Superior Court of New Jersey - Appellate Division

Letter Brief - March 3, 2024

Appellate Division Docket No.: A-000838-23

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Letter Brief on behalf of: Edward Costello

Edward Costello Plaintiff

vs.

Myron Corp., Steve Kjekstad, and Steve Kjekstad, jointly, severally or in the alternative, Persons or Entities 1-10 (said names being fictitious and unknown) Defendant

Case Type: Civil/Law Division

County/Agency: Passaic

Trial Court/Agency Docket No.: PAS-L-003810-20

Trial Court Judge: Hon. Vicki A. Citrino, J.S.C.

Dear Judge(s):

Pursuant to R. 2:6-2(b), please accept this Letter Brief in support of the Appeal filed in this matter.

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LIST OF PARTIES

Party Name Designation	**Appellate Party**	**Trial Court/ Agency Party Role**	**Trial Court/ Agency Party Status**
Edward Costello	Appellant	Plaintiff	Participated Below
Myron Corp.	Respondent	Defendant	Participated Below
Steve Kjekstad	Respondent	Defendant	Participated Below
Steve Kjekstad, jointly, severally or in the alternative	Respondent	Defendant	Participated Below

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TABLE OF TRANSCRIPTS

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PRELIMINARY STATEMENT

The plaintiff was employed with Myron Corp. Pa13. The plaintiff's supervisor at work was Steve Kjekstad. T17-7-9; Pa14. The plaintiff's employment was terminated by the defendants after he complained of the mislabeling and sale of pens alleged to have been "made in America", where in fact they were made in China. Pa17.

This matter now comes before the Appellate Division from the trial courts decisions on a Motion for Summary Judgment, and subsequent Proof Hearing, with the entry of Orders on each. Pa1 and Pa11.

PROCEDURAL HISTORY

The Complaint in this matter was filed on December 9, 2020, alleging claims and seeking damages for wrongful termination, whistle-blower fraud, and fraud. Pa13. An Answer and Counterclaim was filed on behalf of all defendants on January 22, 2021. Pa34. The Counterclaim alleges unjust enrichment, breach of contract, and promissory estoppel.

The plaintiff was deposed on September 26, 2022. Pa35.

A Motion for Summary Judgment filed on behalf of the defendants was argued and heard by the trial court on January 20, 2023, and an Order Granting Summary Judgment and dismissing the Complaint was entered on that day. Pa1

A Proof Hearing for the finding and entry of damages was held before the trial court on October 20, 2023, and an Order was entered awarding damages and attorney's fees and costs on that day. Pa11.

STATEMENT OF FACTS

The plaintiff, Edward Costello, was employed by Myron Corp. for approximately 28 years prior to his termination in November 2020. Pa16.

In 2012, the plaintiff was given direct permission by his supervisor At Myron Corp., Steve Kjekstad, to use company credit cards issued by Mryon Corp. for personal use in lieu of the company paying, and he receiving, company bonuses. T17-1-16. The plaintiff asked his supervisor to put this in writing, but was told that was not necessary. T19-1. The plaintiff used the company credit cards, as he was allowed to do. Pa14.

In 2018, the plaintiff began to complain to Mr. Kjekstadt about the fact that pens were being marketed and sold by Myron Corp. under the representation that they were "made in America", when in fact they were made in China. Pa17; T7-1-9. The plaintiff continued to complain to Mr. Kjestad about this practice up to the beginning of 2020, and then suddenly "all communications stopped" with the plaintiff and Mr. Kjekstad in July 2020 when the plaintiff was confronted by Mr. Kjekstad, regarding the personal use of the credit cards. T22-19-24.

The plaintiff was then placed on "administrative leave", and shortly thereafter terminated from his employment. Pa15.

ARGUMENT

POINT I

THE STANDARD ON APPEAL (Not raised below)

Any and all error by a trial court is tested by the standard of whether the error that occurred is "clearly capable of producing an unjust result." R. 2:10-2; PRESSLER & VERNIWERO, Current N.J. COURT RULES, Comment R. 2:10-2. The focus of the Appellate Court is "whether in all circumstances there is a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." State vs. Mohammed, 226 N.J. 71, 87 (2016).

We submit that for the reasons set forth below, the granting of Summary Judgment was an unjust result and a denial of the plaintiff's right to a trial in this matter.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND DISMISSING THE COMPLAINT (Raised below; Pa1; T25-8-16)

It is well settled law that summary judgment is an extraordinary remedy which essentially denies a litigant's right to a plenary trial on the grounds that there

exists no genuine issue of material fact to be resolved at trial. Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67 (1954). Such a judgment is to be granted with extreme caution and the moving papers and pleadings must be viewed in a light most favorable to the party opposing the motion, all doubts being resolved against the movant. Shadel v. Shell Oil Company, 195 N.J. Super. 311 (App. Div. 1984); Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Boyer v. Anchor Disposal and Sunshiner Maintenance, 135 N.J. 86 (1994). This is a universally accepted principle. The burden is always on the moving party, and where the movant does not make this initial showing, and thus does not demonstrate the propriety of summary judgment, the motion will be denied. United States Use of Pneumatic & Electric Equipment Company v. Continental Insurance Company, 44 F.R.D. 354 (D.C. Pa. 1968).

The trial court's function is one of examination of the facts and not a trial on the facts. It is a fundamental maxim that on a motion for summary judgment, the trial court cannot try issues of fact; it can only determine whether there are issues to be tried. Bilotti v. Accurate Forming Company, 39 N.J. 184 (1963); Manetas v. International Petroleum Carriers, Inc. 541 F.2d 408 (C.A. N.J. 1976).

The party opposing the motion should be given the benefit of all inferences reasonably deducible from the evidence. Nolan v. Otis Elevator Company, 197 N.J.

Super. 468 (App. Div. 1984). In other words, doubts as to the existence or non-existence of a triable issue of fact are resolved against the moving party, and a motion for summary judgment must therefore fail.

In cases where subjective elements such as intent or motive are involved, summary judgment is to be granted only with special caution. Judson v. People's Bank & Trust of Westfield, supra. In this matter, and as discussed below, questions exist as to the intent and motive of defendants, and the questions and issues should have been addressed at a trial and not upon a motion for summary judgment.

The Supreme Court once again visited summary judgment in what is now what is considered the landmark case of Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). In Brill, the Court took a closer look at the summary judgment procedure, and concluded that trial courts must look to find disputes of a substantial nature. There must exist evidence of disagreement to require submission to a jury, with the Court viewing the papers submitted in the light most favorable to the non-moving party. Brill, supra.

Also, and as is expressly stated in the Rule, summary judgment shall not be entered unless the "pleadings, depositions, answers to interrogatories and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as

a matter of law." R. 4:46-2(c); see also Rankin v. Sowinski, 119 N.J. Super. 393 (App. Div. 1972).

Under the facts and circumstances of this matter summary judgment was not appropriate, and the plaintiff should have been allowed a trial. The trial court correctly makes reference to the standard that applies to summary judgment in its decision on the Motion - (Pa5) - but fails to appropriately apply it.

There is no dispute that the defendant, Myron Corp., mislabeled and marketed pens that were alleged as "made in America", when they were in fact made in China, and that the plaintiff complained to his supervisor in 2018 about this. Pa17; T7-1-9. Counsel for the plaintiff correctly advised the trial court at oral argument of the fact that the plaintiff continued to complain to his supervisor, Mr. Kjestad, about this continued practice in the beginning of 2020, and then suddenly "all communications stopped" with the plaintiff and Mr. Kjekstad. T22-19-24. Two months later the plaintiff was terminated for the alleged unauthorized use of company credit cards. T24-19-24. The permission to use the credit cards is clearly a disputed fact in this matter. T24-1-20. Thus, at issue is the timing of the plaintiff's termination after complaining for two years, versus the allegations of the alleged, but disputed, use of the credit cards. It is noted that counsel for the plaintiff appropriately argued:

"Did defendant, Kjekstad have the authority

> **to do that? Again, if that's not a factual issue, I don't know what is." T25-22-25.**

Although the trial court did acknowledge that the plaintiff "likely has satisfied the requirement for a 'whistle-blowing activity'", we submit that based upon the record below the trial court did not have any rational basis to conclude that the plaintiff failed to carry "his burden under CEPA." Pa9; second and third paragraphs. The disputed fact regarding permission to use the credit cards, and the complaints made about the pens and the adverse action of his termination, are and should properly be heard by a jury for determinations on credibility and veracity, and to weigh such facts on the CEPA claim. Judson v. People's Bank & Trust of Westfield, supra. It was an error by the trial court to make that determination.

Accordingly, we respectfully submit that the trial court erred in its determination, and that error denied a fair trial and a fair decision on the merits in this matter.

Defense counsel made reference to alleged "conflicting" and "self-serving" statements made by the plaintiff at this deposition in the argument made to the trial court that such statements do not defeat summary judgment, which was also addressed by the trial court. T12-23 to T13-23. The issue involved the conversations between the plaintiff and his supervisor, Mr. Kjekstad, regarding the

alleged permitted use of the company credit cards in lieu of bonuses. At his deposition, the plaintiff was asked about the dates of the conversation(s) that were stated in the Complaint filed in this matter, which were written as "2020". Pa41 (page 24) to Pa 42 (page 29. The plaintiff fully and adequately explained at his deposition that the dates were incorrect, and that the actual year was 2012. Plaintiff's counsel at oral argument also fully explained that the wrong date of "2020" was simply an inadvertent typo, and that he had discussion with defense about amending the pleading to reflect the correct date. T16-13 to T17-9. No weight or reliability should be given to the fact that an incorrect date was stated in a pleading caused by a mere typo, and that an inadvertent mistake should not be the basis to conclude a "change in testimony" or a "self-serving or contradictory" statement; especially in light of the explanation given.

The issue of the incorrect year, as well as the lack of the defendant's signature and lack of knowledge on a written policy about the use of the company's credit cards - 2T28-20 to 2T29-16 - create and in fact are genuine issues of fact that should be considered by a jury.

In addition, it should be noted of the fact that Myron Corp. sought a criminal investigation with no consequences. T19-234 to T20-5.

POINT III

THE TRIAL COURT ERRED IN AWARDING DAMAGES AND ATTORNEY'S FEES/COSTS
Raised below (T:47-15 to T49-25)

If the trial court erred in entering summary judgment, then the award of any damages and counsel fees must be vacated as well. We also ask that this court consider the following in regard to attorney's fees.

New Jersey has a "strong policy disfavoring shifting of attorney's fees." N. Bergen Rex Transp., Inc. Vs. Trailor Leasing Co., 158 N.J. 561 (1999).

N.J.S.A. 34:10-6 - CEPA - permits an award of attorney's fees "if the court determines that an action brought by an employee under the act was without bases in law or fact." See also Noren v. Heartland Payment Sys., Inc., 488 N.J. Super. 496, (App. Div. 2017). This Court has further held that the standard for an award of attorney's fees is similar to the "Frivolous Law Suit Statute", N.J.S.A. 2A:15-59.1, wherein there must be showing that "... the non-prevailing party either brought the claim in bad faith for harassment, delay, or malicious injury; or knew, or should have known that the complaint or counterclaim was without basis in law or equity." Buccianna vs. Micheletti, 311 N.J. Super. 557 (App. Div. 1998).

As stated above, the facts of this matter presented to the trial court on the Motion for Summary Judgment are that the plaintiff's supervisor, Steve Kjekstad,

gave direct permission to the plaintiff to use company credit cards for personal his use in lieu of the company paying bonuses to the plaintiff in 2012. Pa@@. In 2018, the plaintiff began to complain to Mr. Kjekstadt about the fact that pens were being marketed and sold under the the representation that they were "made in America", when in fact they were made in China. Pa17; T7-1-9. The plaintiff continued to complain to Mr. Kjestad about this continued practice in the up to the beginning of 2020, and then suddenly "all communications stopped" with the plaintiff and Mr. Kjekstad in July 2020 when the plaintiff was confronted by Mr. Kjekstad, regarding the personal use of the credit cards. T22-19-24.

The plaintiff was then placed on "administrative leave", and shortly thereafter terminated from his employment. Pa16.

This is not a case where the plaintiff did not have a specific law or regulation that Myron Corp. was violating by its actions. The trial court made specific reference to it in the written opinion of the trial court. Pa9; top paragraph.

The question is how could there have been a determination by the trial court that the plaintiff had no evidence to support a CEPA claim (Pa9), or that the plaintiff acted maliciously or in bad faith? We submit that the trial court cannot and should not determine credibility or veracity of statements, and draw the conclusions made, on a Motion and without the necessity of a trial.

CONCLUSION

Based upon the foregoing, we respectfully ask that the Appellate Division vacate the Order Granting Summary Judgment and the Order awarding damages and attorney's fees, and allow the matter to proceed to trial.

Respectfully submitted,

/s/ Steven H. Schefers

STEVEN H. SCHEFERS, ESQ.

Superior Court of New Jersey

Appellate Division

Docket No. A-000838-23

EDWARD COSTELLO, *Plaintiff-Appellant,* vs. MYRON CORP., STEVE SJEKSTAD and STEVE SJEKSTAD, jointly, severally or in the alternative, PERSONS OR ENTITIES 1-10 (said names being fictitious and unknown), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO. PAS-L-003810-20 Sat Below: HON. VICKI A. CITRINI, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

Myron Corporation ("Myron"), Steve Kjekstad, and Dan Barron, Defendants-Respondents/Appellees in this appeal, respectfully submit this brief in opposition to the appeal of Plaintiff-Appellant, Edward Costello ("Appellant"), from the trial court's January 20, 2023 Order granting Respondents' motion for summary judgment in its entirety and October 12, 2023 Order awarding damages and attorneys' fees to Respondents.

Appellant is a former Myron employee who admittedly utilized the Company's Purchasing Credit Card ("PCard") to make personal purchases in excess of $256,612.14 and was terminated. The Trial Judge properly granted Respondents' summary judgment motion because Appellant failed to point to any competent record evidence to establish the required elements of his claims of wrongful termination, fraud, or retaliation under the Conscientious Employee Protection Act ("CEPA"). The record evidence conclusively shows that Appellant was terminated for his misappropriation of Company funds and he was under investigation for his misuse of the Company's PCard at the time he repeated two year old claims about the marketing or labeling of Myron products.

There is no competent evidence that could give credence to Appellant's assertion that he was given permission to use the Company's PCard to make personal purchases for an eight (8) year period, let alone a few months.

Appellant's self-serving deposition testimony is severely contradicted by his own consistent and **repeated** assertions that he only received permission to use the PCard for personal purchases in March 2020 and that he did not use the PCard(s) to make personal purchases before 2020. Notably, it was only after Respondents produced a third-party investigation report which revealed Appellant had been utilizing the PCard to make personal purchases since as early as 2012 that Appellant attempted to change his testimony. Here, Appellant conveniently suggests that it is a mere typographical error – an error that Appellant repeated in his draft complaint and certification, the filed complaint, his Responses to Request To Admit, and his Answers to Interrogatories.

The trial court correctly found that Appellant could not establish, through his own contradictory self-serving statements or any other competent evidence, that Respondents engaged in unlawful conduct. The trial court also correctly found that Appellant could not refute the undisputed evidence supporting Myron's counterclaims. In short, this appeal is simply a request for a 'do-over' with new counsel after Appellant failed to present the Court with *any evidence* to support his version of the facts. The time to make conclusory allegations and bare assertions had passed. At summary judgment, the parties are expected to present facts and evidence. Respondent did so; Appellant did not.

PROCEDURAL HISTORY

On December 9, 2020, Appellant filed a Complaint alleging claims for wrongful termination, whistleblower retaliation, and fraud. (Pa13-20). On January 22, 2021, Respondents Myron and Dan Barron filed an Answer denying the material allegations, and Counterclaims against Appellant for unjust enrichment, breach of contract, and promissory estoppel. (Pa21-34). Shortly thereafter, on February 2, 2021, Respondents Myron and Barron filed an Amended Answer with Counterclaims. (Da1-15). On February 5, 2021, Respondent Kjekstad filed an Answer to Appellant's Complaint. (Da103-111).

Following the conclusion of discovery, Respondents moved for summary judgment. (Pa74-75 and Pa77-92). After consideration of the parties' submissions and oral arguments, the Honorable Vicki A. Citrino, J.S.C., granted Respondents' summary judgment motion, in its entirety. (Pa1-Pa10).

On October 12, 2023, the parties attended a proof hearing in which the Court awarded Defendant Myron Corporation the sum of (1) $88,690.65 incurred by Myron Corporation in order to retain a third-party company to investigate and prepare a report qualifying its losses; (2) $89,161.30 representing reasonable attorneys' fees incurred in the defense of Appellant's claims in this litigation pursuant to CEPA; (3) $3,284.65 representing reasonable costs of litigation; and pre-judgment and post-judgment interest.

(Pa11-Pa12). The recoupment of Appellant's personal expenses in excess of $256.000 is the subject of a separate subrogation claim. Pa12.

Appellant thereafter filed an Amended Notice of Appeal on December 4, 2023. (Pa69-Pa73).

COUNTERSTATEMENT OF FACTS

Appellant was employed with Myron from 1992 until November 2020. (Pa3, Pa78-Pa79). At the time of his termination, Appellant held the position of Senior Director of Quality Assurance, Purchasing and Safety Compliance. (Pa3, Pa79 at paragraph 9, and Pa91 at paragraph 51). In this position, Appellant was responsible for, among other things, ensuring Myron's products followed state and federal regulations. (Pa79, Pa91).

During Appellant's employment, Myron implemented a Corporate Purchasing Card Program ("PCard Program") for making business purchases of high volume and low dollar purchases. (Pa3-Pa4, Pa 79, Da67-70). Myron published strict guidelines for employees authorized to use the PCards. (Pa3-Pa4, Pa79-Pa80). Myron's Corporate Purchasing Card Program General Policies and Procedures provides that PCards shall not be used for, among other things, "[p]ersonal business" and "[t]elephone calls or related services." (Pa3-Pa4, Pa79, Da67-70). These procedures warned employees that should they

engage in the foregoing conduct they would be liable for the total dollar amount of such activity and subject to discipline. (Pa4, Pa79-Pa80, Da67-70).

Appellant signed an Employee Agreement in which he agreed that he would use this Card for approved purchases only and would **not charge personal purchases**. This agreement also acknowledged that Appellant would "follow the established procedures for the use of the Card [and a f]ailure to do so may result in either revocation of my use of privileges or other disciplinary actions[.]" (Pa80, Da71-72). Appellant expressly affirmed by his signature that he understood the requirements for the Card's use. (Pa80, Da71-72).

A. Appellant's Unauthorized Use of His PCard.

In or around July 2020, Appellant requested clarity from Myron's then Chief Financial Officer, Dan Barron, on the process for cellular phone expenses. (Pa80, Da74-76). Respondent Barron informed Appellant, that employees should request reimbursement through an expense reimbursement process. However, after this exchange, a charge for Appellant's Sprint cellular phone bill again appeared on Appellant's PCard usage. (Id.). A subsequent review of Appellant's PCard transactions revealed that in addition to the Sprint Charge, Appellant made several charges that appeared to be personal purchases. (Pa81, Da113-120, Da404-415).

On July 16, 2020, Respondent Barron and Human Resources Manager Cathy Vazquez, met with Appellant to discuss the irregular purchases and frequent personal expenditures. (Pa4, Pa81, Da404-415). When confronted about these purchases, Appellant initially maintained that all purchases were made for the benefit of Myron or were an inadvertent mistake. (Pa4, Pa81, Da89-91, Da93-95, Da404-415). Appellant also asked for a breakdown of what he owed Respondent and asserted any personal purchases were accidental and that he would reimburse the company.

> **Dan Barron**: So I have given you the week transactions. What do you think would happen if I went and looked at prior weeks?
>
> **Appellant**: Obviously, you have them there, so just tell me what I owe ya. I truthfully did not realize that I was screwing up until you told me about that one the prime
>
> [* * *]
>
> **Dan Barron**: So let me play it out. I have access - - I have looked into transactions for the last let's say year. And I have a good understanding, I think of what is going on. So now is your time before it gets to be a different situation that you will explain. What do you think? What's really happened with the PCard and purchases?
>
> **Appellant**: [L]ike I said if . . . I blew something, tell me what I owe you. I didn't realize I blew something. I know that I have multiple cards on my account. I didn't realize until you told me about the prime video.
>
> [* * *]

> **Dan Barron**: [T]hen I'll add on, you know, I don't think Myron has a need for a hockey stick. So you know, again, this is your opportunity to basically come clean.
>
> **Appellant**: And again, I'm . . . coming clean as possible and saying you're right, I coach hockey. If Myron was charged for a hockey stick, then that's a shame on me and I'll more than certainly reimburse you. I don't understand how this thing transitioned from . . . my American Express to my Myron card, but you know, I'll take full responsibility. I apologize for that. I had never intention of taking anything from Myron, and I never had any intention of misconstruing funds.

(Pa81-82, Da404-408). Appellant further claimed that he also purchased gift cards to incentivize employees but did not provide an accounting as to how many gifts cards were bought and to whom they were distributed. (Pa4, Pa82-83, Da404-415). After this meeting, Appellant was placed on administrative leave while Respondent investigated. (Pa4, P83).

On July 1, 2020, Defendant Barron and Ms. Vazquez participated in a teleconference with Appellant during which, for the first time, he asserted that Respondent Kjekstad gave him permission to use Appellant's PCard for personal purchases in lieu of his bonus and 401(k) benefits. (Pa83, Da78-87, specifically request to admit nos. 10-12).[1] During the teleconference, Appellant

[1] Respondent Kjekstad denies that Appellant was given permission to make personal purchases on the PCard. (Pa84, Da103-111, at ¶ 7).

told Respondent Barron and Ms. Vazquez for the first time that he believed Myron was engaging in illegal activities by selling products made in China as made in America. (Pa84).

B. Myron Investigates Appellant's Purchasing History.

Myron engaged Crowe LLP ("Crowe") to launch an internal investigation into Appellant's use of Myron PCards for personal expenditures. (Pa4, Pa84, Da113-120). Crowe's investigation concluded that Appellant made approximately $256,612.14 in personal purchases, many of which were purchases from Amazon and NewEgg, a computer electronics retailer. (Pa85, Da113-120).

While the investigation was pending, Appellant retained counsel who sent an October 16, 2020 demand letter threatening to file a lawsuit for wrongful termination if Myron did not provide a definitive answer regarding the status of Appellant's employment "within ten (10) days." (Pa.84, Da122-123). Although Respondents' investigation continued, on November 9, 2020, Appellant, through his counsel again threatened to file suit and attached a proposed complaint, certification of Appellant, and a draft Order to Show Cause. (Pa84-Pa85, Da125-141). On November 12, 2020, Myron responded through its counsel that Appellant's employment was terminated. (Pa85, Da143-144).

C. Appellant's Alleges He Was Granted Permission to Use The Company PCard For Personal Purchases.

Prior to Respondent's production of the Crowe Investigation Report and Findings Report, Appellant represented and maintained that he was first granted permission to use the PCard for personal purchases in March 2020. (Pa86). Specifically, on November 9, 2020, Appellant through his counsel, submitted a draft, unsigned "Certification of Edward Costello" which stated:

> 4. My immediate supervisor is Defendant, Steve Kjekstad ….
>
> 5. **In or about March of 2020**, I was approached by Kjekstad who informed me that Myron was not going to issue any bonuses or 401 (k) benefits **for the rest of the year**.
>
> 6. Kjekstad also told me that in lieu of receiving my annual bonuses/incentives as well as not receiving my 401(k) benefits, that I could use the Myron credit card up to $3,000.00 per month[.]
>
> 7. After Kjekstad authorized me to use the Myron credit card, **I began to use** the company card in accordance with his instruction.

(Pa86, Da137-141 at paragraphs 4-7)(emphasis added).

Similarly, Appellant asserted in his December 9, 2020 Complaint that he was granted permission to use the PCard for personal purchases "**on or about March 2020**" in lieu of receiving bonuses and 401k benefits. (Pa14 at ¶¶3, 5)(emphasis added). Again, Appellant alleged that he "then **began to use**

the company card for the next several months[.]" (Id. at ¶7)(emphasis added).

During discovery, Appellant's story stayed the same. Appellant's responses to Respondents' First Set of Interrogatories Dated May 27, 2021 confirmed at interrogatory no. 34 that he was granted permission to use the Company card for personal purchases **in March 2020**. (Pa87, Da183 (request), Da209 (answer)). Similarly, interrogatory no. 43 asked Appellant to provide facts to support his claim that he was wrongfully placed on administrative leave. (Da191). In answer to interrogatory no. 43, Appellant asserted that he had only utilized the Company purchasing card for "a month"—that is, since March 2020. (Pa87, Da212).

Most compelling is Appellant's response to Respondents' Request for Admissions dated April 15, 2021 in which he **admitted** he was not given permission to use a Myron PCard for personal purchases before March 2020 and he **denied** using the Myron PCard for personal purchases prior to January 1, 2020.

> Request No. 12: "On or about July 21, 2020, Plaintiff told Dan Barron that Plaintiff was given authority to use his Myron Purchasing Card for personal purchases up to $3,000 per month in lieu of receiving a bonus and 401(k) benefit **as of March 2020**. (Da81; emphasis added).
>
> Plaintiff's Response to Request No. 12: "Admit." (Da87)

> Request No. 13: "Plaintiff was not given permission to use a Myron Purchasing Card for personal purchases before March 2020." (Da82)
>
> Plaintiff's Response to Request No. 13: "Admit." (Da87)
>
> Request No. 14: Plaintiff used a Myron Purchasing Cared for personal purchases prior to January 1, 2020. (Da82)
>
> Plaintiff's Response to Request No. 14: "Deny." (Da87)

(Pa88, Da81-82, Da87).

This consistent string of allegations by Appellant that he received permission in March 2020 and that he had only used the PCard for a month or a few months changed **after** Respondents produced the Crowe Investigation Report and Findings on December 1, 2021. The Crowe Report found that Appellant had been using the Company PCard for personal purchases as early as January 1, 2012—perhaps earlier. Nine months then passed and at his September 26, 2022 deposition Appellant then testified at his deposition he received permission from his supervisor Steve Kjekstad to use PCard for personal purchases in 2012:

> Q: And at the time that you reviewed [the Complaint] in preparation for your deposition, was there any factual allegation that you thought needed to be changed?
>
> A: There was dates that were incorrect.

[* * *]

Q: It's not - - okay. Anything else that you saw that should be changed?

A: The in lieu of. It wasn't for 401k. It was only for bonuses.

[* * *]

Q: Statement of fact, okay? Paragraph 3. On or about March 2020, plaintiff was confronted by Defendant Steve Kjekstad, informed that he's not willing - - that Myron was not willing to part with additional money income in this fiscal year and plaintiff would not be receiving a bonus or his 401k benefits. Is that correct?

A: It was 2012.

[* * *]

Q: I'm going to show you what has been produced as your response to Defendant's Request for Admissions. I'm going to ask is that your signature on the final page?

A: Yes, it is.

Q: Okay. And I'm going to read the - - I'm going to read the request. I'm going to have you read your answer, okay?

A: Uh-huh. Yes. Sorry.

Q: Request No. 13, Plaintiff was not given permission to use a Myron purchasing card for personal purchases before March of 2020. What is your answer?

> A: There is no answer. Oh. Admit. [* * *]
>
> Q: Request No. [1]4, Plaintiff used a Myron purchasing card for personal purchases prior to January 1, 2020. Your answer?
>
> [* * *]
>
> A: Oh. Denied.

(Pa41-42, dep. tr. 22-29; Pa88-Pa89 at paragraph 43).

Appellant failed to bring forth any documents or witnesses corroborating his account of the facts pertaining to this litigation. (Pa89; Pa45, dep. tr. p. 38-39). Indeed, Appellant admitted there was no written document memorializing any agreement between Kjekstad and Appellant. (Pa65, dep. tr. 116-117; Pa89 at paragraph 45). Moreover, Appellant does not dispute that he habitually used the PCards for personal purchases/expenditures over the course of several years, despite signing an Employee agreement which stated, in pertinent part: "I agree to use this Card for approved purchases only and agree not to charge personal purchases." (Pa90, Da72).

D. Appellant's Allegations Pertaining to Myron's Misconduct

Appellant contends he was terminated because Respondents knew that Appellant was aware that the Company was selling products that were marked "Made in America by way of lasering the 'Made in China' stamp off and replacing it with the said 'Made in America' stamp." (Pa17, Pa90). In

support of this assertion, Appellant testified that in or around 2018—two years prior to his termination—Myron was sourcing pens from China and changing the marketing materials on the pen to give customers the impression that pens were made in America. (Id.; Pa54, dep. tr. p. 77). Appellant admitted he did nothing to stop this alleged production issue in 2018. (Pa91 at paragraph 52; Pa56, dep. tr. p.83).

Appellant further alleged that he raised concerns in 2018—again, two years prior to his termination—that the Company violated the California Clean Water Act. (Pa91, at ¶53). Appellant conceded that he was not terminated when he raised concerns to the Company about the issues concerning the pens or California's Clean Water Act. (Pa91, at ¶54). Appellant further testified that by the time he informed Respondent Barron and Ms. Vazquez in 2020 of Myron's alleged misconduct in 2018, the Company was already aware of the purported issues and had stopped engaging in any illegal activity. (Id.).

The decision to terminate Appellant for his misuse of the Company PCard was made by Dan Barron and was solely related to the Appellant's admitted conduct.

LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT.[2]

In reviewing summary judgment orders this Court applies the same standard of review applied by the motion Judge. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). It is well-settled in New Jersey that summary judgment "must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." Guartan v. Ortani Place Condo. Ass'n, 2024 N.J. Super. Unpub. LEXIS 465, *5 (App. Div. Mar. 21, 2024) (quoting R. 4:46-2(c)). Therefore, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the

[2] Appellant does not argue that the trial court erred in dismissing his common law wrongful termination claim. Therefore, Appellant's wrongful termination claim is waived and is not addressed herein. See Rule 2:6-2(a)(6); N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

alleged disputed issue in favor of the non-moving party." Ruccolo v. Ardsley W. Cmty. Ass'n, Inc., 2024 N.J. Super. Unpub. LEXIS 518, *19 (App. Div. Mar. 28, 2024).

In conducting its review, the Court must keep in mind that "an issue of fact is genuine only if considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier fact." R. 4:46-2(c). "When the evidence 'is so one-sided that one party must prevail as a matter of law,' trial courts should not hesitate to grant summary judgment." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (same).

Thus, to avoid summary judgment, Appellant can no longer rely on his own allegations; rather, he must show that the competent record evidence exists to create a genuine issue of material fact. See Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.)(holding that only competent evidence is sufficient to defeat a properly supported motion for summary judgment), certif. granted, 183 N.J. 592 (2005). If there is only one "unavoidable resolution of the alleged disputed issue of fact," there is no genuine issue of fact to be tried. Liberty Surplus, 189 N.J. at 446 (quoting Brill,

142 N.J. at 540) (emphasis added). Therefore, Appellant cannot "defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Indeed, Appellant must "do more than simply show that there is some metaphysical doubt as to the material facts in question." Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N.Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993)).

Applying these legal standards to the competent record evidence in this matter leads to the inescapable conclusion that the trial court correctly granted Respondents' motion for summary judgment. Appellant cannot demonstrate the presence of any genuine issue of material fact supporting his claims and defenses in this matter. Indeed, the **evidence** here is so one-sided that no reasonable juror could find for Appellant. Accordingly, as set forth in further detail below, this Court should affirm the trial court's decision to grant summary judgment in favor of Respondents.

A. Appellant's Self-Serving, Contradictory Deposition Testimony Does Not Create A Question Of Fact To Preclude Summary Judgment.

Appellant asserts, without citing any legal authority, the trial court erroneously granted Respondents' motion for summary judgment because he testified that all of his pleadings and discovery were incorrect and that he

actually received permission to use the PCard in 2012. This argument must fail because his self-serving testimony cannot defeat the overwhelming mound of evidence previously submitted by Appellant that refutes his testimony. Appellant appears to believe that he can simply erase certified answers to interrogatories, his signed responses to requests to admit, and filed pleadings—none of which were ever amended. Appellant ignores his own draft certification and draft complaint allegedly supporting a proposed order to show cause. Appellant disregards his own statements during the investigation that it was only in March 2020 that he allegedly received permission to use company funds for personal expenses, as well as his many assertions in writing that he only used the PCard for a month, maybe a few months. Appellant's change to his story is not supported by his own finely crafted record of writings and does not preclude summary judgment.

At the outset, it is undeniable that conclusory, self-serving affidavits and/or testimony are insufficient to defeat a motion for summary judgment. See Gonzalez v. Sec'y of Dep't of Homeland Sec., 678 F.3d 254, 263 (3d Cir. 2012)("[C]onclusory, self-serving affidavits [and testimony] are insufficient to withstand a motion for summary judgment. [. . . plaintiff's] own, sworn statements are insufficient to survive summary judgment."); Irving v. Chester Water Auth., 439 F.App'x 125, 127 (3d Cir. 2011) (holding that "self-

serving deposition testimony is insufficient to raise a genuine issue of material fact."); Synthes, Inc. v. Emerge Med., Inc., 25 F. Supp. 3d 617, 672 (E.D. Pa. 2014) (same); Danois v. i3 Archive, Inc., 2013 U.S. Dist. LEXIS 98105, at *28-29 (E.D. Pa. Jul. 12, 2013)("the Third Circuit has extended to deposition testimony the principle that conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment.")(Da244-264).

Certainly, no reasonable fact finder could give credence to Appellant's new version of the facts as Appellant's own self-serving deposition testimony was contradicted by his own **long repeated** statements throughout this litigation. Indeed, Appellant's deposition testimony is contradicted by the fact that: (1) Appellant has provided **no** documents, witnesses, or any other form of evidence that corroborates his statement of events; (2) Appellant was aware of Myron's PCard policies as evidenced by his signed Employee Agreement (Pa40-41, dep. tr. pp. 21-22; Da71); and (3) Appellant admitted in the July 16, 2020 meeting with the Company that he inappropriately used Myron's PCard to make personal purchases and offered to pay for any personal purchases that were "mistakenly" made by him (Da88-101, Da404-415).

Most notably, Appellant's deposition testimony is directly contradicted by his own signed discovery statements which support the grant of summary judgment. See Carroll v. N.J. Transit, 366 N.J. Super. 380, 388-89

(App. Div. 2004)(holding a plaintiff's interrogatory response that flatly contradicted his own deposition testimony was insufficient to create a genuine dispute of material fact); Masoir v. Insurance Co. of North America, 193 N.J. Super. 190, 195 (App. Div. 1984) ("Plaintiff cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations."). In short, there is no genuine issue of material fact when it is only the Appellant that is contradicting his own version of the "facts."

Appellant's assertion that "[n]o weight or reliability should be given to the fact that an incorrect date was stated in a pleading caused by a mere typo," simply cannot pass muster. Indeed, the Trial Judge found that "[t]he Plaintiff at the present stage has not shown enough evidence, ***in fact, any evidence to prove*** his version of events[.]" (Pa10). Appellant's appeal simply ignores the fact that he admitted in his response to Respondents Request for Admissions that he was ***not*** given permission to use a Myron purchasing card for personal purchases before March 2020 and that he did not use the PCard for personal purchases before 2020. Rule 4:22-2 provides that "[a]ny matter admitted under the Rule is **conclusively established** unless the Court on motion permits withdrawal or amendment of the admission." R. 4:22-2 (emphasis added). No such motion was made in this litigation and Respondents are able to rely on such facts as conclusively established. See generally, Bunker Hill Iron Gym v. B & E Barbell

Club, 2019 N.J. Super. Unpub., *16 (Law Div. Aug. 7, 2019) (noting under R. 4:22-2 any matter admitted under the Rule is conclusively established and "trials are not the time nor place to correct such error").

Likewise, Appellant affirmed that his responses to Respondents' First Set of Interrogatories asserting that Respondent Kjekstad gave him permission in March 2020 to use the PCard to supplement his bonuses was "true to the best of my [Appellant's] knowledge and belief." (Da213). In doing so, Appellant certified that he was fully familiar with the facts set forth herein, he read the answers to Respondents' First of Interrogatories and certified his answers. (Da213). Importantly, Appellant did not at any point during this litigation seek to amend his interrogatory responses. Appellant's assertion that his responses can be reduced to a mere mistake ignores that Rule 1:4-4 impresses upon persons making such statements the gravity of their acts. See State v. Angelo's Motor Sales, Inc. 125 N.J. Super. 200, 206-07 (App. Div. Oct. 1, 1973) (noting that while interrogatories are no longer required to be answered under oath, the adoption of the certification procedure merely constituted a change in ritual and not in substance as "[c]ertification is only another way of swearing or affirming").

Where, as here, Respondent relied on, among other things (1) the allegations of the Appellant's Complaint, (2) Appellant's responses to

Respondents Request For Admissions, and (3) Appellant's responses to Respondents First Set of Interrogatories, Appellant's contradictory and now inconsistent assertion precludes any finding that a genuine issue of material fact exists to preclude summary judgment.

B. Appellant's CEPA Claim Is Not Supported By The Credible Record Evidence.

Appellant's CEPA claim remains subject to dismissal because he did not engage in whistleblowing activity, and he cannot establish the requisite causal connection between his purported whistleblowing activity and his termination. In his Complaint, Appellant alleges that Respondents violated CEPA by terminating his employment because Respondent knew Appellant was aware Respondent "Myron was selling products which were made in China as Made in America by way of lasering the 'Made in China' stamp off and replacing it with the said 'Made in America' stamp." The relevant statutory language of CEPA prohibits an employer from, *inter alia*, taking retaliatory action against an employee because the employee does any of the following:

> Objects to, or refuses to participate in any activity, policy or practice which the employee reasonable believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law; (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19-3; see also McCullough v. City of Atlantic City, 137 F. Supp. 2d 557, 572-73 (D.N.J. 2001); McLelland v. Moore, 343 N.J. Super. 589, 599-600 (App. Div. 2001), cert. denied, 171 N.J. 43 (2002).

In analyzing claims brought under the CEPA, New Jersey courts apply the three-part burden-shifting framework articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Klein v. Univ. of Med. & Dentistry, 377 N.J. Super. 28, 28 (App. Div. 2005), certif. denied, 185 N.J. 39 (2005). Within this framework, if an employee can establish a *prima facie* case of retaliation, the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for its alleged retaliatory decision or action. Id.; see also McDonnell Douglas Corp., 411 U.S. at 802. Once the employer articulates a non-retaliatory reason, the burden shifts back to the Appellant to prove the reason is false, and the real reason is actually a pretext for unlawful retaliation. Id.; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). At all times, however, Appellant bears the ultimate burden of proving unlawful retaliation. See id. at 507.

The undisputed record evidence demonstrates that Appellant fails to establish the *prima facie* elements of a CEPA claim for two reasons. First, Appellant did not engage in whistleblowing activity because simply knowing of illegal activity is not enough to constitute whistleblower activity under the

statute. Second, Appellant's CEPA claims also fails because there is no causal connection between Appellant's comment to Dan Barron at the close of the July 16, 2020 investigation meeting regarding Appellant's misconduct and Appellant's termination on November 12, 2020.

1. Appellant Cannot Establish A *Prima Facie* Claim of Retaliation Under CEPA.

To establish a retaliation claim under CEPA, Appellant must first establish a *prima facie* case of retaliatory action by demonstrating: (1) he reasonably believed Respondents' conduct violated a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he performed a whistle-blowing activity described in N.J.S.A. 34:19-3; (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. McCullough, 137 F. Supp. 2d at 573; see also Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003); Beck v. Tribert, 312 N.J. Super. 335, 342-345 (App. Div.), cert. denied, 156 N.J. 424 (1998).

Although New Jersey Courts have yet to express an opinion as to the application of CEPA when the recipient of the information was already aware of the activity, policy, or practice in question, and had already taken steps to remedy the issue, the Third Circuit Court of Appeals and other courts have routinely held that the mere mention of alleged violations that the employer was

already aware of does not constitute whistleblowing activity. See e.g. Gillispie v. RegionalCare Hosp. Partners Inc., 892 F.3d 585 (3d Cir. 2018) (finding Plaintiff failed to engage in whistle-blowing activity under whistleblower statute as she did not give anyone at the hospital any information about the emergency room visit or discharge "that they were not already aware of."); Pedersen v. Bio-Medical Applications of Minn., 992 F.Supp. 2d 934, 939 (D. Minn. 2014) (finding that "the mere mention of a suspected violation that the employer already knows about" does not constitute whistleblowing activity), aff'd 775 F.3d 1049 (8th Cir. 2015). Certainly, this comports with common sense and societal norms because if Plaintiff is deemed a "whistleblower" under these circumstances, any individual who had knowledge of a company's prior wrongdoings (even if already remedied) could seek to disguise themselves as a whistleblower to insulate themselves from disciplinary action. A finding that Appellant is a whistleblower, under these circumstances, would corrupt the intendment of CEPA by immunizing employees who have been caught red-handed, from termination because they may be a "whistleblower."

Appellant's claim must also fail as this Court has held that an alleged whistleblowing activity that only occurs after being confronted with major work violations is unworthy of protection. See Fenyak v. St. Peter's Univ. Hosp., No. A-2014-21, 2024 N.J. Super. Unpub. LEXIS 115, *10-14 (App. Div.

Jan. 25, 2024) (a plaintiff who reported alleged workplace issues after she was confronted with the defendant company's investigation did not engage in whistleblowing activity because she "was trying to protect her job, not trying to protect the public from the violation of a law, rule, regulation, or clear mandate of public policy."). Accordingly, Appellant did not engage in whistleblowing activity and the trial court's dismissal of Appellant's CEPA claim should be affirmed.

2. Appellant Cannot Establish A Causal Connection Between His Alleged Whistleblowing Activity And His Termination.

The trial court correctly found that Appellant failed to raise any genuine triable issue as to the requisite causal connection between any adverse action and his alleged protected activity. A plaintiff is required to show a factual nexus between the protected activity and the retaliatory employment action. Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002). "The mere fact that [an] adverse employment action occurs after [the protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two." Young v. Hobart W. Grp., 385 N.J. Super. 448, 467 (App. Div. 2005) (second and third alterations in original) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)).

A causation analysis often, but not exclusively, rests on two key factors: "(1) the temporal proximity between the protected activity and the alleged [retaliation] **and** (2) the existence of any pattern of antagonism in the intervening period." Jean v. Deflaminis, 480 F.3d 259, 267 (3d Cir. 2007)(emphasis added). "Only where the facts of the particular case are so unusually suggestive of retaliatory motive may temporal proximity, on its own, support an inference of causation." Kant v. Seton Hall Univ., 2010 N.J. Super. Unpub. LEXIS 2469, at *11 (App. Div. 2010) (internal citations and quotation marks omitted) (Da266-270); see also Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997) ("[T]he mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events.") (citations omitted); Carita v. Mon Cheri Bridals, LLC, 2012 U.S. Dist. LEXIS 87472, at *21 (D.N.J. June 22, 2012) ("Temporal proximity alone, however, is insufficient to establish causation under the CEPA.") (citing Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002, citing Bowles v. City of Camden, 993 F. Supp. 255, 263-64 (D.N.J. 1998)) (Da272-280).

Courts have routinely found that long periods between the alleged retaliation and the alleged protected activity can bar CEPA claims. Flear v. Glacier Garlock Bearings, 159 Fed. Appx. 390, 393 (3d Cir. 2005) (no sufficient

temporal connection between complaints and subsequent termination **two months** later); Martins v. Rutgers, 2021 U.S. Dist. LEXIS 209586, at *40-41 (D.N.J. Oct. 29, 2021) (dismissing plaintiff's CEPA claim because no temporal proximity was pled with respect to the alleged protected activity) (citing Myer v. Spectra Gases, Inc., 2009 U.S. Dist. LEXIS 73354, at *3 (D.N.J. Aug. 18, 2009) (holding that plaintiff failed to demonstrate causation because six months passed between protected activity and termination))(Da282-296); Young v. Hobart W. Grp., 385 N.J. Super. 448, 1073-74 (App. Div. 2005) (holding that plaintiff's termination four months after performing a whistle-blowing activity did not, without more, suggest causal link); Choy v. Comcast Cable Communications, Inc., 2012 U.S. Dist. LEXIS 9432, at *29 (D.N.J. 2012) (no causal connection between alleged protected activity and termination where "three (3) months passed between the time Plaintiff contacted Comcast's legal department and the time Plaintiff was ultimately terminated") (Da303-311).

As the trial court aptly noted, even if Appellant contended that his decision to notify the Company of its alleged marketing actions in 2018 constituted whistleblowing activity, it is undisputed that the decision to terminate Appellant was made in November 2020 approximately, two years after Appellant allegedly notified the Company of the marketing issues. To the extent Appellant attempts to argue that his whistleblowing activity occurred during the

July 16, 2020 investigatory conversation with Respondent, the decision to terminate Appellant was made a full four months after Appellant would have purportedly reported the marketing issues. As is made clear in Young, four months, let alone two years, severs any temporal connection between the alleged complaint and termination where the employee does not introduce additional evidence of causation. Here, Appellant has not introduced ***any evidence*** that could support a causal link.

Further, the circumstances leading up to Appellant's separation directly refute any allegation that Appellant's termination was retaliatory in any way. It is undisputed that at the time he re-raised concerns about the marketing of Myron's products in 2020, Appellant was already under investigation and placed on administrative leave, pending further investigation, for his misuse of the Company's PCard.[3] Moreover, Appellant admits that by July 2020, the Company was aware of and had addressed all of the reported marketing issues (e.g., the lasered pens or the CA labeling, assuming Appellant ever reported or

[3] *Nota Bene:* Appellant has not raised any adverse or retaliatory actions by Defendants after his alleged 2018 report of marketing discrepancies. Rather, Appellant continued his employment which severely undercuts a finding of causation. Evidence of raises, promotions, bonuses, and positive reviews that come after the whistleblowing activity weigh strongly against finding a causal connection sufficient to support a CEPA claim. See e.g. Blizzard v. Exel Logistics N. Am., Inc., 2005 U.S. Dist. LEXIS 28160, at 28 (D.N.J. Nov. 15, 2005). (Da313-336).

objected to either activity). Since there is no temporal proximity to Appellant's protected activity, and his termination was predicated on the fact that he misused the Company's PCard to make personal purchases, Appellant has failed to establish that the decision to terminate his employment was causally linked to his alleged protected activity.

3. Respondent Has Articulated Legitimate Non-Pretextual Reasons for Appellant's Termination.

Ultimately, Appellant bears the burden of demonstrating that Respondents' legitimate non-discriminatory reasons for termination of his employment due to his misappropriation of Company funds and violations of Myron's policies were pretextual. Bocobo v. Radiology Consultants of South Jersey, 477 Fed.Appx. 890, 900 (3d Cir.2012) (affirming summary judgment where "no reasonable jury could have found in Bocobo's favor on his CEPA claim"), citing Blackburn v. UPS, Inc., 179 F.3d 81, 85 (3d Cir. 1999) (affirming summary judgment in a CEPA case where plaintiff was terminated for his violation of company policies); Campbell v. Abercrombie & Fitch, Co., 2005 U.S. Dist. LEXIS 11507 (D.N.J. June 9, 2005) (Da336-352).

It is axiomatic that an employer's dissatisfaction with an employee's misappropriation of company property/funds and violations of the Company's code of conduct are both legitimate non-discriminatory reasons for termination. Ross v. M.A.C. Cosmetics, Inc., 2014 U.S. Dist. LEXIS 82492

(D.N.J., June 17, 2014) (Linares, D.J.)(Da354-362); Young v. Hobart West Group, 385 N.J. Super. 448, 467 (App. Div. 2005) (affirming summary judgment where "evidence of pretext consists solely of [plaintiff's] unsubstantiated and conclusory allegations"); Victor v. State, 401 N.J. Super. 596, 615 (App. Div. 2008), aff'd in relevant part, modified in part, 203 N.J. 383 (2010). Fernandez v. Costco Wholesale Corp., No. A-6466-06T1, 2009 N.J. Super. Unpub. LEXIS 46 (App. Div. Jan. 8, 2009) (employer's decision to not tolerate theft of any kind was a legitimate business reason for termination)(Da364-370).

"To prove pretext, however, a plaintiff must do more than simply show that the employer's proffered legitimate, non-discriminatory reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent." Fulton v. Sunhillo Corp., 2013 N.J. Super. Unpub. LEXIS 2770, at *20-22 (App. Div., Nov. 18, 2013), *quotin*g Viscik v. Fowler Equip. Co., 173 N.J. 1, 14 (2002); Shelcusky v. Garjulio, 172 N.J. 185, 194 (2002) (sham affidavit allegations contrary to prior testimony do not create a fact issue to withstand summary judgment). Stated differently, retaliatory discharge claims must be dismissed unless there is competent evidence from which a reasonable factfinder could determine that unlawful animus "played a role in the decision-making process and that it had a determinative influence on the outcome of that process."

> To establish pretext, [plaintiff] needed to establish 'that (1) a discriminatory reason more likely motivated the employer than the employer's proffered legitimate reason, or (2) the defendant's proffered explanation is 'unworthy of credence.' …
>
> The non-moving party must demonstrate such 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reason for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reason.

Beatty v. Farmer, 366 N.J. Super. 69, 77-78 (App. Div. 2004), quoting Maiorino v. Schering-Plough, 302 N.J. Super. 323, 347 (App. Div. 1997), certif. denied, 152 N.J. 189 (1997); Fuentes v. Perskie, 32 F.3d 759, 763-764 (3d Cir. 1997) (additional citations omitted).

Here, Appellant's long term use of the company's PCard to make personal purchases in violation of his Employment Agreement resulted in his termination. Appellant offers no alternative evidence of an improper motive supporting his termination. Appellant merely asserts—without *any evidence* (as found by the Trial Judge)—that his mere mention of reports in 2018 about Respondents' prior marketing issues, was the reason for his termination. In short, the record evidence is one-sided and confirms it was his use of the company PCard that led to his termination. See, Terry v. Town of Morristown, 446 Fed.Appx. 457, 2011 U.S. App. LEXIS 20053, at *12 (3d Cir. 2011)

(affirming summary judgment based on legitimate nondiscriminatory reason that plaintiff's "aggressive behavior, inability to follow orders, and difficulty interacting with the community" were not pretextual); Arenas v. L'Oreal USA Products, Inc., 2012 U.S. App. LEXIS 2933 (3d Cir. 2012) (affirming summary judgment because the "record fails to cast any doubt on [the employer's] legitimate non-discriminatory reason for terminating [plaintiff]"); Finn v. J.B. Hunt Transport Services, Inc., 437 Fed.Appx. 91, 2011 U.S. App. LEXIS 14459, *6 (3d Cir. 2011) (summary judgment upheld because "subpar job performance that is documented adequately" was legitimate non-discriminatory reason for termination).

In this case, it is undisputed that Appellant (1) was aware of the Company's policies prohibiting the use of Company's policies as he admitted he signed an agreement which explicitly prohibited using the PCard for personal purchases; and (2) used the Company Purchasing Card to make personal purchases for nearly eight (8) years until the cessation of his employment in November 2020. No reasonable fact finder could doubt that Appellant was terminated for any reason other than his own violation of Company policies and misappropriation of Company funds as Appellant has provided no evidence refuting the legitimate business reason. Appellant's self-serving statements, without more, cannot defeat summary judgment. Gonzalez, 678 F.3d at 263

("[C]onclusory, self-serving affidavits [and testimony] are insufficient to withstand a motion for summary judgment"); Scott 550 U.S. at 380 ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for the purposes of ruling on a motion for summary judgment."); Danois, 2013 U.S. Dist. LEXIS 98105, at *28-29 (E.D. Pa. Jul. 12, 2013) (finding that plaintiff's reliance on their self-serving deposition testimony cannot create an issue of fact on summary judgment."). Accordingly, this Court should affirm the trial Court's dismissal of Appellant's CEPA claim.

C. The Motion Judge Properly Dismissed Appellant's Fraud Claim.

The trial court correctly dismissed Appellants fraud claim because, as the trial judge aptly noted, Appellant did not bring forth any evidence, let alone clear and convincing evidence, to establish his fraud claims. To prove common law fraud, a plaintiff must establish: (1) a material misrepresentation by Defendants of a presently existing fact or past fact; (2) knowledge or belief of its falsity; (3) an intent that he rely on the statement; (4) reasonable reliance; and (5) resulting damages. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 75 (2006); Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624-25 (1981). "Fraud is not presumed; it must be proven through **clear and convincing evidence**." Stoecker v. Echevarria, 408 N.J. Super. 597, 617 (App. Div. 2009)

(emphasis added).

In this case, the trial court correctly found that Appellant's legal and equitable fraud claims cannot survive summary judgment because he failed to bring forth clear and convincing evidence that a material misrepresentation was made and that he reasonably relied on said misrepresentation. With respect to the material misrepresentation, Appellant relies solely on his own self-serving deposition testimony to support his assertion that Respondent Kjekstad authorized him to use the PCard for personal purchases.[4]

Appellant's deposition testimony is also refuted by the fact that Appellant admitted in the July 16, 2020 meeting that any personal charges were a mistake and offered to reimburse Myron. In the July 16, 2020 meeting Appellant stated:

> **Dan Barron**: So I have given you the week transactions. What do you think would happen if I went and looked at prior weeks?
>
> **Appellant**: Obviously, you have them there, so just tell me what I owe ya. I truthfully did not realize that I was screwing up until you told me about the prime [video purchase].
>
> [* * *]
>
> **Dan Barron**: Let me play it out. I have access - - I have looked into transactions for the last year and I have a

[4] Appellant's self-serving testimony cannot defeat summary judgment. Irving., 439 F.App'x at 127, *supra* at p. 19.

> good understanding of what I think is going on. So now is your time before it gets to be a different situation that you will explain. What do you really think happened with the PCard and purchases?
>
> **Appellant**: [L]ike I said if . . . I blew something, tell me what I owe ya. I didn't realize I blew something. I know that I have multiple cards on my account. I didn't realize until you told me about the prime video.
>
> [* * *]
>
> **Dan Barron**: Then I'll add on, you know, I don't think Myron has a need for a hockey stick. So you know, again, this is your opportunity to basically come clean.
>
> **Appellant**: And again, I'm coming clean as possible and saying you're right, I coach hockey. If Myron was charged for a hockey stick, then that's a shame on me and I'll more than certainly reimburse you. I don't understand how this thing transitioned from my American Express to my Myron card, but you know, I'll take full responsibility. I apologize for that. I had never intention of taking anything from Myron, and I never had any intention of misconstruing funds.

(SOMF,¶22) (emphasis added).

Moreover, Appellant's deposition testimony that he received permission to use the PCard for personal purchases in 2012 is severely undercut by his statements throughout this litigation including but not limited to, his admissions that he explicitly denied using the Company's PCard for personal purchases before January 1, 2020. See Counterstatement of Facts, Section C, *supra,* pp. 9-13. Based on the foregoing, it is beyond any dispute that

Appellant's own admissions, both before and during this litigation, circumscribe his ability to prove through **clear and convincing evidence** that a material representation was made by Respondents. Masoir, 193 N.J. Super. 195 ("Plaintiff cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations."); Shelcusky v. Garjulio, 343 N.J. Super. 504 (App. Div. 2001) (citation omitted), rev'd on other grounds, 172 N.J. 185 (2002) ("[I]t is only genuine issues of fact and not simply issues created by self-contradictions of an opposing party that are intended to preclude resort to the device of summary judgment.'").

Similarly, even assuming *arguendo*, that Appellant was able to prove a representation was made, which he cannot, Appellant cannot prove that he reasonably relied on said misrepresentation as he was at all times aware of Myron's policies which explicitly prohibit using PCards for personal purchases. Indeed, Appellant signed an Employee Agreement in which Appellant agreed:

> I understand that I am being entrusted with a valuable tool—a Corporate Purchasing Card— and will be making financial commitments on behalf of Myron Manufacturing Corporation, and will strive to obtain the best value for the company by using "preferred suppliers" as identified by the Purchasing Department.
>
> [* * *]
>
> I agree to use this Card for approved purchases only and **agree not to charge personal purchases**.
>
> [* * *]

> I will follow the established procedures for the use of the Card.

(Pa80; Da70-72).

Appellant admitted that he signed the agreement and therefore cannot defeat summary judgment by suggesting that these terms of the agreement did not apply to him. See Stelluti v. Casapenn Enter., LLC, 203 N.J. 286, 305 (2010) ("When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected."). Moreover, New Jersey courts have repeatedly recognized that a litigant cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations. See Carroll v. N.J. Transit, 366 N.J. Super. 380, 388-89 (App. Div. 2004) (holding a plaintiff's interrogatory response that flatly contradicted his own deposition testimony insufficient to create a genuine dispute of material fact); Masoir, *supra;* Shelcusky, *supra*.

Since Appellant failed to demonstrate through **clear and convincing** evidence that a misrepresentation was made and that he reasonably relied on that misrepresentation, this Court should affirm trial court's dismissal of Appellant's fraud claims.

POINT III

THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT ON RESPONDENTS' COUNTERCLAIMS

Respondents asserted three counterclaims: (1) breach of contract; (2) promissory estoppel; and (3) unjust enrichment. The trial court correctly found that Myron is entitled to summary judgment on its counterclaims because there is no genuine dispute in the record that Appellant misused his corporate credit card by charging personal expenses to it. The Trial Judge found a "lack of evidentiary basis" in Appellant's opposition to Respondents' motion on the counterclaims. (Pa10).

A. Respondent Is Entitled To Summary Judgment On Its Breach of Contract Claim

With respect to the breach of contract claim, Respondent Myron has the burden to show (1) the parties entered into a valid contract, (2) that the defendant failed to perform his obligations under the contract and (3) that the plaintiff sustained damages as a result. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). "Generally, the terms of an agreement are to be given their plain and ordinary meeting." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). "If the terms of a contract are clear, [courts] must enforce the contract as written. . . ." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

It is undisputed that the parties entered into a valid contract, that Appellant failed to perform his obligations under the contract, and Respondent Respondent suffered damages as a result. Indeed, Appellant admitted that he signed the Employee Agreement which explicitly stated that he agreed "not to charge personal purchases." Appellant admitted he used the PCard to make personal purchases from 2012 until the cessation of his employment. Respondent suffered damages from Appellant's breach as the Crowe report confirmed Appellant used his PCard for personal purchases over several years and incurred more than $256,000 in personal purchases.[5] Since the foregoing facts are undisputed, Respondent Myron is entitled to summary judgment on its breach of contract claim.

B. Myron Is Entitled To Summary Judgment On Its Promissory Estoppel Claim As No Genuine Issue Of Material Fact Exists.

A promissory claim will be justified if counterclaimant satisfies its burden of demonstrating the existence of four elements:(1) a clear and definite promise by the promissor; (2) the promise must be made with the expectation that the promissee will rely thereon; (3) the promise must in fact rely on the

[5] It is noteworthy that Appellant testified that he was to limit his personal purchases to $2,000/month but at $24,000 per year, that exceeded his past bonuses which were under $20,000 by his own estimation. Further, Plaintiff's purchases of $256,612 over 8 years totals $30,189 per year – far above the alleged authorization and exceedingly above any bonus he received.

promise[;] and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise. Pop's Cones, Inc. v. Resorts Intern. Hotel Inc., 307 N.J. Super. 461, 468 (App. Div. 1998). The essential justification for the promissory estoppel doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced. Id. at 469.

Here, the trial court correctly found that Respondent satisfied all of the elements of its promissory estoppel claim because: (1) it relied on the clear and definite promise, via the Employee Agreement, that Appellant would not to use the Company's PCard for personal purchases; (2) the promise was made with the expectation that Respondent would rely on such promise in exchange for the right to access the PCard; (3) Respondent exhibited its reliance upon this promise by paying the balance on Appellant's PCard for years; (4) the Crowe investigation and Appellant's admissions confirm Appellant used the PCard to make personal purchases in excess of $256,000. Accordingly, Myron is entitled to summary judgment on its promissory estoppel claim.

C. Respondent Was Correctly Granted Summary Judgment On Its Unjust Enrichment Claim.

Lastly, the trial court correctly found Respondent Myron is entitled to summary judgment on its unjust enrichment claim as it is undisputed that Appellant utilized Myron's PCard for his own personal purchases. A claim for unjust enrichment requires proof that Appellant "received a benefit and that

retention of that benefit without payment [to Respondent] would be unjust." Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016).

Here, as noted above, Appellant misused Myron's Pcard(s) to make personal purchases in excess of $256,000 and it would be inequitable and against good conscience to permit Appellant to not repay Myron for the personal purchases made on Myron PCards. In fact, Appellant, in the July 16, 2020 meeting, recognized the inequities in allowing him to abscond with the Companies funds:

> **Appellant**: And again, I'm coming clean as possible and saying you're right, I coach hockey. If Myron was charged for a hockey stick, then that's a shame on me and I'll more than certainly reimburse you. [* * *] I'll take full responsibility. I apologize for that. I had never intention of taking anything from Myron, and I never had any intention of misconstruing funds.

(Da408).

Accordingly, Defendant/counterclaimants, based on the record evidence, are entitled to summary judgment on its unjust enrichment claims.

POINT IV

THE TRIAL JUDGE PROPERLY AWARDED RESPONDENTS THE REASONABLE ATTORNEYS' FEES AND COSTS.

This Court reviews the trial court's award of attorneys' fees under an abuse of discretion standard. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 388 (2009). "An abuse of discretion occurs where the trial court's decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Ripp v. Cnty. of Hudson, 472 N.J. Super. 600, 610-11 (App. Div. 2022) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). Attorneys' fees determinations will be disturbed "only on the rarest of occasions, and then only because of a clear abuse of discretion." Litton, 200 N.J. at 386 (quoting Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001)). As set forth in further detail here below, the trial court correctly found that Respondents were entitled to an award of Attorney's fees and costs because Appellant brought his CEPA claim without any basis in fact.

A. The Undisputed Record Evidence Demonstrates Appellant's CEPA Claim Was Without A Basis In Law or Fact.

CEPA specifically permits "an award of 'reasonable attorneys' fees and court costs' to a prevailing employer 'if the court determines that an action

brought by an employee under th[e] act was without basis in law **or** fact.'" Marrin v. Capital Health Sys., 2017 U.S. Dist. LEXIS 112988, * 7 (D.N.J. July 20, 2017) (quoting Noren v. Heartland Payment Sys., Inc., 448 N.J. Super. 486, 497 (App. Div. 2017)). This provision is only applicable in circumstances where "the employer [was] vindicated and the employee . . . proceeded without basis in law or fact." Id.; see also N.J.S.A. 34:19-6 ("[a] court, . . . may . . . order that reasonable attorneys' fees and court costs be awarded to an employer if the court determines that an action brought by an employee under this act was without basis in law or in fact.").

Respondent successfully obtained a summary dismissal of Appellant's complaint and may be awarded reasonable attorneys' fees. As set forth herein, there can be no doubt that Appellant's complaint was brought without any basis in fact. Here, the trial court correctly noted that courts have not hesitated to grant fees to prevailing employers where it was self-evident that the Appellant had no factual basis for their CEPA claim and brought forth no evidence supporting the same. 2T34-35 (Tr. dated October 12, 2023, pp.34-35), citing, Marrin, 2017 U.S. Dist. LEXIS 112988, at *15-16 (D.N.J. July 20, 2017) and R.M. v. Supreme Court of New Jersey, 190 N.J. 1 (2007)). Notably, in Marrin, the court stated "[p]laintiff's deposition testimony [* * *] actively

shows the absence of [any] basis, militating in favor of an award of fees to [d]efendants in this case." Marrin, *supra*.

Similarly, in Hennigan v. Merck & CO., Inc., 2016 N.J. Super. Unpub. LEXIS 2151, at *23-26 (App. Div. Sep. 28, 2016), the New Jersey Appellate Division awarded attorneys' fees to a defendant in a New Jersey Law Against Discrimination ("LAD") case. In doing so, the Court noted the LAD's fee shifting provision is akin to CEPA's as filing and pursuing a claim "without basis in law of in fact," can justify an award of attorneys' fees under the LAD. Id. at 25; see also Best v. C&M Door Controls, Inc., 200 N.J. 348, 358 n.3 (2009) (likening the LAD fee claim to fee awards under the frivolous claims provision of the Conscientious Employee Protection Act, N.J.S.A. 34:19-6, which requires a determination that the action was filed "without basis in law or fact").

In this case, like in Marrin and Hennigan, there can be no doubt that Appellant proceeded without any basis in law or in fact and with a reckless disregard and purposeful obliviousness to the known facts on his CEPA claim. Appellant was at no time in ignorance of any relevant facts, but he blatantly ignored their import. The record evidenced the following:

- Appellant admitted he was an at-will employee;
- Appellant admitted he signed an agreement which explicitly prohibited using the PCard for personal purchases;

- Appellant offered to pay for any personal purchases that were "mistakenly" made by him;

- Appellant was already under investigation and placed on administrative leave, pending further investigation, for his misuse of the Company's PCard when he raised prior concerns about the marketing of Myron's products;

- Appellant repeatedly stated, throughout the course of this litigation, that his alleged authorization to use the PCard for personal purchases was limited to March 2020 and thereafter; and

- Appellant failed to produce any documents, witnesses, certifications, or other admissible evidence to corroborate his statement of events, or change in his own allegations.

The import of the above facts–none of which were unknown to Appellant–was that he was terminated for utilizing the Company's PCard to make personal purchases in excess of $250,000. Appellant, without any factual evidence or legal basis to back him whatsoever, persisted for over two years in claiming that Respondents terminated him because he engaged in whistleblowing activity more than two (2) years prior to his termination. When it came time for Appellant to present the evidence and law in support of his CEPA claim, Appellant offered no evidence–only his conjecture.

The trial court correctly determined that Appellant's CEPA claim was completely devoid of evidence and was specious. As the Court's January 20, 2023, Statement of Reasons noted "[Appellant] has provided **no evidence or documentation** to demonstrate that retaliation for his objections was

determinative." (Pa9). As determined by the trial court, the record clearly demonstrated that Myron had a legitimate reason for terminating Appellant's employment and that there was zero evidence that supported Appellant's CEPA claim. Further, Judge Citrino noted: "my decision for summary judgment found that [Appellant] failed to allege any evidence [ ] that showed that he was [* * *] terminated as the result of his [ ] 2018 allegations that he [ ] told upper management of" any violations of law. 2T34-35 (Tr. dated October 12, 2023, pp. 34-35). Appellant did not allow the lack of evidence in his favor, or the fact that he *admittedly* utilized the Company's PCard to make personal purchases, stop him from pursuing his CEPA claim against Respondents. This reckless disregard and purposeful obliviousness to the known facts confirms that Appellant had no factual basis for pursuing a CEPA claim against Respondents. The trial court did not abuse its discretion in awarding Respondents their reasonable attorneys' fees in defending against Appellant's baseless claims.

B. The Trial Court Appropriately Found The Fees And Costs Incurred By Myron In The Defense Of This Case Are Reasonable.

In a fee shifting case, the prevailing standard is that an allowance will be made for reasonable fees. See Kellam Assocs., Inc. v. Angel Projects, LLC, 357 N.J. Super. 1332, 142 (App. Div. 2003). The determination for reasonableness requires consideration of the time and labor required, the novelty

and difficulty of the issues involved, the skill required to deal with such issues, the amount involved, the fees customarily charged in the locality for similar legal services, and the like. See RPC 1.5(a).

In this case, the trial court correctly determined that Respondents' attorney's fees were reasonable. 2T36-39 (Tr. dated October 12, 2023, pp. 36-39). Appellant did not assert at the trial level that Respondent's attorneys' fees and costs were unreasonable and therefore did not preserve his ability to raise this issue on appeal. Nieder v. Royal Indem. Ins., 62 N.J. 229, 234 (1973)(quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). Since Appellant has not, and cannot, refute the trial judge's sound basis for determining Respondents' attorneys' fees were reasonable, this Court should affirm the trial court's award of attorneys' fees and costs.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court affirm the trial court's grant of summary judgment and award of reasonable attorneys' fees and costs in favor of Respondents. Appellant's sole support for his appeal is his own change in story to now assert that a typographical error was placed into multiple documents, pleadings, drafts certifications, and—fatal to his appeal—his own responses to request for admissions. Appellant's new version of the facts strains credulity. If there truly

was an error, Appellant could have tried to correct it by motion practice, but he did not do so. Appellant did not file amended answers to interrogatories or amend his response to the requests for admissions. Instead, Appellant files this appeal in hopes that this Honorable Court will grant him a second chance to replead his complaint, change his discovery responses, and redo nearly two years of discovery activities.

As set forth above, at the time of termination, Appellant alleged only that he was given permission to make personal purchases in 2020. Yet, an extensive months long investigation revealed eight (8) years of personal purchases exceeding $256,000. At best, Appellant concocted his story that he received permission in March 2020 for such personal purchases because it matched the time frame that Appellant was being questioned about. In the end, Appellant offered no evidence in discovery to support his claims or to support his effort at deposition to recant his prior admissions and assertions. The decision to terminate Appellant was irrefutably based on Appellant's misconduct—there is no genuine question of fact as to why Respondent terminated Appellant and, as the Trial Judge found, Appellant offered no evidence to support his version of the facts.

Accordingly, summary judgment was correctly granted on Appellant's complaint and on the Respondents' counterclaims. The resulting

order of costs and fees to Respondents was fully supported by the record evidence and the law. There is no question that Appellant knowingly pursued a baseless claim of retaliation under CEPA. Respondents therefore respectfully request that the trial court's Orders dated January 23, 2023 and October 12, 2023 be AFFIRMED.

Respectfully submitted,

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