Id. at 1. As was the case in 2015, the findings by Judge Pickering were inconsistent with what was required by Rule 1:7-4(a). The Court found that there was "nothing to be changed, however, by further prolonging the resolution of this relatively simple dispute…the Judge did not conduct an evidentiary hearing and he, therefore gained no particular feel of the case that had not been equally experienced by this court." Id. at 2. Pa109. Therefore, Appellants urge the Appellate Division to hold original jurisdiction over the issues on Appeal.

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/s/ *Dennis A. Estis*

By: _____
Dennis A. Estis, Esq.

Dated: February 10, 2025

Superior Court of New Jersey
Appellate Division

Docket No A-000013-21T2

GEORGE HAFFERT AND TERESA DOWNEY

Plaintiffs,

vs.

BELL TOWER CONDOMINIUM ASSOCIATION, CAROL BARNOSKY, MARTIN J. MEHL, TARA MEHL, PAUL GLODEK, JILL GLODEK, DOUGLAS MORRISON and GLORIA MORRISON

Defendants.

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION, CAPE MAY COUNTY Docket CPM-L-478-17

Sat Below:
Hon. James H. Pickering, Jr., J.S.C.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT BELL TOWER CONDOMINIUM ASSOCIATION ON THE CROSS APPEAL

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Attorneys for Bell Tower Condominium Association

TABLE OF CONTENTS OF BRIEF

TABLE OF CITATIONS

LEGAL ARGUMENT

THE TRIAL COURT HAD AUTHORITY TO AWARD FEES FOR LEGAL SERVICES ON APPEAL (PA609)

The plaintiffs initially assert in POINT V of their Reply Brief (Prb23) that the trial court declined to award fees for legal services rendered on appeal based upon R. 2:11-4 and the case law" and therefore, the cross-appeal should be denied. That is exactly why the cross-appeal should be granted. The case law, as stated by the New Jersey Supreme Court in the case of Hansen v. Rite Aid Corp., *253 N.J. 191 (2023)* on March 15, 2023 was as follows:

> *Pending the Civil Practice Committee's recommendation of an amended Rule and the Court's consideration of that recommendation, courts, parties, and counsel should proceed in accordance with the procedure for applications for appellate fees set forth above. (Hansen, Supra. at p.225)*

Above that statement is a discussion of R. 2:11-4 and the procedure followed in the Court of Appeals for the Eleventh Circuit for a similar local Rule. Based thereon, the Court remanded the matter to the trial court to consider the application for legal fees incurred on appeal. In the instant case, all counsel and the trial judge were unaware of that opinion, but that does not negate the fact that it was the law. As stated in the *Hansen* opinion at page 223, "The ten day time limit set forth in Rule 2:11-4 is impractical and inequitable in certain settings." Such was the case there and such is the case here. That inequity was resolved

by the *Hansen* court and it pronounced the law to be followed. The fact that counsel for the Association represented to the trial court that he would provide legal support for his claim and failed to do so does not constitute a waiver by him of his client's right to counsel fees. Nor does the fact that the trial judge conducted his own legal research and failed to discover the controlling law alter the ultimate fact, that the trial judge did have the authority to act and should have acted upon the application.

The plaintiffs then assert (Prb25) that the "Defendants/Cross-Appellants admit they were not successful on the Appeal and could not seek fees in the time referenced in the rule because it was not a prevailing party." They then go on to say that therefore, "The Association is not entitled to two (2) years of legal fees sought in connection with that appeal." There is a difference between being successful on appeal and being a prevailing party for the purpose of an award of attorneys' fees. In general, new Jersy disfavors the shifting of attorneys' fees. N. Bergan Rex Transp., Inc. v. Trailer Leasing Co., *158 N.J. 561, 569.* However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co., Inc. v Collier, *167 N.J. 427, 440.* As stated in the *Hansen* opinion at page 225, discussing a proposed amendment to Rule 2:11-4,

Absent exceptional circumstances, such an amendment

> *would apply only to fee-shifting cases in which an appellate court reverses and remands for further proceedings, such that the party that has succeeded in the appeal is not yet a prevailing party entitled to an award of fees and costs. In such a setting, a party that later becomes a prevailing party by virtue of a determination on remand should be permitted to seek appellate legal fees directly from the trial court.*

Here, the Association was totally successful in the appellate proceeding, every adverse order being vacated and the case remanded to proceed as the Receiver had originally asked the trial court to do. It was not, however, a prevailing party until entry of judgment on February 6,2024.

The plaintiffs then (Prb26) assert that contrary to the current wording of R. 2:11-4, the award of counsel fees did not "abide the event." It certainly did. The "event" was the determination on the merits by the trial judge upon remand, which determination might establish the successful party in the appeal as being a prevailing party.

Finally, the plaintiffs (Prb26) attempt to distinguish *Hansen* and limit its applicability to legal fees sought under N.J.S.A. 10:5-27.1 without any basis for doing so. The *Hansen* decision very clearly applies to all cases in which as a condition precedent to the award of attorneys' fees, a party must first be established as a prevailing party.

CONCLUSION

For all of the reasons stated above and in the initial brief in support of the cross-appeal, it is submitted that the case should be remanded to the trial court to reconsider the application for legal fees incurred on appeal between September 2021 and September 2023, as well as legal fees incurred on this appeal.

Respectfully submitted,

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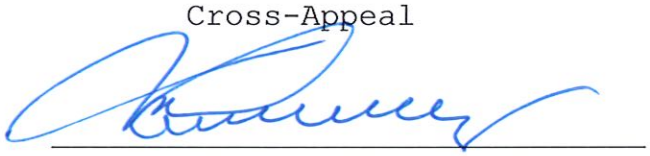
Cross-Appeal



JAY H. GREENBLATT, ESQUIRE

Dated: February 18, 2025