Steven D'Agostino
Appellant / Plaintiff
and Valerie D'Agostino
Plaintiff

v.

Dirke's Auto LLC;
Cramer's Auto Recycling; and
Double D Auto, LLC
Respondents / Defendants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-855-22

CIVIL ACTION

SAT BELOW:
Honorable John M. Doran, J.S.C.
Ocean County Special Civil Part,
Small Claims section
DOCKET NO. OCN-SC-332-22

PRINCIPAL BRIEF

FOR APPELLANT STEVEN D'AGOSTINO

STEVEN D'AGOSTINO
APPELLANT, PRO SE

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DATE: Apr 1, 2024

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** This was filed on Jan 3, 2023

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Preliminary Statement

This small claims case involved the vehicle that had belonged to the late mother of the Plaintiffs, Steven D'Agostino and Valerie D'Agostino (brother and sister). The vehicle, a 2000 Nissan Sentra, was the only item she had that was of any value (i.e. aside from a few de minimis items such as her clothing and a few pieces of old dilapidated furniture, she had no other assets and had died virtually penniless).

Prior to the events leading up to this lawsuit, two of the defendants in this case (both of whom were junk yards / auto recyclers) had agreed to buy the vehicle; however both of them had failed to come through as agreed. Then on May 9, 2022, the vehicle was reported to the local police department as being abandoned, and as a result it was then towed to the junkyard of defendant Dirke's Used Auto Parts (hereinafter "Dirkes").

Two days later on May 11th, the local police department released the vehicle to Plaintiff-Appellant Steven D'Agostino. (For the sake of simplicity, Plaintiff-Appellant Steven D'Agostino shall hereinafter refer to himself in the first person). For reasons discussed in subsequent sections of this brief, Plaintiff Valerie D'Agostino is not participating in this appeal.

The following day on May 12th, I contacted Dirkes and explained the situation to the employee, asking if they were still interested in buying it. This time the employee offered me $400 for it (instead of the $500 that was previously offered

when they had failed to come and pick it up as they had promised). I then agreed to accept that lesser amount, given that they had already towed it there and held it for a few days. When the employee said that they would need the title, I explained the situation with the title (i.e. that my sister had misplaced it after my mother had signed it with the buyer's name blank), and that it might take me until Monday to find it and bring it. The Dirke's employee responded that it was no problem, and that when I showed up with the title, he would give me the $400 for the vehicle.

However about 10 minutes later the Dirke's employee me called back, saying that his boss wanted to change the deal as follows: I would still bring him the title, but now they would not pay me anything for it; and on top of that, I would have to pay them $130! I then told the employee that he was breaching our verbal contract and that I would sue, to which the employee responded that they would counter sue. On May 30th we then filed the complaint, but no counter suit was filed.

The matter was scheduled for trial on Aug 12, 2022; however Dirke's attorney, John B. Kearney Esq., had filed a motion to dismiss just one day earlier. Thus during the calendar call, I asked for an adjournment to formally oppose the motion, which was granted. However we then participated in mediation, where the parties had verbally agreed to a settlement; but then out of nowhere Mr. Kearney changed his mind and wanted to significantly alter the already-agreed-upon terms. And then when I pushed back, he started screaming and shouting like a maniac, calling me a

liar, and refused to participate in the mediation any further. Later that day, I sent an email to both attorneys (i.e. Mr. Kearney and the attorney for defendant Cramer's Auto), which should have been a "no brainer" that would have resolved the matter at no cost to either defendant, and was actually even better for Dirke's than what they had initially offered during the mediation. However on Sunday Aug 14th, Mr. Kearney rejected this offer without any explanation or counter offer, and instead 2 days later sent me and my sister what I believed (and still believe) to be a bogus *R. 1:4-8* letter. I had also called counsel for Cramer's, asking him to try to convince Dirke's attorney to accept my offer, as it would get his client off the hook for no money at all. But he refused to even make a quick call to Mr. Kearney, and instead chose to send us his own bogus *R. 1:4-8* letter.

Mr. Kearney filed a second motion to dismiss, and I filed an opposition/cross motions, seeking to enforce the Aug 12th settlement, and to sanction the attorneys. On Sep 23, 2022 Dirke's motions were granted and my cross motions were denied.

Mr. Kearney then filed a motion for sanctions, and I filed an opposition/cross motion, seeking to reinstate my claims after obtaining the letter of administration of our mom's estate from the Surrogate's Office. On Oct 21, 2022, Dirke's motion for sanctions was granted (without prejudice to another motion seeking more sanctions) and my cross motions were denied. (*The parties then signed and filed a consent order, but the judge did not sign it*). This appeal was timely filed on Nov 15, 2022.

Procedural History [1]

On May 30, 2022, the complaint was filed in the Special Civil Part, small claims section of the Ocean County vicinage. (Pa1)

On June 13, 2022 the parties were notified that the matter was scheduled for trial on Aug 12, 2022. (Pa7)

On Aug 11, 2022, defendant Dirkes Used Auto Parts filed a motion to dismiss, via its counsel, John B. Kearney Esq. (Pa8)

During the calendar call on Aug 12, 2022, I raised the issue that the court should not hear Dirke's motion at that time, because the motion had only been filed one day in advance, affording me no opportunity to formally oppose the motion. As a result, the trial court granted my request for an adjournment, and then immediately sent our matter out to mediation, which did not conclude with a settlement being successfully placed on the record. [2]

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[1] The parties consented to abbreviated transcripts to include only the court's rulings on 9/23/22 (**1T**) and 10/21/22 (**2T**), as we had agreed that all of our arguments are fully set forth via the parties' certifications and exhibits. There are also 3 letter-briefs are included with the appendix, because they are germane to the appeal to show the arguments that had been raised below. That is, although the trial court had summarized the parties' arguments during the hearings, and afforded us an opportunity to orally highlight those, only the papers fully set forth our arguments (aside from Mr. Kearney arguing that he does not need to prove bad faith). There was no oral argument for the court's 2/28/23 paper rulings (**3T**, unabbreviated)**.**

[2] Although the parties had verbally reached a settlement during that Aug 12th mediation session, Mr. Kearney then suddenly changed his mind about the agreed upon terms; and then when I pushed back on the proposed changes, he started screaming and yelling at both me and my sister, calling me names, threatening me with perjury charges, and refusing to participate in the mediation session any further.

The parties did not go back on the record after the mediation. A few days later, the case (including the motion to dismiss) was then rescheduled for Sep 23, 2022.

I was in the process of preparing my opposition and cross motion when Mr. Kearney filed a second motion to dismiss on Aug 24, 2022. (Pa11)

As a result, my opposition and cross motion needed to be modified somewhat, which was ultimately filed several days later on Aug 29, 2022. (Pa19)

On Aug 31, 2022, Mr. Kearney submitted a very scant reply via a letter-brief. (Pa68).

On Sep 23, 2022, the trial court heard oral argument on the motions and cross motions. (1T). On this date, the trial court granted Dirke's motions to dismiss, on the sole basis that neither Plaintiff was an administrator or executor or our mother's estate. (1T, Pa70) Also on this same date, the trial court denied my cross motions. (1T, Pa71) Specifically, the trial court found my position to be "creative". (1T6:14)

On Sep 29, 2022, Dirke's filed a motion for sanctions. (Pa73)

On Oct 10, 2022, I opposed the motion along with a cross motion to vacate the dismissal and file an amended complaint, as I had since obtained the paperwork to be the administrator of my mother's estate. (Pa83)

On Oct 17, 2022, Dirke's filed a reply (*misdated as Sep 20, 2022*). (Pa105)

On Oct 21, 2022, the trial court heard oral argument on the motion and cross motions. The trial court then granted Dirke's motion for sanctions (Pa110)

Also on this same date, the trial court denied my cross motions. (Pa112)

On Nov 7, 2022, Dirkes had reached a settlement agreement with my sister, at which time he had prepared consent order (Pa150), which I modified (Pa155). On Nov 10, 2022, Mr. Kearney filed a modified consent order, where amongst several other things, the parties agreed to abbreviation of transcripts for this appeal. (Pa113)

On Nov 15, 2022, I filed (in person) and served (via regular mail) my Notice of Appeal and Case Information Statement (Pa116). Then when asked by this Court, on Dec 6, 2022 Mr. Kearney initially agreed that the matter was final as of Oct 21, 2022 (Pa120); but then on Dec 29, 2022 he changed his mind, after I refused to participate in another hearing before the trial court (Pa121).[3] That same day, I opposed his 180-degree change of position (Pa122).

On Jan 9, 2023, this Court dismissed the appeal sua sponte, therein deciding that the appeal was interlocutory, remanding the case for further proceedings (Pa123).

However even before this Court made that ruling, Dirkes had already filed another trial court motion seeking additional sanctions (Pa124). On Jan 13, 2023, I had timely opposed this motion, and I cross-moved seeking (amongst other relief) indigent status and a stay on the execution of the judgment (Pa133). On Jan 18, 2023, Dirkes filed a reply, which raised new issues for the very time (Pa140). Thus on Jan 31, 2023, I filed a sur-reply rebutting those new issues. (Pa143)

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[3] Both of these letters were misdated as “Nov 4, 2022”.

On Feb 28, 2023 the trial court dismissed or denied all of my cross motions while granting (in part) Dirke's motion, thereby adding another $4,040 in sanctions, bringing the total to $8,900.49 (Pa169, 3T).

On Mar 10, 2023 I moved before this Court to reinstate my appeal, for indigent status, as well as a stay. On Apr 10, 2023, the motion was denied in part, and granted in part (Pa171).

On Apr 19, 2023 I then filed an amended Notice of Appeal and an amended Case Information Statement. (Pa173) On this same date, I also sought stay relief and indigent status from this Court. On Apr 28, 2023, Dirkes opposed this motion (Pa 177). On May 11, 2023 this Court denied the relief I sought (Pa179).

I then raised those issues in a motion to the N.J. Supreme Court, which was unopposed. On June 23, 2023, our case manager stayed these proceedings until the issues pending before the N.J. Supreme Court were resolved (Pa182).

The N.J. Supreme Court rendered its initial ruling on Jul 13, 2023 (filed on Jul 19, 2023) (Pa183), and then rendered its final ruling on Jan 23, 2024 (filed on Jan 29, 2024) (Pa184). After receiving this final N.J. Supreme Court motion order, I then attempted to contact my case manager again, but then I learned that she had since retired. After making a few inquiries, on Feb 13, 2024 the appeal was reactivated (and assigned to a new case manager), and on that same date the parties were sent a new briefing schedule (Pa185).

Statement of Facts

It is undisputed that Dirkes is a junk yard that primarily sells used auto parts, and only performs towing services on an ancillary basis. (Pa2, Pa158 – Pa168)

It is undisputed that after receiving our mom's vehicle on May 9, 2022 (i.e. due to a call from the local police reporting it as abandoned), Dirkes has since kept our mom's vehicle for free, thereby yielding Dirkes a windfall benefit of $2,000 to $3,000 in used auto parts and scrap metal. (Pa3)

It is undisputed that on May 11, 2022, the local police released the vehicle back to me, even though they knew that the title was still in my mom's name. (Pa38)

It is undisputed that on May 12, 2022 Dirkes offered me $400 for my mom's vehicle, even after I made them completely aware of the situation with the title. (See Pa40 and Pa41, which is my own transcript of my phone call with Dirkes).

It is undisputed that 10 minutes later Dirkes reneged upon this offer, then not wanting to pay anything at all for our mom's vehicle. But even at that time, it is undisputed that Dirkes still had no issue whatsoever with the title still being in my mom's name. It is undisputed that Dirkes never asked me to have the title transferred into my name, or to become an executor of my mom's estate. [4]

[4] There was nothing whatsoever in the record to support the trial court's bald conclusion that Dirke's decision to renege upon their agreement had anything to do with the person's name on the title (e.g. "And then somebody might have said well maybe we better talk to the boss, maybe we better talk to our attorney, or how are we going to take title from somebody that doesn't have title?)" (2T8:25 – 9:3) Instead, this finding was literally pulled out of thin air.

It is undisputed that most junk yards / auto recyclers do not even require a title (See Pa42 – Pa54, showing that many junk car buyers require absolutely nothing, while Cramer's only requires a key, and Modern Day Recycling only requires either a registration card or insurance ID card in lieu of a title). [5]

It is undisputed that on June 29 2022, I had been contacted by a Sgt. Smith from the local police department, after Dirkes had asked them to contact me with an offer to settle the case by simply giving me back the vehicle. (Pa22, ¶7) It is further undisputed that although I rejected that offer (at that time); during this same call, I told Sgt. Smith that Mr. Dirkes could instead contact me directly to discuss settlement (Pa23, ¶8); but Mr. Dirkes never did so. *This phone conversation was recorded by the police, and I was later able to obtain a copy of that audio recording*. (These undisputed facts are set forth in more detail at Pa66-67, ¶¶10-23).

Trial was scheduled for Aug 12, 2022, and mediation occurred on that date.

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[5] It is undisputed that Modern Day Recycling will accept a registration card or insurance card in lieu of any title, and that Modern Day Recycling does not care anything about estate executor papers, nor even if the title is signed, nor whose name is on any of the paperwork.

It is further undisputed that defendant Cramer's Auto does not require any paperwork at all – instead, when they buy a junk car, they only require having a key.

It is also important to recognize the practical realities with selling cars for junk, in that the normal paperwork which is required to sell a vehicle to a "normal buyer" (i.e. a buyer who wants to drive the vehicle on the road again) is not applicable. That is, the junk yard will be the car's "final destination", where it will be stripped for its valuable parts, and then whatever is left over will be crushed for the value of the metals. Thus, all of the documentation that normally would be required to sell a decedent's car to a normal buyer, is not required at all when the car is sold as junk.

It is undisputed that the issue of standing had first arisen just one day before trial, via Mr. Kearney's Aug 11, 2022 motion to dismiss. (Pa8) [6]

It is undisputed that Mr. Kearney ended the mediation by screaming and yelling at me and my sister, conducting himself in an unprofessional, belligerent and threatening manner. (See my testimony to this fact at Pa23, Pa24, Pa34, Pa57-Pa58; as well as Mr. Kearney's failure to deny this fact in his reply at Pa68, Pa69).

It is undisputed that Dirkes could have easily resolved the issue later that same day at no cost to themselves (or anyone else), simply by accepting my offer. (Pa27)

But on Aug 14, 2022 Mr. Kearney wrote back rejecting that offer. (Pa30) As Aug 14th was a Sunday and the junkyard is closed on weekends, most likely Mr. Kearney rejected this offer without even consulting with his client first.

It is undisputed that Mr. Kearney has never argued that either me or my sister acted in bad faith. It is further undisputed that Mr. Kearney has never billed his client for any of the legal services. (Pa130) When the trial court granted the motion for sanctions, there was no scrutinization of the reasonableness of the alleged services; instead, the trial court simply found that the total amount sought "seemed low" (2T11:7 to 12:4), and granted the motion without prejudice to another motion seeking additional sanctions (2T13:6).

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[6] The motion was only addressed to me, and it was only served to me via email. Moreover, this motion was not served upon my sister at all, via any means. (Pa8) Then on Aug 24th Mr. Kearney filed a second version of this motion. Again this second version of the motion was only served to me via email, and it was not addressed or served upon my sister at all. (Pa11)

Mr. Kearney's Nov 7, 2022 email states that an additional amount of $2,000 would cover "the work done but not considered yet by the Court". This email also states an additional cost of $1,200 for him to file a motion to obtain this extra $2,000. This fact was further reflected within his proposed order. (Pa149, Pa150)

However in his subsequent motion for additional sanctions, Mr. Kearney sought an additional amount of $6,160 (Pa131), which was more than triple the amount that he had previously stated in his Nov 7, 2022 email. Thus, he was seeking a total sanctions award of $11,020.49 against me (Pa127). On top of that, Mr. Kearney wanted to also keep the $2,430 amount which my sister had paid to settle her portion of the sanctions award (Pa114), for a total benefit of $13,450.49.[7]

When the court ruled on this motion, there was only scant scrutinization (3T10) of the alleged services, which Mr. Kearney admitted were "unbilled" (Pa130). Ultimately, the trial court only limited the award of sanctions by date range, and granted everything that fell within that date range, exactly as sought. (3T11:3). The trial court allowed for no offset whatsoever, for the $2,000-$3,000 benefit that Dirkes had reaped from the car (a vehicle which Dirkes hadn't paid a penny for).

As a result, Mr. Kearney was awarded a total of $8,900.49 in sanctions, plus

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[7] My sister agreed to pay $2,430 (i.e. half of the then-awarded sanctions), forfeit her rights on appeal, and in return the judgment against her was supposed to be vacated. Although she fully honored her end of the settlement agreement, ultimately the judgment against her was not vacated. (3T5:17) So to date, Dirkes has received the full benefit of that settlement agreement with my sister, while conversely she has not received any benefit at all.

Dirkes also got to keep our mom's car for free.[8] (3T14:17, Pa169).

Long before I filed this small claims case, I was familiar with many authorities pertaining to the issue of standing. This was because it was first raised by the defendants in an unrelated Mercer County Law Division case, MER-L-1937-18, then again in my subsequent appeal (A-5331-18, *D'Agostino v. Colony Insurance Company*, 2022 WL 1553717), in which I prevailed on May 17, 2022 (i.e. less than 2 weeks before I filed this small claims case).

So even though the car's title was not in my name, and even though neither my sister or I was an "executor" of our mom's "estate" (which consisted solely of her vehicle), nonetheless I believed then, as I still do now, that we both had standing to bring our claims as intended third party beneficiaries.

But unfortunately for both me and my sister, as of 2022 I could only vaguely recall seeing an authority specifically on the issue of standing pertaining to a car and its titled owner; and sadly I did not find it again (i.e. *Haylett v. Baladi*, 2010 WL 2346713) until many months later.

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[8] Then on top of everything else, several months later I ultimately was sanctioned for an additional $600, for a total of $9,500.49. This additional $600 was against me only, and was incurred because the U.S. Post Office had twice lost my mail (when I attempted to return my completed information subpoena back to Mr. Kearney), and because I had a serious security concern about emailing my most sensitive information, as email is a notoriously unsecure method of transmission. Although I believe the trial court erred by discounting my attempts and scoffing at my security concerns, I did not include this issue in the appeal. This is because I was concerned that doing so would only increase the complexity of the appeal; and I have learned from past experience that it is best to limit the issues raised in any appeal.

ARGUMENTS

1. My claims were valid and should have proceeded. (Pa19-67;Pa84-85;Pa136-146)

A) My contract-based claims were viable, which I had ample standing to bring.

We had asserted four (4) causes of action against Dirkes. The first three (Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Consumer Fraud) were based upon on the May 12, 2022 verbal agreement made between Dirkes and myself. The fourth cause of action (Unjust Enrichment) would only come into play if for any reason the May 12, 2022 verbal agreement (i.e. contract) should be deemed to be unenforceable.

Dirke's counsel, Mr. Kearney, was the person whom first raised the issue of standing, and he did so just one day before trial.[9] Mr. Kearney had simply argued his position that we had no standing at all, solely because the title to our mom's vehicle was not in our name. However, this exact same issue has already been before this Court, where in a 2010 unpublished opinion, even though the defendant was represented by counsel and the plaintiff was a pro se non-attorney, this Court affirmed the lower court's ruling that the plaintiff did have standing – specifically rejecting defense counsel's argument as to that plaintiff's lack of standing.

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[9] Although he did not make his position on this issue clear until almost 6 months later, it would turn out that his position also subsumed the following argument: the contract made on May 12, 2022 should be considered null and void, simply because we did not have documentation from the Surrogate's Office at that time. This was not quite the same argument as what he had presented within his motion papers, nor as what he had stated within his *R. 1:4-8* letter.

My primary position was that Dirkes had negotiated directly with me and made a contract directly with me, not my late mother. (Pa61) This position was virtually identical to that of the successful plaintiff in *Haylett v. Baladi*, 2010 WL 2346713, where in that case the plaintiff was the secretary for an auto repair shop, who in attempting to sell an abandoned car, had entered into a verbal contract with the defendant, whom apparently took the car and kept it, but had never paid for it. The secretary Haylett brought suit against the defendant Baladi, whom later via its counsel had then argued that the plaintiff lacked standing to bring suit, as the title was not in her name, and she was not even the owner (or corporate officer) of the auto repair shop where the vehicle had been abandoned at. That is, Baladi had contended that Haylett "had no ownership, title or proprietary interest in the subject automobile and therefore lacked standing to commence the civil action for loss of property." However the trial court rejected the defendant's contention, as did the unanimous Appellate panel:

> "Baladi argues that Haylett had no standing to sue in her own name because she was representing an auto body shop that she did not own and that she could not sell the car because she did not have the title. **We reject this argument**." [emphasis added] *Id.* at *1

The unanimous Appellate panel found that the plaintiff had standing because the defendant "dealt with her", and also found that the plaintiff's lack of title was not an impediment to the contract, because the defendant had "accepted it that way". The Appellate panel further found that the appropriate measure of damages was based

on the defendant's unjust enrichment of $3,000, rather than just the (breached) contract amount of $500 that the defendant had failed to pay, therein holding:

> "The judge decided that any contract was breached by Baladi's nonpayment. A return of the 2001 Sebring, after Baladi had used it for several months, would not be fair. Therefore, on a quantum meruit basis, the judge awarded $3,000 as a fair market value of the 2001 Sebring at the time it came into Baladi's possession. We perceive no error in this approach." *Id.* at *2

Here in this case, the facts are even more favorable for my position, in that: 1) unlike Haylett who had no relationship whatsoever with the vehicle's titled-owner (Miriam Perez, whom was still alive), my sister and I had inherent financial interest (and standing) as the natural heirs of our mom's vehicle; 2) unlike Ms. Perez, our deceased mom could not possibly ever "redeem" her vehicle; 3) our mom's vehicle would never be driven again, unlike the Perez vehicle that was driven on the road again by a new owner; and 4) our mom had expressly assigned her vehicle rights to us (i.e. she had signed it for the purpose of our being able to sell it after she passed), and she had authorized me to negotiate the sale of the vehicle post-mortem.

As a general rule, courts should enforce contracts as the parties intended. *Pacifico v. Pacifico*, 190 N.J. 258, 266 (2007). Dirkes had taken our late mother's vehicle, but then refused to pay us the amount of money that it had previously agreed to (i.e. for it keeping that vehicle to sell as parts). Further, Dirkes knew the status of the title (i.e. that the title was still in my mom's name), and with full knowledge of that fact, had nonetheless agreed to pay me $400 to keep our mom's vehicle (i.e. to then sell $2,000-$3,000 worth of parts from), with the title "as-is".

Moreover, as I had argued to the trial court in my motion for reconsideration, even assuming arguendo if we were technically required to have the documentation of the Surrogate's Office, there is ample precedent holding that technical defects (e.g. such as a lack of documentation), would not cause a contract to become unenforceable, unless doing so would be violative of public policy. For example, I pointed out an authority pertaining to an employment contract made with an illegal (i.e. undocumented) alien, *Montoya v. Gateway Insurance Company*, 168 N.J. Super. 100 (App.Div. 1979), where this Court enforced the contract and held that it would be wrong to allow the employer to reap an unfair benefit of free labor, simply because the worker did not have the proper documentation when he entered into the employment contract. This concept was reaffirmed several more times (see e.g. *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 NJ Super. 14 (App.Div. 1996); *Serrano v. Underground Utils. Corp.*, 407 NJ Super. 253 (App.Div. 2009)). As another example, I also pointed to an authority from the neighboring state of New York, *Matter of Sakow*, 219 A.D.2d 479, 631 N.Y.S.2d 637, 640 (N.Y. App.Div. 1995), which held that a person (i.e. an heir whom selfishly and improperly took estate property for his own benefit) was properly recognized as a "de facto executor" of his father's estate, even though he had no official paperwork to designate him as such. (Pa146, ¶22). Thus I had direct standing with that contract. Therefore I had brought valid contract-based claims case against defendant Dirkes.

Further, here we also had (essentially) an express assignment of rights, due to our mother's signature on the car's title, which our mom authorized us (i.e. in writing via her signature on the title) to sell after her death. (Pa2, ¶3) And as I argued to the trial court, to the extent that the contract was made on our mother's behalf, I was acting as an authorized agent. (Pa137, ¶42). Mr. Kearney countered this with his argument that agency "terminates with death". (Pa 141). However I rebutted that argument by pointing to the fact that in many states, "disposition agents" are recognized to act after the principal's death. (Pa145, ¶15) But even assuming arguendo if this fact is insufficient to establish privity of contract, notwithstanding that assumption, we still had standing. That is, as this Court has previously made clear, "third-party beneficiaries may sue upon a contract made for their benefit **without privity of contract**." *Rieder Cmtys. v. N. Brunswick*, 227 N.J. Super. 214, 221-22 (App. Div.1988) [emphasis added] (citing *Houdaille Constr. Materials, Inc. v. Am. Tel. & Tel. Co.*, 166 N.J. Super. 172, 184-185 (Law Div. 1979)), certif. denied, 113 N.J. 638 (1988)).

Even further still, my alternate position was that my sister and I (i.e. the only natural heirs) also had standing as intended third party beneficiaries of the sale of the vehicle. (Pa61, Pa62) Thus even aside from all of the foregoing, and even if the verbal contract with Dirkes was deemed to be unenforceable, nonetheless we still had standing to pursue an unjust enrichment cause of action, as we had a significant

financial interest in the outcome of the vehicle (one that the defendant never paid for and was keeping to sell parts from and make a windfall profit).

B) My extra-contractual/quasi-contractual claim (i.e. unjust enrichment) was viable.

As I argued above, even assuming arguendo if there was a fatal defect in the contract-based claims, nonetheless the unjust enrichment claim (which of course is quasi-contractual / extra-contractual in nature) should have survived. It should be noted that there was nothing afoul with our assertion of both contractual and non-contractual claims. See e.g. *Caputo v. Nice-Pak Products, Inc.*, 300 N.J. Super. 498, 504-505 (App.Div. 1997), holding that "Plaintiff correctly contended before the trial court that, if the jury found that there was no valid contract, the jury could then consider whether plaintiff nonetheless might recover for unjust enrichment, a cause of action that does not depend on there being an express contract." See also *Power-Matics, Inc. v. Ligotti*, 79 N.J. Super. 294, 306 (App.Div. 1963), holding that a plaintiff may attempt to prove both unjust enrichment and breach of contract without also showing rescission of the alleged contract.

As I argued to the trial court, even though neither I nor my sister was an “owner” of the vehicle, nonetheless we still had standing - due to our financial interest in its disposition. "New Jersey courts take a broad and liberal approach to standing". *New Jersey Citizen Action v. Riviera Motel Corporation*, 296 N.J. Super. 402, 415 (App.Div. 1997). Generally, the threshold to prove a party's standing is

"fairly low." *Reaves v. Egg Harbor Twp.*, 277 N.J.Super. 360, 366, 649 A.2d 904 (Ch.1994). "A financial interest in the outcome ordinarily is sufficient to confer standing." *Strulowitz v. Provident Life & Cas. Ins. Co.,* 357 N.J.Super. 454, 459, 815 A.2d 993 (App. Div. 2003). That is, in order to possess standing, the plaintiff need only have a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision. *In re Camden Cnty.*, 170 N.J. 439, 449, 790 A.2d 158 (2002); *In re Tp. of Howell*, 254 N.J. Super. 411, 416, 603 A.2d 959 (App.Div. 1991); *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 N.J. 57, 67, 411 A.2d 168 (1980); *Crescent Pk. Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 107, 275 A.2d 433 (1971).

Mr. Kearney argued that my sister and I lacked standing, because we only had an "inchoate interest" in our mom's car (Pa12, ¶9) – however the New Jersey Supreme Court has expressly held that an "inchoate interest" is sufficient to confer standing. In *Cherokee LCP Land, LLC v. City of Linden Planning Bd.*, 234 N.J. 403 (2018), a case involving the rights of tax certificate lien holders, the majority of the N.J. Supreme Court held that even though the plaintiffs were not the titled owner of the property, since the plaintiffs' rights to the property could be affected by an

adverse outcome, their claims could not be foreclosed due to lack of standing. In pertinent part, the N.J. Supreme Court held:

> "The lien purchaser obtains an **inchoate interest ..."**
>
> In this appeal, the trial court found that only a party with an "ownership or possessory interest" could have standing to maintain an action challenging a municipal planning board's approval. The trial court dismissed plaintiffs' complaint, finding that "the holder of a tax sale certificate cannot be deemed an `interested party'" without an "ownership or possessory interest," which did not exist here. **We disagree and conclude that a tax lienholder may have standing to challenge a planning board's actions.**
>
> **Although a tax lienholder does not have title to the subject property**, *Township of Jefferson*, 228 N.J. Super. at 4, 548 A.2d 521, and has, at best, a limited possessory interest in it pursuant to *N.J.S.A. 54:5-86 (c)*,[9] **the absence of title** or possession **is not determinative of standing**. *Id.* at 416-417 [emphasis added]

It also should be noted that although there was a split in the courts in their respective decisions about if those plaintiffs had standing, the split was only due to the speculative nature of the plaintiffs' financial interest in the outcome (i.e. if the titled owner should chose to redeem the property in question, as pointed out in the dissent). But here in this instant matter, there is nothing speculative about my financial interest in the outcome of Dirke's possession of our mom's car, as sadly there is no possibility at all that my mom could choose to "redeem" her vehicle.

Moreover, even further assuming arguendo that the documentation from the Surrogate's Office was an absolute prerequisite before being able to bring this unjust enrichment claim, there was and is absolutely no reason why that claim should not have been reinstated once I obtained that documentation.

Even assuming arguendo if the court had correctly determined that there was no valid contract, nonetheless I could still recover for “unjust enrichment, a cause of action that does not depend on there being an express contract." *Caputo v. Nice-Pak Products, Inc.*, 300 N.J. Super. 498, 504-505 (App.Div. 1997)

To demonstrate unjust enrichment, "a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust". *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519 (1994). Additionally, unjust enrichment may constitute a ground for imposing equitable relief. See C*allano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108-109* (App.Div. 1966) (holding that "It rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle of whatsoever it is certain a man ought to do, that the law supposes him to have promised to do") (citing *St. Paul Fire, etc., Co. v. Indemnity Ins. Co. of No. America*, 32 N.J. 17, 22 (1960)) Equitable relief may be created "[w]here property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched." *Restatement of Restitution § 161 (1937)*; see *Copeland v. Clafin*, 12 N.J. Super. 10, 14 (App.Div.1951).

It is undisputed that Dirkes received a huge benefit from keeping my mom’s car, which it has never paid a penny for. Thus, my unjust enrichment claim was valid.

C) I had rights to the vehicle, as determined by the local police department.
Dirkes only obtained this vehicle because the local police department had reported it as abandoned, and then on May 9, 2022 asked Dirkes to tow it to their junkyard. Dirkes right to keep possession of the vehicle was limited by that authorization from the police. And only after a certain period of time, if no further action was taken, could Dirkes then keep the vehicle to sell as parts and scrap metal. But even in that scenario, Dirkes would not need to become an estate executor for my mother before being able to do so. (*Obviously, Dirkes never became an estate executor*).

But then just two days later on May 11, 2022, knowing full well that the title of the vehicle was still in my deceased mother's name, the same local police department then released the vehicle back to me (Pa38). I then had the same rights as Dirkes to keep possession of the vehicle, and the only thing Dirkes was entitled to would be compensation for the towing and storage. I could have negotiated with Dirkes for that amount owed, then retaken possession of the vehicle. I could then have chosen to: A) keep it in my backyard as a memorial; and/or B) take parts from it for my own needs; and/or C) sell parts (and/or scrap metal) from it to others.

However instead of proceeding down that path, after my negotiating with its employee, Dirkes agreed to buy my rights to the vehicle for $400, and they would then be able to keep and sell the vehicle (presumably for the parts and scrap metal).

At no time prior to Aug 11, 2022 (i.e. just one day before trial), was the name on the title (or being an estate executor) ever an issue.

But then all of the sudden on Aug 11, 2022, Dirkes' legal position then became that I have no rights to the vehicle, (nor to benefit from the sale of it, in part or in whole), without being an official estate executor or administrator. And the trial court found that my doing so was necessary to protect other possible creditors. Yet incredulously, Dirkes was (and still is) able to keep the vehicle, and reap a much greater benefit from it than the $400 which we agreed to, and Dirkes does not need to do the same.

In other words, rhetorically speaking, why is that before I am allowed to reap a mere $400 benefit from the vehicle, I first must become an official estate administrator; yet in stark contrast, Dirkes can reap a $2,000-$3,000 benefit from it, without Dirkes needing to do the same??? Moreover, if anything, it should be exact opposite way around – that is, Dirkes had no relation at all to my mother, while obviously I am someone who is her natural heir. Further still, *N.J.S.A. 3B:16-5* (codifying a $5,000 personal property exemption for the benefit of a decedent's family) provides that any personal property of a deceased person which has a value less than $5,000, can be kept by the decedent's heirs and is immune from collection by creditors. Likewise, even prior to death, *N.J.S.A. 2A:17-19* provides for a $1,000 exemption "both before and after [her] death, for [her] use or that of [her] family or [her] estate, and shall not be liable to be seized or taken by virtue of any execution or civil process whatever, issued out of any court of this State."

From our perspective, the car had a value of only in the $400-$650 range. Yet from Dirkes' perspective, it has a value in the $2,000-$3,000 range (and of course, Dirkes is not an heir). Thus here, the $400-$650 value of the vehicle (from our perspective) falls below the exemption thresholds of both statutes *N.J.S.A. 3B:16-5* and *N.J.S.A. 2A:17-19*, while the value from either party's perspective falls below the $5,000 exemption threshold of the former statute, *N.J.S.A. 3B:16-5* (i.e. even from Dirkes' perspective, the $2,000-$3,000 value of my mother's vehicle was well below that $5,000 property value threshold). So even assuming arguendo if there had been one or more creditors whom otherwise would have wanted to collect upon outstanding debt via that vehicle, that option would not have been available to any such creditor(s) after her death.

So there was no practical reason whatsoever for me to become an official estate executor or administrator prior to entering into my agreement with Dirkes. And there is absolutely no reason at all for precluding my unjust enrichment claim, especially even after I obtained the official estate administration paper work.

2. Sanctions should never have been imposed. (1T, 2T, 3T, Pa1 – Pa186)

Obviously, if even just one of the claims was valid, then the complaint as a whole was not frivolous. *United Hearts, LLC v. Zahabian*, 407 NJ Super. 379, 394 (App. Div. 2009) (holding that a pleading will not be considered frivolous for purposes of imposing sanctions under *Rule 1:4-8* unless the pleading as a whole is frivolous).

Moreover, even assuming arguendo if there was some fatal flaw with each and every claim asserted, even still sanctions should not have been imposed. There are several reasons for this.

A) I had several valid substantive arguments supporting my position.

For starters, comparing what I had argued in my Aug 29, 2022 brief (Pa61) to this Court's findings in *Haylett*, shows that they are virtually the exact same positions. Thus, the only 2 possible are conclusions are either: A) Even though I couldn't exactly recall this opinion at the time in 2022, in the back of my mind I still remembered what I had learned from reading it (in passing) years earlier when I was researching my case against Colony Insurance Company; or B) I thought of my position all by myself, without even any subconscious knowledge of *Haylett*, and I just happened to think the same exact way as the 3 judges (i.e. the trial court and the 2 Appellate judges) did in that case.

Although I think that the most-likely and logical conclusion is the former scenario (i.e. that in 2022 I had vaguely recalled this Court's rulings in *Haylett* and attempted to reiterate those findings therein, even though not specifically cited when the case was before the trial court), the latter scenario is also possible (i.e. that "great minds think alike"). But as I will discuss in detail within the next several paragraphs, either way, my position certainly was not frivolous.

As to the former scenario, although I had not been consciously aware of the *Haylett* authority until just a few months ago, I now believe that I must have been

previously aware of it subconsciously, and for the whole time while this matter was pending in the trial court.

That is, in late 2018 I had filed a Law Division case (MER-L-1937-18) against the insurer (Colony Insurance) and the broker (Poulton & Associates) whom sold my former attorney (Laurence Hecker) a legal malpractice policy, where Colony then wrongfully denied the timely claim submitted by Hecker. A few months later, both Colony and Poulton moved to dismiss my claims against them, arguing that I lacked standing. As a result, starting in early 2019, I did a ton of research on case law regarding the issue of standing, especially with respect to intended third party beneficiaries, particularly in regards to the standing of injured patients and clients with the professionals' malpractice insurance policies. Then after the Law Division granted those motions (agreeing with the defendants that I lacked standing), I continued to delve into even more case law during the Appellate phase. On May 17, 2022, I eventually prevailed in my appeal of that matter (A-5331-18, 2022 WL 1553717), from which the defendants then immediately sought certification from the New Jersey Supreme Court (087175), which the Court ultimately denied on May 22, 2023, and which is now (finally) pending in the Law Division again.

So although I do not specifically recall seeing the unpublished opinion of *Haylett v. Baladi*, 2010 WL 2346713 during that time, it is very likely that sometime between 2019 and 2020 I had came across it and read it; but because it

was not directly applicable to my case against Colony and Poulton, I did not consciously remember it (even when I filed this instant small claims case against Dirkes, nor even during the early stage of the current appeal). However, I think that it is very likely that I subconsciously did remember it, as my position was so closely similar to that asserted in the *Haylett* case, which 3 different judges held to be correct and viable. And this Court should take judicial notice of the fact people often won't remember how, when, or where they had come to form their beliefs or opinions. So unless it is just purely coincidence, I think it is very likely that I was subconsciously guided by this unpublished opinion, which I did not find (again) until almost a year after I filed this case.

But as to the latter scenario, even supposing if I had formed my belief in my primary position without ever having laid eyes upon the unpublished opinion of *Haylett v. Baladi*, nonetheless it is still irrefutable proof that my position was neither "irrational" nor "completely untenable", as at least three (3) different N.J. Superior Court judges/justices in the case of *Haylett v. Baladi* all had thought the same way as I did (i.e. the trial court judge, and the 2-justice Appellate panel).

And even aside from the *Haylett* arguments, I had set forth an abundance of authorities supporting my alternate position that my sister and I (even though we were not owners per se) had standing as intended third party beneficiaries, due to our financial interest in the outcome of the vehicle's sale.

That is, our mother had signed the vehicle title a few months prior to her passing, but it was still in her name. And Dirkes agreed to accept the car with the vehicle title "as is" (in its existing form, which was still in my mom's name), and to pay me $400 for the car when I brought that title to them. So even assuming that the contract with Dirkes was made on my mother's behalf, it was clearly made for our benefit. And as one of my cited authorities clearly held, "third-party beneficiaries may sue upon a contract made for their benefit **without privity of contract**." *Rieder Cmtys. v. N. Brunswick*, 227 N.J. Super. 214, 221-22 (App. Div.1988). Another authority held that the threshold to prove a party's standing in New Jersey is **"fairly low."** *Reaves v. Egg Harbor Twp.*, 277 N.J.Super. 360, 366, 649 A.2d 904 (Ch.1994). While yet another authority held that having a "financial interest in the outcome ordinarily is sufficient to confer standing." *Strulowitz v. Provident Life & Cas. Ins. Co.,* 357 N.J.Super. 454, 459, 815 A.2d 993 (App. Div. 2003). [emphasis added]

Dirkes was not able to challenge, let alone refute, any of those authorities. Moreover, the only authority that Dirkes had ever cited in either version of its motion to dismiss was *NJ State Chamber of Commerce v. NJ Election Law*, 82 N.J. 57 (1980) (but Dirkes had only cited just one sentence of this authority, which did not even remotely suggest that we did not have standing – that cited sentence was this: "Among the considerations when a Court reviews standing is … the

relationship of plaintiffs to the subject matter of the litigation …"). However that very same authority, which Dirkes had cited to support its position, actually only further supported my position that we did have standing! That is, in *NJ State Chamber of Commerce*, this Court held that even though the Plaintiffs only had an **"indirect interest"** in the subject matter of that litigation, they did in fact have standing, as the "circumstances adequately demonstrate that plaintiffs have a stake in the outcome of these proceedings and there is genuine adverseness between the parties in terms of the litigated controversy". *NJ State Chamber of Commerce v. NJ Election Law*, 82 N.J. 57, 68 (1980) (citing *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 107 (1971)). [emphasis added]

Thus the trial court's award of frivolous litigation sanctions was clearly in error, as for purposes of imposing sanctions under *Rule 1:4-8*, an assertion is deemed "frivolous" when "`no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" *First Atl. Fed. Credit Union v. Perez*, 391 N.J.Super. 419, 432 (App.Div. 2007) (quoting *Fagas v. Scott*, 251 N.J. Super. 169, 190 (Law Div. 1991))." Thus I cannot be faulted for maintaining a position that was nearly identical to the position that was successfully asserted by the plaintiff in the above case of *Haylett v. Baladi* (i.e. a matter involving a plaintiff's viable contract to sell a vehicle which she did not own and did not have the title for, and her adequate standing to enforce that contract).

B) Even if I was completely wrong on every argument that I raised, nonetheless sanctions should not be imposed simply because a litigant is wrong about the law.

The trial court found my claims to be frivolous, and in doing so he had essentially stated that my position was "...wrong from the outset, compounded by wrong after wrong after wrong." He also repeatedly stated that my "little knowledge" of the law is a "bad thing" and/or "dangerous thing". The judge imposed sanctions upon these bases. (2T8:14 – 2T12:5)

But that ruling was clearly in error, as there is a recent authority from this Court that is exactly on point and virtually on all four corners with this case, which holds that sanctions can not be imposed under such circumstances. That authority is this Court's published opinion in *Tagayun v. AmeriChoice of N.J.*, Inc., 446 N.J. Super. 570 (App.Div. 2016), where plaintiff Dr. Myrna B. Tagayun had a contract with the defendant for her services as an in-network HMO service provider. The co-plaintiff in that matter was Robert S. Mandell, her husband and office manager. Shortly after that case was filed, defense counsel had sent *R. 1:4-8* letters to both plaintiffs, informing them that each of their claims was frivolous. The letters stated that the wife's claim was frivolous because her contract had an express arbitration clause which precluded litigation, while the husband's claim was frivolous because he was not a party to the contract. (However the husband incorrectly believed that he was a third party beneficiary of that contract). Another 28 days had passed, but neither of

the plaintiffs withdrew their claims, so a motion to dismiss was then filed and granted, and the trial court subsequently awarded sanctions against both plaintiffs.

However on appeal, this Court reversed, in essence finding that even though the defense was correct in its *R. 1:4-8* letters, and even though the plaintiffs failed to withdraw their claims, and even though the trial court properly dismissed all of the claims of both plaintiffs, nonetheless the trial court erred by awarding sanctions for anything prior to the dismissal of the original complaint. This Court further held that even the plaintiffs' appeal of that ruling was proper and within their rights.

This Court held that the only sanctionable conduct came after the trial court's ruling that dismissed their original complaint, when the plaintiffs re-filed the exact same complaint a second time as an amended complaint while the appeal for the dismissal of the original complaint was still pending. "**Sanctions for frivolous litigation are not imposed because a party is wrong about the law** and loses his or her case." [emphasis added] *Tagayun, 446 N.J. Super. at 580*. Sanctions should be awarded only in exceptional cases. *Iannone v. McHale,* 245 *N.J. Super.* 17, 28 (App.Div. 1990). "When the plaintiff's conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." *Belfer v. Merling,* 322 N.J. Super. 124, 144-145 (App.Div. 1999). **The party seeking sanctions bears the burden to prove bad faith**. *Ferolito v. Park Hill Ass'n*, 408 N.J.Super. 401, 408 (App.Div. 2009).

Here in this case, Mr. Kearney has not even attempted to meet that burden (i.e. nowhere within anywhere of his trial court papers does he even mention the phrase "bad faith", let alone any purported bad faith by either my sister or myself); and then in his Apr 28, 2023 opposition to my Appellate motion for a stay, he (incorrectly) argued "R. 1:4-8 ... does not require any showing of bad faith"

Further, directly on point with my alternate position, in *Tagayun* this Court held:

> "As to Mandell, we are also constrained to reverse the order of the trial judge that awarded sanctions against him in connection with the original complaint. **He presented an argument to the court that he had standing as a third-party beneficiary** of the contract. The judge properly declined to accept that argument, but **an award of sanctions was not warranted simply because Mandell misconstrued the law"**. [emphasis added]

Here in this case, I believed then (as I still do now) in both my primary position (i.e. that I had a direct contract with Dirkes) and my alternate position (i.e. that both my sister and I had standing to bring our claims as intended third party beneficiaries).

As to the latter, I certainly had an argument (i.e. exactly the same argument that the co-plaintiff in *Tagayun* had), that my sister and I were intended third party beneficiaries. Moreover, here in this case I had actually found and cited multiple authorities to support that argument, one of one which was *NJ State Chamber of Commerce v. NJ Election Law*, 82 N.J. 57, 68 (1980), which was the very same authority that Mr. Kearney had cited in his Aug 24, 2022 motion to dismiss (albeit just one sentence, and only as to the Court's holding that: "Among the considerations when a Court reviews standing is … the relationship of plaintiffs to

the subject matter of the litigation …"). Thus, Dirkes' own argument is that the issue of standing is something that a Court must decide, on a case-by-case basis, after weighing the facts and circumstances surrounding any given case.[10]

Moreover, in the very same case cited by Mr. Kearney, the New Jersey Supreme Court held that even though the Plaintiffs only had an **"indirect interest"** in the subject matter of that litigation, the "circumstances adequately demonstrate that plaintiffs have a stake in the outcome of these proceedings and there is genuine adverseness between the parties in terms of the litigated controversy". *NJ State Chamber of Commerce v. NJ Election Law*, 82 N.J. 57, 68 (1980) (citing *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 107 (1971)).

And as I had argued to the trial court, other authorities I found held that: A) "third-party beneficiaries may sue upon a contract made for their benefit without privity of contract." *Rieder Cmtys. v. N. Brunswick*, 227 N.J. Super. 214, 221-22 (App. Div.1988); 2) the threshold to prove a party's standing in New Jersey is "fairly low." *Reaves v. Egg Harbor Twp.*, 277 N.J.Super. 360, 366, 649 A.2d 904 (Ch.1994); and 3) having a "financial interest in the outcome ordinarily is sufficient to confer standing." *Strulowitz v. Provident Life & Cas. Ins. Co.,* 357 N.J.Super. 454, 459, 815 A.2d 993 (App. Div. 2003).

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[10] In his Aug 24, 2022 certification, Mr. Kearney acknowledged that my sister and I did have an "inchoate interest" in the vehicle (which was even prior to my going to the Surrogate's Office on Oct 5, 2022 and becoming the official estate administrator). (Pa12-13, ¶9*)*

Thus even if my belief was wrong, and/or even if somehow all of the above authorities I cited were misapplied (which neither Mr. Kearney nor the trial court ever stated), even still, as the *Tagayun* authority makes clear, it still would not justify an award of sanctions.

C) The defendants never even alleged bad faith; and the court's finding of bad faith is not supported by anything on the record.

As argued above, the party seeking sanctions bears the burden to prove bad faith. *Ferolito v. Park Hill Ass'n*, 408 N.J.Super. 401, 408 (App.Div. 2009).

However at no point during this entire litigation has either Mr. Kearney or his client even attempted to meet that burden. That is, nowhere was it ever argued that my sister and I had acted in bad faith. This fact is plainly evident, and not just from the absence of such arguments; but further even directly from Mr. Kearney's Apr 28, 2023 opposition to my Appellate motion for a stay. (Pa178) Mr. Kearney had therein acknowledged that he/his client would bear the burden to prove bad faith for sanctions under the frivolous litigation statute *N.J.S.A. 2A:15-59*; but he then (incorrectly) argued that: "*R. 1:4-8* ... does not require any showing of bad faith." He then adds that he would have made such an argument, if he thought it was necessary to do so. (Pa178) So this document is clear proof that no such argument was ever actually made – thus he has not even made a prima facie showing of bad faith, let alone did he ever meet his requisite burden of proof in that regard.

D) The court's finding of my being creative (with arguing my position of enforcing a settlement agreement) does not warrant sanctions.

I argued in detail why I believed the settlement we reached in mediation should be enforced. (Pa56 – Pa57). To summarize those arguments herein, ordinarily verbal settlement agreements are binding. (I cited *Pascarella v. Bruck*, 190 N.J. Super. 118 (App.Div. 1983), *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3rd.Cir.1971), and *Williams v. Vito*, 65 NJ Super. 225 (Law Div. 2003)). I also mentioned the exception for court-appointed mediation, where the settlement is not final until the parties sign the mediator's form (I cited *Lehr v. Afflitto*, 382 NJ Super. 376 (App. Div. 2006)). But since our mediation was done virtually, we could not physically sign anything; instead we would have to wait to go back on the record. Thus it unfairly created a "cooling off period", where either party could then experience buyer's remorse and want to rescind - and this is exactly what happened in *Willingboro Mall, Ltd. v. 240/242 Franklin Ave.*, LLC, 215 NJ 242 (2013), where one party experienced buyer's remorse only moments after verbally agreeing to the settlement terms. I argued that due to the uncharted new area of virtual mediation (which in turn was a result of COVID), this may be a matter of first impression.

The trial court rejected this argument, and explicitly found this position to be "creative". (1T6:14) However, "honest and creative advocacy should not be discouraged." *Iannone v. McHale*, 245 NJ Super. 17, 28 (App.Div. 1990). Thus my "creative" position / argument certainly did not justify sanctions.

E) The R. 1:4-8 letter was defective.

Dirke's attorney moved to dismiss our claims because the vehicle's title was still in our mom's name. In Mr. Kearney's *R.1:4-8* letter, he cited no authority at all for his position that we lacked standing. Moreover, in that same *R.1:4-8* letter, Mr. Kearney stated he would seek sanctions "in the event that [his] analysis is correct", which I interpreted to mean that he was not sure if his analysis would be deemed to be correct or not, thus I allowed the issue to go forward and be submitted to this Court to decide. This interpretation was confirmed in ¶4 of Mr. Kearney's Sep 29, 2022 certification in support of his motion for sanctions (Pa75), where he states: "application for sanctions, if I were correct on my analysis, would be made." Mr. Kearney's use of the word "if" removes any refutation of the fact that he himself was uncertain if his analysis would be deemed to be correct or not.

Thus, it should be clear that the Mr. Kearney's *R.1:4-8* letter was defective, and for at least two (2) separate reasons: 1) it lacked specificity / any support for its so-called "analysis"; and 2) it admitted that his "analysis" could possibly be incorrect.

F) I also had valid arguments as to the technical defects of the motions to dismiss.

In addition to all of the substantive defects which I have addressed above, there were also numerous procedural / technical defects with both versions of the motion to dismiss. Mr. Kearney had prepared his Aug 16, 2022 *R. 1:4-8* letter (Pa77) after he already filed a motion to dismiss on Aug 11, 2022 (Pa8) – a motion which was technically defective. Even when he filed his second version of this motion on Aug

24, 2022, that second version of the motion also suffered from the same technical defects as the first version did. (Pa11). I pointed all of this out, and in great detail, within my Aug 29, 2022 opposition to these motions. (Pa59 - Pa61).

To summarize those arguments herein, the numerous defects were: A) we were never formally served "as provided in *Rule 4:4-4* ", which is a violation of *Rule 1:5-1* (i.e. which includes service of written motions); B) no certification of service accompanied either version of the motion, which is a violation of *Rule 1:5-3*; C) both versions of the motion specified a return date, which is a violation of *Rule 6:3-3(c)(1)*; D) both versions of the motion violated *Rule 6:3-3(c)(2)* by failing to include the required language; E) both versions of the motion also violated *Rule 6:3-3(c)(3)* by failing to include other required language; and F) the first version of the motion violated *Rule 1:6-3* because it was filed only 1 day before the intended return date. So at a bare minimum, undeniably these were at least valid arguments for me to raise.

That is, years earlier in an unrelated case, I sued a law firm that was then represented by another law firm, which was hired by the defendant's insurance carrier, where my time-sensitive motion was rejected because it suffered from similar (yet lesser) defects. For example, unlike Dirke's motion, my motion was properly addressed to the defendant at its full mailing address, and it was served properly and successfully at that mailing address. However, I had incorrectly used

the "Law Division style" for my notice of motion, therein specifying a return date, and not including the language required by *R. 6:3-3(c)*. On appeal, this Court found no error with the rejection of my "non-conforming motion". (*D'Agostino v. Drazin & Warshaw*, 2013 WL 4859575). Moreover, in *Eastampton Center, LLC v. Planning Board of Eastampton*, 354 NJ Super. 171 (App.Div. 2002) (the only published opinion I could find on this issue), a non-conforming motion to reconsider was filed, which the trial court had denied with prejudice. This Court reversed, holding that the trial court should have allowed the moving party an opportunity to correct the defect. However this Court did not find that the trial court should have just ignored the motion's defect, let alone find that the non-moving party had acted in bad faith by raising the defect within its opposition.

Here in this case, the facts and defects favoring rejection of Dirkes' motion(s) to dismiss were even greater than with my motion in the *Drazin* case – that is, both me and my sister were/are unrepresented, both of us were/are non-attorneys, neither of our mailing addresses were listed on either version of Dirkes' notice of motion, neither version of the motion was ever formally served upon either of us, and just like my motion in *Drazin*, neither version of Dirkes' motion included any of the language required by *R. 6:3-3(c)*, while both had also improperly specified a return date. But the trial court never addressed these defects within any of its rulings.

However I should not be sanctioned for challenging the numerous technical defects that were contained within both versions of Dirkes' motion to dismiss.

G) In a recent unrelated matter, Mr. Kearney acted in the same manner as I did.

Mr. Kearney was a pro se plaintiff in a Law Division case, CAM-L-983-18, where he clearly lacked standing. The defense attorney advised him of this and sent him a R. 1:4-8 letter, but he never withdraw his claims. So then 28 days later the defense attorney filed a motion to dismiss and for sanctions, which he did not even oppose. However the judge in that case granted the motion to dismiss without prejudice, denied the motion for sanctions, and sua sponte granted him 20 days to file an amended complaint (i.e. to name a plaintiff that did have standing). I brought all of this to the attention of the trial court in this case. (Pa86-Pa87,¶¶29-39; Pa94-Pa104).

Yet the trial court just completely ignored all of this. (2T)

3. The amount of sanctions was wholly unjustified (Pa87-88;Pa133-138;Pa143-145)

A) Dirkes could have chosen to resolve this case, at no cost to itself whatsoever, but instead chose not to.

As mentioned above, mediation occurred on Aug 12, 2022. Later that very same day, I made a "no cost" settlement offer that was actually even better for Dirke's than what Dirkes had initially offered during the mediation. (Pa27) However on Sunday Aug 14th, Mr. Kearney rejected this offer without any explanation or counter offer. (Pa30) I repeatedly brought this fact to the court's attention, (Pa22-

Pa25; Pa27-Pa30; Pa34; Pa66-Pa67;Pa87); but the court ignored this fact, except for a finding that "settlement opportunities are likewise irrelevant." (2T10:7).

It is well established that in any civil case, a plaintiff must attempt to mitigate his/her damages, even when the defendant is clearly otherwise liable. In cases where a plaintiff can establish liability, but where the defendant can prove that the plaintiff failed to sufficiently mitigate damages, the correct result is no award. As this Court held in *Ingraham v. Trowbridge Builders*, 297 N.J. Super. 72 (1997):

> Mitigation of damages is a concept which takes into account the injured party's acts or failure to act when computing the amount of his recovery. *White v. North Bergen Township*, 77 N.J. 538, 546, 391 A.2d 911 (1978). The Court in *Ostrowski v. Azzara*, 111 N.J. 429, 441, 545 A.2d 148 (1988), explained the concept of the duty to mitigate, or the doctrine of avoidable consequences, by comparing it to the doctrine of contributory negligence. The Court stated that the doctrine of avoidable damages is
>
> > "[w]here the defendant has already committed an actionable wrong, whether tort or breach of contract, then this doctrine [avoidable consequences] limits the plaintiff's recovery by disallowing only those items of damages which could reasonably have been averted * * *[.]" "Contributory negligence is to be asserted as a complete defense, whereas the doctrine of avoidable consequences is not considered a defense at all, but merely a rule of damages by which certain particular items of loss may be excluded from consideration * * *." *McCormick on Damages, West Publishing Company, 1935, Chapter 5, Avoidable Consequences, pages 127, et seq.; see also 61 Harvard Law Review (1947), 113, 131-134, Developments in Damages*.
> >
> > *[Ibid.]*.
>
> Further, the Court held that "expressing mitigation of damages as a percentage of fault reducing plaintiff's damages has been found to be a proper method for fairly accounting for failure to mitigate." *Id.* at 445, 545 A.2d 148.
>
> Thus, "[i]t **is well settled that injured parties have a duty to take reasonable steps to mitigate damages**." *McDonald*, supra, 79 N.J. at 299, 398 A.2d 1283. Damages will not be recovered to the extent that the injured party could have avoided his losses through reasonable efforts "without undue risk, burden or humiliation." Restatement (Second) of Contracts, Section 350(1),(2) (1981).

Thus it is irrefutable that a plaintiff must try to mitigate damages, even when the defendant is clearly liable. So I can see no reason why that same underlying rationale would not also apply to scenarios involving frivolous litigation sanctions.

In fact, the controlling authorities strongly suggest that I am correct. For example, the New Jersey Supreme Court has held that in calculating the amount of reasonable attorneys' fees, Courts must determine the "lodestar," defined as the "number of hours reasonably expended" by the attorney, "multiplied by a reasonable hourly rate." *Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 386 (2009) (citing *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 21 (2004)). "The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." *Furst*, 182 N.J. at 22 (citing *Rendine v. Pantzer*, 141 N.J. 292, 335-36 (1995)). The court is required to make findings on each element of the lodestar fee. *Id.* at 12. The fee awarded must be "reasonable," and reasonableness is a "calculation" to be made in "every case." *Furst*, 182 N.J. at 21-22. To elaborate further, in *Furst v. Einstein Moomjy* the New Jersey Supreme Court held:

> We now consider defendants' challenge to the trial court's award of reasonable attorneys' fees in the amount of $28,050.00 and costs in the amount of $1,055.55. In granting plaintiff's attorney-fee application, the court simply relied on the "reasons advanced" by plaintiff in his certification and in argument. We cannot tell on this record whether the trial court applied the factors set forth in *Rendine*, supra, that govern an award of counsel fees in a fee-shifting statute. **We agree with the Appellate Division that a trial court must analyze the Rendine factors in determining an award of reasonable counsel fees and then must state its reasons on the record for awarding a particular fee.** ***R. 1:7-4(a)*** (requiring trial court to "find the facts and state its conclusion of law thereon in all actions tried without a jury"). [emphasis added]

> In setting the lodestar, a trial court first must determine the reasonableness of the rates proposed by prevailing counsel in support of the fee application. *Rendine, supra*, 141 N.J. at 335, 661 A.2d at 1226. In that regard, the court should evaluate the rate of the prevailing attorney in comparison to rates "`for similar services by lawyers of reasonably comparable skill, experience, and reputation'" in the community. Id. at 337, 661 A.2d at 1226 (quoting *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir.1990)). Second, a trial court must determine whether the time expended in pursuit of the "interests to be vindicated," the "underlying statutory objectives," and recoverable damages is equivalent to the time "competent counsel reasonably would have expended to achieve a comparable result...." *Id.* at 336, 661 A.2d at 1227. **The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar**. *Id.* at 335-36, 661 A.2d at 1226-27 (noting that it is not "`time actually expended'" but time "`reasonably expended'" that matters and that "`[h]ours that are not properly billed to one's client also are not properly billed to one's adversary'") (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C.Cir.1980)). Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires a consideration of what is reasonable under the circumstances. [emphasis added]

Likewise, in *Litton Industries v. IMO INDUSTRIES* the N.J. Supreme Court held:

> Beyond the lodestar amount, **in cases in which the fee requested far exceeds the damages recovered**, "the trial court should consider the damages sought and the damages actually recovered." *Packard-Bamberger & Co., supra*, 167 N.J. at 446, 771 A.2d 1194. In addition to that proportionality analysis, the court must evaluate the reasonableness of the total fee requested as compared to the amount of the jury award. That is, when the amount actually recovered is less than the attorney's fee request, the court must consider that fact in determining the overall reasonableness of the attorney's fee award. *Ibid.* To be sure, there is no precise formula for that portion of the reasonableness analysis. **The ultimate goal is to approve a reasonable attorney's fee that is not excessive.** [emphasis added]

Thus, it was unreasonable to incur a total of $9.500.69 in fees, all just to “recover” (i.e. spare his client from) the mere $400 which we sought against his client in our small claims case. The trial court opined that a defendant could spend $100,000 to defend against a $100 case, and then be able to recover $100,000 from the plaintiff. (2T10:3) However the foregoing cited authorities contradict such a contention.

Moreover, since the matter could have been resolved back on Aug 12, 2022 at no cost at all to Dirkes (i.e. by just going along with the same settlement offer that Dirkes had made to us on both June 29, 2022 as well as earlier that same day on Aug 12, 2022), this fact removes any doubt that it was completely unnecessary and unreasonable for Mr. Kearney to incur such an excessive fee.

B) The trial court did not weigh the reasonableness of the fees requested (other than the court's extra-judicial impression that the total amount sought "seemed low") – this fact is axiomatic from the transcript, as well as the fact that the total fee requested does not match the total stated in Mr. Kearney's own affidavit of service.

As argued above, the trial court was required to "analyze the *Rendine* factors in determining an award of reasonable counsel fees and then must state its reasons on the record for awarding a particular fee." *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 21, (2004) (citing *Rule 1:7-4(a)*, requiring trial court to "find the facts and state its conclusions of law thereon in all actions tried without a jury"). However, a review of the transcript reveals that this never happened here in this case; instead during the Oct 21, 2022 motion hearing, the trial court had only stated his own personal (extra-judicial) opinion that the total amount sought "seemed low". (2T11:9, 2T12:1) But this is a "far cry" from what was required by the controlling authorities. Further, there's even more evidence to show that no analysis was made, as the trial court failed to catch what should have been an obvious math mistake.

That is, in Mr. Kearney's Sep 29, 2022 affidavit of service, he states that he spent a total of 12.1 hours on the case, which at $400 per hour, equates to $4,840.

He then also added another $17.58 in expenses. (Pa81). This of course adds up to a grand total of **$4,857.58**. However this was not the amount that he asked for; instead he asked for **$4,860.49** (Pa76 ¶10), and the court awarded him that different number, which did not match the total from his own affidavit of services! The trial court never even mentioned this discrepancy, which it undoubtedly would have detected if it had performed even a precursory analysis of the itemized bill.

C) There was no analysis for temporal limitation (other than the court's unsupported notion that the case was frivolous from even before it was filed)

In addition to failing to analyze the fee request for reasonableness, the trial court also failed to consider the temporal limitation of the fee request, which it was also required to do. *Rule 1:4-8* "imposes a temporal limitation on any fee award, holding that reasonable fees may be awarded only from that point in the litigation at which it becomes clear that the action is frivolous." *LoBiondo v. Schwartz*, 199 N.J. 62, 99 (2009) (citing *DeBrango v. Summit Bancorp*, 328 N.J. Super. 219, 229-30 (App. Div. 2000)). Here, although the trial court was aware of my argument in this regard, it simply circumvented that with a bald finding that our case (which was filed on May 30, 2022) "was frivolous before May 30th, it wasn't even half-baked". [11]

[11] The trial court made the bald conclusion that: "The reality here is that the Plaintiffs' claim was frivolous from the start. I agree with that, except I'll add it was frivolous before May 30th, it wasn't even half-baked". (2T10:17-20) Perhaps the trial court is suggesting here that I should have been sanctioned for even thinking about bringing the case.

Further, as this Court pointed out in *Bove v. AkPharma Inc.*, 460 N.J. Super. 123 (App.Div. 2019), even though in that case the trial court had performed a "painstaking analysis" of the reasonableness of the requested fee, nonetheless this Court found that the trial court had "erred by awarding sanctions against Bove's counsel, without accounting for the temporal limitation governing such an award". This court also held that the defendant's *Rule 1:4-8* letter lacked the requisite specificity (by failing to specifically mention the "WCA exclusivity bar").

D) There was no offset for the value of the car, nor for my sister's settlement.

In my Jan 31, 2023 certification, I again raised the issue that the amount of sanctions, at a minimum, should reflect an offset for the $2,000-$3,000 benefit that Dirkes reaped from selling parts and metal from my mom's car, as well as an offset for the $2,430 benefit it received from its settlement with my sister, that she had since paid in full. (Pa144, ¶¶10-11). But although the trial court was aware of both of these arguments (3T9:22-25 and 3T14:16-20), neither was addressed in its subsequent rulings, and ultimately the court allowed for no deduction for either the value of the car, or for my sister's settlement. The lack of any offset has in turn erroneously allowed Dirkes a "double recovery", if not a "triple recovery". As this Court held in *Finderne Mgmt. Co. v. Barrett*, 402 N.J. Super 546 (App.Div. 2008):

> Despite the lack of published authority on this narrow issue, we note New Jersey has a strong public policy against permitting double recoveries. See *N.J.S.A. 2A:15-97* (collateral source statute permits the court to deduct any duplicative award from a plaintiff's personal injury recovery); *Taylor v. Metzger*, 152 N.J. 490, 509, 706 A.2d 685 (1998) (plaintiff cannot obtain double recovery for intentional infliction of emotional distress and violation

> of LAD); *Millison v. E.I. Du Pont de Nemours & Co.*, 101 N.J. 161, 187, 501 A.2d 505 (1985) (injured employee must reimburse workers' compensation carrier in the event of recovery in civil action for employers' intentional actions that caused injury); *Rosales v. State Dept. of the Judiciary*, 373 N.J.Super. 29, 31, 860 A.2d 929 (App.Div.2004) (long standing public policy prohibiting dual recoveries for the same disability), certif. denied, 182 N.J. 630, 868 A.2d 1033 (2005); *Kislak Co. v. Hirschfeld*, 222 N.J.Super. 553, 559, 537 A.2d 748 (App.Div.1988) (real estate agent is entitled to the commission for performance, diminished by any expense to accomplish result, which included commission of selling agent).
>
> We cannot ignore that
>
> a harmed plaintiff is permitted to recover for the wrongdoing of a tortfeasor, but that the plaintiff's recovery should be reduced by any benefits received from the wrongdoers' actions. This is the only reasonable interpretation that furthers the overriding tort damages principle of restoring the plaintiff to the position he or she would have been but for the actions of the tortfeasor.
>
> [*Ronson v. Talesnick*, 33 F.Supp.2d 347, 354 (D.N.J.1999).]

E) Kearney states that his services were "unbilled" - not "actually incurred"

"If reasonable attorneys' fees are not actually incurred by a litigant as a direct result of a frivolous claim, they are not compensable under the rule". *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 547 (App.Div. 2009)

Mr. Kearney's itemized bill clearly states that each of the listed amounts were "unbilled". (Pa130) Thus it was never stated, one way or the other, whether or not if those fees were "actually incurred". Although often this phrase is used to compare against "imputed fees", there is no clear definition of what constitutes an "actually incurred" fee. But there does seem to be at least some guidance here, as this Court discussed *Rule 1:4-8* fees in *Biser v. Levine,* 2015 WL 10002369:

> Thus, the majority of the factors examine what fees have been "incurred," the amount of those fees a party has "paid" and has the ability "to pay," and the financial resources to pay such fees. *Ibid*. Nothing in *Rule 5:3-5(c)* suggests that a party may be recompensed for imagined "fees" that have not been incurred, or supposed "fees" that there is no actual obligation to pay. See Alpert, supra, 410 N.J. Super. at 545 (fees are "incurred" if there is an obligation to pay).

> Here, defendant does not claim that he had paid fees, or incurred an obligation to pay fees, to LaZare. The court was sure defendant was not paying LaZare. Defendant cannot recover "`fees that [he] is not obligated to pay,'" that he has not paid, and that he will never pay. See *ibid*. (citation omitted).

Here, it is very unlikely that Mr. Kearney would charge any client $9,000 in fees for a $400 case, especially with Dirkes, whom has been his client for 25 years. (Pa79)

4. Mr. Kearney should have been sanctioned, instead of being rewarded, for his atrocious mediation conduct, which unnecessarily escalated and magnified this simple small claims case into a major ordeal. (Pa23, Pa57, Pa58, Pa68; 1T)

In my Aug 29, 2022 cross motion, I pointed out Mr. Kearney's atrocious behavior during the mediation, where he began screaming and yelling like a manic at both me and my sister. (Pa23, ¶¶19-22) I argued that this misconduct was an exception to the confidentiality privilege, citing *N.J.S.A. 2A:23C-6(a)(6)*. (Pa57 - Pa58) In his response, Mr. Kearney did not deny any of this – rather he only incorrectly stated that *Rule 1:40-4(d)* prohibited him from responding to my allegations. (Pa68) However the rule he cited cannot nullify the statute I cited, which makes clear that mediation conduct is an exception to the confidentiality privilege. Yet at the Sep 23, 2022 hearing, the trial court did not even want to inquire about it further; instead the court just abruptly brushed the issue aside, stating that "this isn't the right forum for that." (1T5:1 – 1T6:1). But unless I misread *N.J.S.A. 2A:23C-6(a)(6)*, I believe this was yet another error.

Even aside from the monetary issues involved in this appeal, I believe it would be unfair to allow Mr. Kearney's atrocious mediation conduct to go unpunished.

Conclusion

My contract-based claims were valid and should have proceeded, given that Dirkes had made a contract directly with me to pay me $400 to keep my mom's car (once I brought in the car's title, which Dirkes knew was still in my mom's name). There never was an issue of whose name was on the title, until just one day before trial when Mr. Kearney first tried to use this as a technicality to allow his client to be unjustly enriched. Even to the extent the contract should have been viewed as being made on behalf of our mom, it is undeniable that both Dirkes and our mom intended that I was an intended beneficiary of the sale of the vehicle (i.e. my mom's signature on the title, and Dirkes statements to me that he would give me the $400 for the car). Thus we had more-than-ample standing to bring our contract-based claims, as well as our extra-contractual / quasi-contractual claim for unjust enrichment, especially after I went and obtained the paperwork from the Surrogate's Office (which I was following the trial court's rulings that: "And the Plaintiffs haven't shown it, that either of them is the executor or executrix, the administrator or the administratrix of the Estate of Carol D'Agostino. And without that they have no authority to act." (1T8:1-4) Yet even after I went obtained that "authority to act", the trial court then stated that it still wasn't enough; as during the second motion hearing he denied my cross motion to reinstate my claims, stating that: "He and the other Plaintiff, his sister, still don't have ownership." (2T6:2-3) This was error not to at least allow my unjust enrichment claim to go forward at that point in time, even if the prior lack of documentation was a sufficient basis to nullify the May 12, 2022 verbal contract.

I had rights to the vehicle, as determined by the local police department. The only rights Dirkes had to the car came from the police department's abandonment on May 9, 2022, and then 2 days later the police department (who knew that the title was still in my mom's name) gave that same right of possession back to me. So Dirkes had no right at all to keep my mom's car for free. Sanctions never should have been imposed, because I had several valid substantive arguments supporting my position (as well as valid arguments as to the technical defects of the motions to dismiss). But even assuming arguendo if I was completely wrong on every argument that I raised - which I was not - nonetheless even in that hypothetical scenario, sanctions should not be imposed simply because I had been wrong about the law. The defendants never even alleged bad faith, let alone even attempted to prove bad faith, let alone actually meet that requisite. The court's finding of bad faith is unsupported by anything on the record, and was literally a conclusion he pulled out of thin air, only by asking himself: "How could he have not known [that he needed to act as administrator for the estate]?" (2T8:1-3) But just because he could not think of an answer to his own question, it does not prove (nor even come close to proving) the requisite bad faith. Further, the court's finding that my position was "creative" should have been encouraged, not discouraged; and it certainly did not warrant sanctions. On top of that, the R. 1:4-8 letter was defective – it cited no authority to support Mr. Kearney's self-serving analysis that we lacked standing, and as he admitted directly in that letter, he was not certain if his analysis was correct or not, stating: "[if] my analysis is correct, an application for sanctions [will be made]." Then even in his

motion 8 days later, he cited only one sentence of one authority, which only held that standing is something a court needs to decide. That very same authority stated the plaintiffs' "indirect interest" was sufficient to confer standing. So even viewing his papers as a whole, this was far from being sufficiently specific and definitive so as to allow a sanctions award.

Moreover, the amount of sanctions was entirely unjustified. For one, Dirkes could have resolved this case, at no cost to itself whatsoever, but instead chose not to. The trial court erroneously discounted this fact. Then the trial court erred by failing to weigh the reasonableness of the fees requested (aside from an extra-judicial belief that the total amount sought "seemed low"), as well as failing to analyze the temporal limitation (other than the court's unreality that the case was frivolous from before it was even filed). The court erred further by failing to make any offset to the award - either for the value of the car, or for my sister's settlement, which in turn has unfairly afforded Dirkes a double / triple recovery (for alleged legal services which Kearney admits were "unbilled" and never paid by his client, not "actually incurred"). And on top of all that, to date not only has Mr. Kearney's atrocious mediation conduct gone unpunished; but further, he has been rewarded for it. I respectfully submit that this cannot be allowed. Thus, based upon the foregoing, I respectfully ask this Court to reverse the orders awarding sanctions, and to reinstate my claims against the defendants.* Thank you.

Respectfully submitted,

Steven D'Agostino

* I also ask this Court to explicitly award me my R. 2:11-5 costs incurred in this appeal, which I approximate to be about $1,300.

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May 7, 2024

Appellate Division
25 Market Street
Trenton, NJ 08625-0970

RE: Steven D'Agostino and Valerie D'Agostino v. Dirke's Auto LLC, Cramer's Auto Recycling, and Double D's Auto LLC
Docket No. A-000855-22T2
On Appeal from: Superior Court of New Jersey
Ocean County
Special Civil Part, Small Claims
Docket No. OCN-SC-332-22
Honorable John M. Doran, J.S.C.

Dear Judges;

Kindly accept the foregoing as respondent's brief in response to appellants' filing.

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Preliminary Statement

Plaintiff-Appellant Steven D'Agostino ("Appellant") launched this appeal against one of the initial defendants, Defendant-Respondent, Dirke's Auto Parts ("Respondent"), following a small claims case that was already deemed frivolous by the lower court with sanctions imposed.

Appellant's lengthy brief contains a lot of fluff and incorrectly interpreted authority that are irrelevant to the case at hand. Appellant also lists plenty of facts in his principal brief as "undisputed". Many of these facts are not undisputed, they are *uncontested* as there was no reason to contest them. Appellant recites these facts as undisputed to argue that he must be correct if no one is responding to them. This is not the case. They are uncontested due to clear lack of relevance to the matter at hand. This is a simple case that has been unnecessarily drawn out by narrative and time. The relevant core of the matter is as follows. Appellant claimed to have possession of a 2000 Nissan Sentra (the "car" or "vehicle" or "automobile") that was titled to his late mother. Although he may have been in possession of the vehicle, Appellant did not own the vehicle at the time the small claims case commenced. He had not filed with the Surrogate's Court to establish an estate for their late mother and did not have physical copy of the title.

The car in question was towed to Respondent's auto shop ("the auto shop") at the direction of the local police department. Appellant offered to sell the car to the Respondent for $400, attempting to enter into a contract to sell the vehicle that he did not own. An employee at the auto shop tentatively accepted the offer, conditioned upon receiving the car's title. The employee's boss however rejected the offer. The other defendants in this case also rejected similar offers. In response, Appellant filed a breach of contract suit over "contracts" he had no legal authority

to enter into or ability to create. These are the only relevant facts and issues at hand that should be considered in this appeal. Appellant has filed various motions related to this case at all levels of the court system, almost all of which have been denied. Yet, Appellant continues to drag out this frivolous case at the expense of all parties and the judicial system.

Appellant self-admittedly has filed "at least 2-3 dozen past cases" pro se (Pa24, #32). It is clear that Appellant avails himself of the justice system at any minor inconvenience for financial gain, debasing its purpose and necessity. In this case, the Appellant is using the judicial system to bully a small business into enforcing a contract that doesn't exist. Respondents request the lower court's decisions to dismiss and impose sanctions be affirmed.

Procedural History

On May 30, 2022, Appellant filed a complaint in the Superior Court of New Jersey, Ocean County in the Special Civil Part, Small Claims Division (Pa1). The matter was scheduled for trial on August 12, 2022 (Pa7).

On August 11, 2022, Respondent filed a motion to dismiss (Pa8). Appellant requested an adjournment which was granted. The trial court sent the matter for mediation. After an unsuccessful mediation, the case was rescheduled for Sept 23, 2022.

On September 23, 2022, the trial court heard oral argument on the motions and cross motions. A transcript is attached as 1T. Respondent's motion to dismiss was granted.

On September 29, 2022, Respondent filed a motion for sanctions (Pa73). Appellant filed an opposition and respondent filed a reply to the opposition.

On October 10, 2022, Appellant filed a cross motion to vacate the dismissal and file an amended complaint after receiving letters of administration for his mother's estate (Pa83).

Respondent filed a reply (Pa105).

On October 21, 2022, the trial court heard oral arguments and granted Respondent's motion for sanctions (Pa110). The trial court denied Appellant's cross motions.

On November 10, 2022, the parties signed a modified consent order (Pa113). The consent order was never signed by the lower court, due to Appellant's withdrawal of his consent.

On November 15, 2022, Appellant filed a Notice of Appeal (Pa116).

On January 9, 2023, the Appellate Division dismissed the appeal sua sponte, as Appellant had not sought leave to appeal (Pa123).

Respondent filed another motion seeking additional sanctions which was granted on February 28, 2023 (Pa169).

On March 10, 2023, Appellant motioned to have the appeal reinstated which was granted on April 10, 2023 (Pa171). On April 19, 2023, Appellant filed an amended Notice of Appeal and Case Information Statement (Pa173). On February 13, 2024, the appeal was reactivated (Pa185).

Statement of Facts

As stated in the preliminary statement above, Appellant cites a lengthy, fluffy narrative as undisputed facts but the majority are simply uncontested. The actual undisputed facts are as follows.

Dirke's is an auto shop that primarily sells used auto parts and performs towing services on an ancillary basis. Appellant is an individual that had possession of his late mother's vehicle and attempted to sell it to various auto shops and junk yards. On May 9, 2022, the vehicle in question was reported as abandoned and the police had it towed by Respondent. A few days later, the local police released the vehicle back to Appellant. Appellant offered to sell the vehicle to the auto shop for $400 and informed them that he lacked the title to the car. An employee at the auto shop initially accepted the offer with the condition that Appellant turn over proper

title. Ten minutes later, the shop called Appellant, deciding to withdraw the conditional acceptance.

At this stage, Appellant did not have proper title and as such, he did not have standing to create a contract selling property he did not own. Thus, a contract was not formed. After the offer was rejected on May 9, Appellant did not retrieve the car. Appellant also did not file to receive letters of administration for his mother's estate at this time. Instead, filed an improper suit for breach of contract on May 30, 2022 – around 3 weeks later. Again, Appellant did not have a legal interest in the car and had made no attempts to obtain legal interest in the car. Appellant emphatically argues that the auto shop never raise issue with the fact that the title was in the deceased mother's name or ask for it to be transferred (Pb p. 8). It should be noted that the auto shop had rejected the offer, so this issue was of no concern to them, and it is not the shop's responsibility to advise Appellant on property ownership.

On June 29, 2022, the local police department contacted Appellant to retrieve his vehicle from Respondent's auto shop at no cost. Appellant rejected this offer and instead moved forward with the suit at hand. Mediation ensured on August 12, 2022. Disclosure of what occurred in mediation, without consent, violates R. 1:40 – 4(d), however Appellant discusses what occurred at length in his certification (Pa23). As such, the undersigned refers to the mediation events in rebuttal to Appellant's points as he opened the door.

During this mediation, Respondent once again offered that Appellant take the car back at no cost, even offering to deliver it for free. Appellant refused this offer with the unfounded concern that parts may have already been stripped from the vehicle and he had no way of recovering for that potential loss. (Pa23, #13-14). Eventually, Respondent's attorney, the undersigned, agreed (on behalf of Respondent) to pay $400 + $66 filing fee for the car in exchange for a bill of sale or certificate of title. The undersigned was promptly informed by Respondent that Appellant had previously admitted that the car was actually owned by his late mother, and he did not have title to the car. As such, the undersigned revised the offer on behalf of Respondent to make the $466 payment after receiving the title by fax. (Pa23, #15-18). This revision was clearly reasonable as Respondent had an interest in making sure the purchase of the car is proper and valid.

Given that Appellant had no authority to sell a car he did not legally own at the time the complaint was filed, the Appellant did not have standing to file a breach of contract case as there is no valid contract here. As such, the undersigned filed a motion to dismiss, which was granted, and then moved for sanctions for filing a frivolous suit. This motion was also granted by the trial court without prejudice to seek additional sanctions as the court found that the amount sought for sanctions was more than reasonable and actually lower than standard (Pa2T, 11:7 – 12:4). Respondent motioned for additional sanctions, which were also granted in its favor.

Appellant filed this appeal to reconsider the dismissal of his complaint and sanctions imposed.

Legal Argument

1. **Appellant had no legal authority to sell his late mother's car at the time of the events underlying the claim. As such, there was no contract, and he has no standing to bring a breach of contract suit.**

Under the Motor Vehicle Certificate of Ownership Law, N.J.S.A. §§ 39:10-1 – 39:10-42 ("MVCOL"), Appellant cannot legally sell a vehicle he does not own. The purpose of the MVCOL is to prevent the sale, transfer or disposal of stolen vehicles and/or cars with fraudulent titles. N.J.S.A. § 39:10-3. Under this chapter, every person in possession of a car must have a conforming certificate of ownership and if the car is registered, a registration certificate as well. N.J.S.A. § 39:10-6. In order to sell a used motor vehicle, the seller must turn over an assignment of the certificate of ownership or an assignment of a bill of sale that was issued prior to October 1, 1946. N.J.S.A. § 39:10-9. At the time the Appellant attempted to sell the car, the appellant did not have a proper certificate of ownership for the vehicle. If he had successfully sold his car at this time period, it would be an illegal sale in violation of the MVCOL. N.J.S.A. § 39:10-5.

Appellant claims many businesses would purchase his late mother's car without proper title or ownership certification. That is irrelevant to the case at hand, because not only is it not a standard business practice, but it is also an illegal business practice. That being said, even if there was a proper contract here, it would be an illegal, unenforceable contract. Therefore, there is no breach of contract and Appellant lacks standing to bring this suit. The trial court correctly dismissed this case and correctly imposed sanctions, finding it frivolous.

2. **The case should remain dismissed because Appellant clearly does not understand the issues in this suit and is frivolously arguing to argue, as evidenced by his misinterpretations of the authorities he cites to argue he has standing.**

First, Appellant argues that the case at hand is identical to the case Haylett v. Baladi, No. A-4350-08T3, 2010 N.J. Super. Unpub. LEXIS 1291 (App. Div. June 14, 2010), an unpublished opinion which is not attached to Appellant's brief or supplied to Respondent in violation of R. 1:36-3. He alleges this case proves that he in fact has standing because he cherry picks a line from the opinion stating the court rejects the standing argument. However, the facts and context in Haylett v. Baladi are not similar to this case. Appellant's misinterpretation here calls into question whether he actually understands the issues he is raising in this present suit.

In Haylett v. Baladi, plaintiff, Haylett, is a receptionist at an auto service center that had possession of a 2001 Chrysler Sebring that was abandoned at the shop. Haylett sells the car to Baladi conditioned on the actual owner not coming back to redeem the car. Haylett sells this 2001 Sebring and a 1997 Sebring to Baladi for $500 each. Baladi takes the cars into his possession. A few days later, Haylett asks for the 2001 Sebring back and Baladi offered to return it for his money back. However, Haylett contends Baladi never actually paid for the cars. In response, Baladi produces a check he made out to Haylett as proof of payment, but this check he presented noted it was for an entirely different car. Baladi then argued that Haylett lacked

"standing to sue *in her own name* because she was representing an auto body shop that she did not own". *Id.* at *2 (emphasis added). The court in Haylett v. Baladi, rejected Baladi's standing argument because Baladi's own physical proof is written out to Haylett personally, not the auto body shop, giving her standing to pursue the complaint. As the court notes, "[w]hatever arrangement Haylett had with the shop owner to collect payments is between her and the owner." *Id.* at *3.

By citing this case, it is clear that Appellant is confused about the issues raised in this present case. In Haylett v. Baladi, the car was already physically sold. When the court says it is clear that Baladi "dealt with her", it's because Baladi had written a check in her name. This gives her standing to *bring the suit*. At that point, whether

Haylett actually had standing to sell the car or not was irrelevant because the car was already manifestly sold. That being said, it can reasonably be assumed in this case that she had her employer's permission to sell vehicles on their behalf.

In this present case, the issue is whether Appellant had legal standing *to sell his late mother's car* without proper agency (via established estate) or actual title (which Appellant doesn't have). If he had no legal standing to sell the car, which he does not, *there is no contract.* This is a breach of contract suit but there is no contract to be breached. Appellant does not have standing to bring an impossible breach of contract suit because there is no breached contract. That is just common sense. Additionally, regardless of the case's clear substantive inapplicability here, unpublished opinions do not constitute legal precedent.

Appellant further argues that "there is ample precedent" to show that a lack of documentation is a technical defect and does not make a contract unenforceable (Pb p. 16). This argument further shows that Appellant does not actually understand the issues in this present suit. The cases he cites to make this point are cases about *undocumented workers*. The term undocumented in this context refers to the legality of their presence in the nation and has very little to do with missing actual physical documents in the same sense as this case. Appellant is clearly aware of this as he refers to the plaintiffs as "illegal (i.e. undocumented)" (Pb p 16). None of these cases are about lacking a necessary physical document proving ownership, to create a

bargained-for exchange. All of these cases are about whether the illegality of their presence in the nation renders the existing contracts they have illegal and unenforceable.

Appellant goes on to argue that in Matter of Sakow, 219 A.D.2d 479, 631 N.Y.S.2d 637, 640 (N.Y. App. Div. 1995), an heir to an estate was recognized as de facto executor despite lacking proper documentation designating him as executor. Once again, Appellant clearly does not understand the issues he is arguing and is simply making frivolous arguments for the sake of furthering this case. A quick skim of the case history in Matter of Sakow, clearly relays that the estate was properly probated and letters of testamentary were issued to the defendant's mother, the widowed spouse. The son is considered a de facto (in fact) executor because he fraudulently did the accounting for the estate, on behalf of his mother. Basically, the son in this case is considered an executor in fact per his actions in distributing the *properly probated* estate – not unlike if an executor hires an accountant or attorney to manage distribution. At the time this suit was filed, there was no properly probated estate for Appellant to be considered any type of executor.

Appellant also cites Rieder Cmtys. v. N. Brunswick, 227 N.J. Super. 214, 221-22 (App. Div.1988) to paint him as having standing to sue as a third-party beneficiary of a contract intentionally made for his benefit. At this point, it's clear that Appellant is just picking key phrases from cases to support his points without

actually reading the cases. In Rieder, the court ruled plaintiffs did not have standing to sue because they were incidental beneficiaries to a contract between two townships, even though the benefit was an obviously foreseeable one.

Appellant has not made a clear argument as to how he is actually a third-party beneficiary, he simply states a rule cited in the case as self-sufficient proof. The fact is he is not a third-party beneficiary with standing to sue, for several reasons. First, as established earlier, there is no contract here. One cannot be a third-party beneficiary of a contract that doesn't exist. Two, he attempted to make the contract he's claiming to be a beneficiary of. One cannot be an actual party to a contract and third-party beneficiary to that same contract. Being an actual party creates the benefit. Three, the assumption here is that if his late mother had been alive to sell the car, he stood to benefit from the profits. This is an unfounded assumption and even if it were true, the result is Appellant would be an *incidental* beneficiary with no standing to sue. Appellant says that his late mother had signed the car's title with a blank space for the title holder, for the specific intention of him benefitting from the sale. That is also an unfounded assumption and an illogical one. If his late mother intended for him to benefit from the sale, why wouldn't she transfer the title appropriately so that he could easily sell it and benefit without any hassle? All she had to do was write his name as the buyer on the title. Regardless, he has stated that he can't find this blank signed title, and just expects to be taken at his word.

3. The case should remain dismissed because Appellant's unjust enrichment claims are not viable.

Appellant makes the argument that because Respondent has taken his car without payment, Respondent is unjustly enriched because there is potential for him to receive a windfall benefit by selling the parts. First, it is important to note that Respondent did not actively seek possession of the car – the police required them to tow it to their shop. Respondent has also asked Appellant many times to come pick up the car, which Appellant has refused to do claiming he has no way of knowing what parts Respondent has sold. That being said, Appellant tries to draw the comparison that in Haylett, the court ruled Baladi received a windfall benefit by taking the car without payment. However, in Haylett, the defendant had actual possession *and was making actual use* of the car. As stated in Pb at p. 21, "to demonstrate unjust enrichment, [']a plaintiff must show both that defendant *received a benefit* and that retention of that benefit without payment would be unjust[']. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554, 641 A.2d 519 (1994) (emphasis added)." Here, Appellant is merely speculating that Respondent can potentially receive a windfall benefit by selling his car for parts but offers no actual proof that the shop has made use of the car in this way. The only proof is that the Appellant abandoned the car and refused to come get it.

Generally, if a car is towed to a shop by the police, there is a commonsense presumption that the owner of the vehicle will eventually come to redeem the car. Given this presumption, a reasonable auto shop owner that wants to keep his business would wait a significant amount of time for redemption before junking the car. Appellant readily admits to this stating "only after a certain period of time, if no further action was taken, could [Respondent] then keep the vehicle to sell as parts and scrap metal" (Pb p. 22). Appellant has not argued that he did in fact sell the parts and benefit. Appellant seems to be clearly aware that Respondent hasn't done so yet, rendering his argument for why he refused to redeem the car senseless.

Appellant's argument regarding unjust enrichment also indicates that he is unaware of the issues present in this case and is simply arguing to argue. He cites Cherokee LCP Land, LLC v. City of Linden Planning Bd., 234 N.J. 403 (2018), to prove he has standing as having a financial interest in the property, even without title. As Appellant correctly notes in his brief, this case involves the rights of tax *certificate* lien holders. The plaintiffs in this case have a physically observable financial interest in the subject property, therefore, they have standing. Appellant goes on to state, "there is nothing speculative about my financial interest in the outcome of [Respondent]'s possession of our mom's car, as sadly there is no possibility at all that my mom could choose to [']redeem[‘] her vehicle" (Pb p. 20). It is unclear how this relates to the Cherokee case, as once again, they had a

physically observable financial interest in the property via the certificates. Appellant does not have the title and he had not established the estate at the time of suit, physically manifesting his financial interest. Furthermore, if the issue is redemption, Respondent has offered to return the vehicle several times at no cost and Appellant has refused to take it back.

4. The case should remain dismissed, and sanctions should be upheld because Appellant is clearly aware that he had far better options for making use of the car than pursuing this suit.

On page 22 of his brief, Appellant elaborately explains several of the better options he had to make use of the car, since he also had right to repossess his vehicle once the police department released the vehicle back to him. He admits that at that stage, he would have owed Respondent just compensation for towing and storage, but he could have negotiated that amount and just taken his vehicle back. He then proceeds to say he could have kept the car as a memorial or use its parts for personal use or to sell them. Instead, he chose to negotiate a contract with Respondent and when the contract didn't work in his favor, he chose to tie up the justice system over $400 when he could have stood to let it go and benefit in much better ways. This fact alone and in itself indicates the frivolity of this suit. Appellant knowingly had better options to profit from the car, and instead chose to pursue this suit for what? Appellant's initial threat to file this suit was simply a means to bully Respondent

into honoring a non-existent contract. Had that threat panned out for him, all he would have gained was $400. Even after he filed the suit, he was given ample opportunity to withdraw his claims and redeem the car and pursue his other options to profit off the car. Yet, he persisted in following through with this suit, presumably spending more than $400 on filing costs alone at this stage, with no guarantee that he would benefit. Appellant spends an ample amount of time explaining why he believed he had substantive arguments in this case, allegedly proving it wasn't a frivolous case. Yet, having potential arguments isn't enough to warrant the necessity of a suit. It's also important to consider the viability of winning the suit and the potential gain from the suit. When looking at the totality of the circumstances, Appellant admittedly had better routes to gain from the core situation and wasn't really certain of the viability of winning this suit since he readily admits he "couldn't exactly recall the [Haylett] opinion" which he mainly relies on to prove standing (Pb p. 25). Appellant also readily argues later that the matter could have easily been resolved two years ago had Respondent just gone along with his offer, but Respondent didn't so Appellant moved forward (Pb p. 42).

5. **The Appellant's reading of the frivolous litigation statute N.J.S.A. §2A:15-59 is incorrect and does not indicate a burden of proof for bad faith. The statute clearly states that the judge has the authority to make that determination on the basis of the pleadings and the record.**

N.J.S.A. §2A:15-59(a) states that a party may be awarded all litigation costs "if *the judge finds* at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous." §2A:15-59(b) states that "[i]n order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, *the judge* shall find on the basis of the pleadings, discovery, or the evidence…". Nowhere in the statute does it state that a prevailing party has a burden to prove bad faith under this statute. The language in the statute clearly gives the Court authority to make that determination at its discretion.

That being said, as stated in the previous section of this brief, Appellant knew he had better options when it came to profiting off of the car, making it obvious that this case was a frivolous attempt at making his point. Engaging all the parties in this action for over two years for an unlikely "principle of things" argument, is in itself an act of bad faith. Beyond his better options, it's clear that Appellant is running off the "principle of things" by making his technical defect arguments of the motion to dismiss and R. 1:4-8 letter and by arguing that Respondent's attorney has also initiated a case where he lacked standing (Pb p. 36 – 38). As to the latter, not that Appellant deserves a justification, but one should note that the key difference here is that the undersigned did not further pursue the case after receiving a R. 1:4-8 letter, despite not withdrawing his complaint. As to the former, Appellant has already

argued in his principal brief that technical defects should not carry great weight in consideration. Objectively, the "technical defect" of missing a vital proof of ownership is far more consequential than alleged formatting and procedural defects.

6. The Appellate Division is required to apply an abuse of discretion standard of review when assessing the reasonableness of sanctions awarded, and there is no abuse of discretion.

Appellant argues that the attorney's fees and costs imposed are unreasonable and the trial court erred in calculating them. The trial court has expressly asserted that the initial attorney's fees charged are actually low. This determination does not come out of thin air and frankly, Appellant's claim as such is disrespectful. Prior to becoming a judge, the Honorable John M. Doran, J.S.C. was a practicing attorney for decades. Additionally, as a judge, he meets attorneys every single day. It is unreasonable and rude to assume that he doesn't keep up with the value and standards of his chosen profession. He would certainly have a better understanding of what attorneys at different skills levels charge than Appellant does.

An award for attorney's fees and costs is at the court's discretion. Zyck v. Hartford Ins. Group, 150 N.J. Super. 431, 435, 375 A.2d 1232 (App.Div.), certif. denied, 75 N.J. 521, 384 A.2d 501 (1977). Except in extraordinary circumstances, an award of attorney's fees will not be disturbed on appeal. Hermann v. Rutgers Cas.

Ins. Co., 221 N.J. Super. 162, 168-69, 534 A.2d 51 (App.Div.1987). There are no extraordinary circumstances in this case, nor is there evidence of an abuse of discretion. As such, the Appellate Division should disregard Appellant's arguments as to the reasonableness of the sanctions imposed.

Conclusion

For the reasons set forth above, the Division should affirm the lower court's dismissal and imposed sanctions.

Respectfully Submitted,

Dated: 5.10.24

JOHN B. KEARNEY, ESQUIRE.

JBK/bq

T2 Pm

Steven D'Agostino
Appellant / Plaintiff
and Valerie D'Agostino
Plaintiff

v.

Dirke's Auto LLC;
Cramer's Auto Recycling; and
Double D Auto, LLC
Respondents / Defendants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-855-22

CIVIL ACTION

SAT BELOW:
Honorable John M. Doran, J.S.C.
Ocean County Special Civil Part,
Small Claims section
DOCKET NO. OCN-SC-332-22

REPLY BRIEF AND APPENDIX
FOR APPELLANT STEVEN D'AGOSTINO

RECEIVED
APPELLATE DIVISION
JUN 11 2024
SUPERIOR COURT
OF NEW JERSEY

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DATE: Jun 10, 2024

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TABLE OF APPENDIX (Reply)

* *This single-page exhibit is germane to a reply argument in this appeal, see Prb12.*

TABLE OF AUTHORITIES

Preliminary Statement

For the sake of simplicity, Plaintiff-Appellant Steven D'Agostino shall hereinafter refer to himself in the first person. Moreover, because a large portion of the relevant facts in this case is directly applicable to the Respondent's counsel (i.e. Mr. Kearney) instead of that of his client (i.e. Mr. Dirkes), where most appropriate I will address Mr. Kearney separately from Mr. Dirkes, rather than address them collectively as "Respondent".

In the Respondent brief, Mr. Kearney largely admits to the facts; and with the few exceptions noted herein, the facts that he has now admitted to are undisputed.

Likewise, for most of my arguments, Mr. Kearney offers no refutation attempt at all. And for the few of my arguments that he does try to refute, he mainly points to distinctions that are completely immaterial as to the applicability of the authorities that I have cited.

Procedural History

Please refer to my principal brief, at Pb4 – Pb7.

Statement Of Facts (Rebuttal)

I herein incorporate the Statement of Facts set forth in my principal brief as though set forth at length herein. And now within his Respondent brief, for the first time, Mr. Kearney only now admits to other facts - facts that I have alleged all along.

For example, in the Respondent's Statement of Facts (at Db7 – Db10), Mr. Kearney now admits that his client had made me two separate settlement offers, each of which involved my getting the car back and no cost. He also admits that my concern, about each/both of those offers, was my fear that his client may have

already stripped some parts off of the car. Moreover, he specifically admits that the second offer occurred during the August 12, 2022 mediation session, where his client would not only give us the car back at no cost, but would even tow it back to my sister's house for free.

However other "facts" stated therein are either inaccurate, misleading, or in some cases, completely false. Thus, the following is my rebuttal to same.

Although admitting to making the offer during the August 12th mediation, what Mr. Kearney conveniently omits mentioning is the fact that later is that same day on August 12th, I had agreed to accept that offer, provided his client would be willing to certify that no parts had been stripped from the car yet. (See Pa27). This would have immediately resolved the case at no cost to anyone.

He also conveniently omits mentioning the fact that two days later he flatly refused this offer, with no counter offer being made. (See Pa30)

A disputed fact is Mr. Kearney's false statement that Dirke's employee had made the offer to purchase the vehicle contingent upon my delivery of a "proper" title to him (i.e. disingenuously inferring / suggesting that I first needed to change the title into my own name). However the word "proper" was never used at any time during this call, and my transcript speaks for itself - I made the Dirkes employee clearly aware of the fact that the title was still in my mom's name, and he had no problem whatsoever with that. (See Pa41).

Along the same line, Mr. Kearney misrepresents that on the second call back to me 10 minutes later, Dirkes had withdrawn the offer (i.e. again indirectly and misleadingly suggesting that they had a problem with whose name was on the title, which is totally 100% false). Instead the real truth is that when Dirkes called me back, they wanted to change the offer, not to withdraw it. And the only change they wanted to make was my monetary compensation - that is, instead of paying me $400 net when I brought in the "as-is" title, then they wanted to change that $400 amount into a credit to be applied against a $530 amount they were then alleging would be owed for towing and storage. So when Dirkes called back, they still wanted to keep the car, and still wanted me to bring them the as-is title – but now instead of my receiving $400 for doing so, now they wanted me to pay them $130 out of my own pocket to do so (for them to keep the car to sell parts off of). That quickly turned into an argument, because the $400 amount we had previously agreed to reflected a flat $100 offset for a short period of storage involved - as just a few weeks earlier, Dirkes had offered to pay us $500 for the car, where they were going to come out to my sister's house (i.e. the same exact location) and pick up the car, and they were going to give us $500 in cash. So when I called on May 12th and the offer was then reduced to $400, I did not make a fuss over it and immediately agreed to it, because I understood that they had already held/kept it there for 3 days without knowing that they would become the car's new owners.

But as of my May 12th phone call, they then knew that they were going to keep the car, and my bringing them the as-is title was just a formality, which they wanted merely to cover their butts. So the mutually accepted offer was for me to receive $400 net, once I brought in the as-is title; and it was mutually understood that it may take me a couple days to do so, because as I told the employee, my scatterbrain sister had misplaced the title and I might not be able to bring it down until Monday (i.e. May 16, 2022). He was fine with that. But then when he called back, his boss wanted to change the deal so as to make the $400 into a credit, such that he would essentially get the car for free (i.e. either I could bring them the title, let them keep the car, and on top of that still have to pay them money; or alternatively I could just throw my hands up in the air, not give them any money, and just let them keep the car for free - the latter of which was what they really wanted all along, and in the end, is exactly what they got).

However, Mr. Kearney does admit that Dirkes never raised an issue about whose name was on the title, stating on Db8: "it is not the shop's responsibility."

Another disputed fact is what transpired during the mediation. Although Mr. Kearney correctly admitted to the first offer of towing it back to my sister's house at no cost, and also correctly admitted to the second offer which I made (i.e. where he would pay us $466 in return for either the title or a bill of sale), what he misrepresents is when and why he changed the deal which we had all already

accepted. That is, he claims that "promptly" after we all agreed to the deal, only then did his client inform him of the status of the title, and that was why he wanted to change his mind. However this is totally untrue. For starters, the status of the title was clearly discussed repeatedly throughout the mediation (i.e. that my mom had signed it and left the buyer's name blank), before we had agreed to anything. And then on top of that, not only did all the parties (including defendant Cramer's Auto and his counsel) agree to all the terms, including our agreeing upon all of the specifics (e.g. when, how and where payment would be made), but at the time when Mr. Kearney changed his mind, he was not even speaking to his client at all! Instead, as we were just about to go back before the court to place the settlement onto the record, Mr. Dirkes had asked me a question about what his employee had said to me, which I answered. He then indicated that he want to call him and confirm. But then while Mr. Dirkes was speaking quietly over his cell phone (presumably with his employee), for about a minute or so there was nothing but complete silence from the rest of us, when all of the sudden and completely out of the blue, Mr. Kearney then wanted to change the deal. And it was then when I tried to push back on the proposed changes (because we were already in agreement as to everything), that was when Mr. Kearney started to flip out and become loud and belligerent, calling me a liar, threatening me with perjury, and wanted to rescind our settlement agreement completely. I was shocked by this, and it appeared to me that

both the mediator (who was an attorney) as well as counsel for Cramer's Auto were equally shocked by this as well. Even when my sister tried to calmly intervene, he was shouting at her at the top of his lungs, and doing so in a very belligerent unprofessional manner. Because of his conduct, the mediation session ended without us ever putting a settlement on to the record. And the rest is history.

Interestingly, Mr. Kearney does not deny any of this. Nor did he even attempt to offer an explanation for his completely unprofessional and unacceptable conduct.

There are a few other misrepresented "facts" within the "Legal Argument" section of his brief, which I will address in turn within my rebuttal arguments.

ARGUMENTS (Rebuttal)

1. Mr. Kearney is conflating his arguments about a lack of an enforceable contract with his arguments about a lack of standing; and further asks this Court to ignore the practical realities involved with selling cars for junk.

Just as he done in the lower court, in the Respondent brief Mr. Kearney interchangeably conflates a purported "unenforceable contract" with a purported "lack of standing". But clearly these are 2 different things. Although I could not find an exact authority on this point, to me the distinction seems axiomatic. That is, in order to have standing, there is a vast abundance of case law which makes clear that although the threshold is "fairly low", the plaintiff needs to have a financial interest in the outcome. Only then, can he/she challenge the validity of the contract terms. Such was the case in my own appeal against Colony Insurance Company, where the trial court dismissed my claims, stating that because I could not first

establish that I had standing, I could not even get the opportunity to challenge the unenforceable language of the contract (i.e. an insurance policy that violated the rulings in *Sparks v. St. Paul Ins. Co.*, 100 NJ 325 (1985)). When this Court reversed, it held that I did have standing under the direct action statute; and then as a result, only then was I able to challenge the terms of the policy (contract).

But what Mr. Kearney argues here is the reverse – that is, he argues that because he contends that my contract with Dirkes was unenforceable, that contention therefore equates to a lack of standing. In other words, Mr. Kearney's position is essentially an argument that the cart should be put before the horse.

Also in this same point heading, he ignores the practical realities involved with selling a vehicle as junk, conflating that with statutes that were intended for selling normal vehicles which would be driven on the road again. And despite the bald misrepresentation on Db11, it **is** a "standard business practice" to accept junk vehicles with no title at all, and even no paperwork at all (e.g. Cramer's Auto only wants a key when they buy a junk car; see also Pa43-Pa54). And again in this point heading, Mr. Kearney deceptively interjects the word "proper" before the word "title" (i.e. disingenuously suggesting a problem with whose name was on the title), when the truth is revealed within his own brief - he himself admits that he had no problem with his client accepting the title "as is", a title that was still in my mom's name, as this was included in the mediation settlement agreement.

That is, Mr. Kearney admits that even during mediation, after he himself became aware of the fact that the title was still in my mom's name, this "newly learned" fact did not prevent him / his client from still accepting the car's title as-is. Instead, according to his own statement of facts, the only change that he wanted to make to our settlement agreement was that we would fax him the title. (See Db9, where Mr. Kearney states that after he learned that the title was still in my mom's name, "the undersigned revised the offer on behalf of Respondent to make the $466 payment after receiving the title by fax"). Thus, Mr. Kearney therein indirectly admits that even he, a veteran attorney, did not have a problem with his client accepting the title "as-is" (i.e. even from his own point of view, the "as-is" title was sufficient for Dirkes to retain possession of the vehicle so as to sell parts from).

2. Mr. Kearney distorts this Court's rulings in *Haylett v. Baladi*, 2010 WL 2346713, and also points to distinctions that are immaterial to its applicability to the facts here in this instant matter.

Mr. Kearney argues that *Haylett v. Baladi*, 2010 WL 2346713 is not applicable, arguing that the only reason why Haylett had standing was "because Baladi had written a check in her name". However, this Court did not rule that a written check was a prerequisite for standing. Instead, this Court's ruling simply noted that the check served as proof/evidence "that Baladi dealt with her". Here in this case, my transcript and audio recording is proof that Dirkes "dealt with me". This fact is also admitted to in the Respondent's brief. (See Pa40-Pa41; Db4, Db7-Db8)

Moreover, as Mr. Kearney readily acknowledges, that Baladi check was for a different car. So if a written check was a requirement for her to have standing, then Haylett would have been deprived of standing as soon as she informed the trial court that the check she received was for a different vehicle. (See Pra1 and Pra2).

On Db13, Mr. Kearney goes further to suggest that the authorities I cited, which pertain to undocumented immigrants being able to enforce their employment contracts, are inapplicable - therein stating that these cases are not about lacking a necessary physical document. However, this argument is clearly meritless, as it is clear that in order for these non-US-citizens to legally work in our country, they would first need to obtain "work visas" – which of course are physical documents.[1]

His attack on my "defacto executor" argument really only supports my position.

Lastly, his attack on my assertion of different legal theories is also meritless. As this Court has noted: "Our rules permit the pleading and pursuit of alternative and even inconsistent theories". *Kas Oriental Rugs, Inc. v. Ellman*, 394 N.J. Super. 278 (App.Div. 2007) (citing *Cartel Capital Corp. v. Fireco of N.J.*, 81 N.J. 548, 564, 410 A.2d 674 (1980)). Instead, authority makes clear that I would only be precluded from obtaining **recovery** on inconsistent theories. Ibid. (citing *Caputo v. Nice-Pak Prods., Inc.*, 300 N.J.Super. 498, 504, 693 A.2d 494 (App.Div. 1997)).

[1] And their employment contracts were enforced by the Courts, even though they: A) had no work visas; B) committed intentional affirmative acts by illegally crossing our border (and numerous state lines); and C) were residing here illegally.

3. The Respondent cannot defeat the validity of my unjust enrichment claim.
In his brief, all that Mr. Kearney can possibly do, to feebly try to attack the validity of my unjust enrichment claim, is to make the absurd contention that I could not prove that his client actually benefited from keeping the vehicle. However, as shown by my exhibits, Dirkes is primarily a junk yard, **that actively seeks junk cars**, as its primary business is selling used auto parts. (See e.g. Pa160, which for this Court's convenience, I have included again and attached hereto as Pra3).

Moreover, this fact is readily admitted to in the Respondent's brief – on Db7, Mr. Kearney admits: "Dirke's is an auto shop that primarily sells used auto parts".

Further, Mr. Kearney admits to the fact that his client had repeatedly offered to purchase the car for $400 (i.e. even during mediation, had offered to pay us $466 to keep the car). So logically, and rhetorically speaking, why else would Dirkes have wanted to pay out this money to buy this car, if not to make a significant profit from selling used parts off of it? (This of course is their primary business).

Further still, Dirkes never denied reaping this benefit; and even if it had, it would then have been an issue to be proven at trial – but since the granted motion to dismiss was based on the pleadings, all of my allegations needed to be presumed as true. "On a motion to dismiss a claim on its face under Rule 4:6-2(e), ... we must presume ... that plaintiff's factual allegations pled in the complaint are true". *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App.Div. 2019) (citing *Printing Mart v. Sharp Elecs. Corp.*, 116 N.J. 739, 772, (1989)).

Tellingly, Mr. Kearney does not dispute the fact that after I obtained the document from the Surrogate's office, undeniably I had standing to bring the unjust enrichment claim (i.e. at least at that stage - if not earlier, as is my position).

4. The Respondent was the party whom had numerous "far better options".

What Mr. Kearney conveniently omits mentioning is the fact that his client wanted to extort $530 from me, as a condition to release the car back to me. He did this deliberately knowing that the grossly-inflated amount he sought from me would exceed the value I could likely get from selling it anywhere else. And then even when Mr. Dirkes offered to return the car to me at no cost, he refused to certify that he had not already stripped parts off of the car. So it begs the question of: "Why would Mr. Dirkes not provide that certification"? And it begs the questions of: "Why did mediation end after I pushed back on the proposed change to our settlement agreement", "Why not continue to negotiate", "Why was my offer, later that same day, flatly refused", etc? Thus it was Mr. Dirkes and Mr. Kearney who each/both refused several better options, which would have resolved the case at no cost to anyone. Instead, both Mr. Dirkes and Mr. Kearney decided to escalate this $400 case into a 5-figure case. Thus it should be obvious who the "bully" is here.

Interestingly, Mr. Kearney argues that the court should look at the totality of the circumstances, and the potential benefit from pursuing the litigation. I agree with this argument, which I think would only yield a result which would be the exact

opposite of what Mr. Kearney contends. In this regard, he fails to even attempt to refute my authorities pertaining to reasonableness of the legal fees being sought.[2]

Lastly, Mr. Kearney tries to argue that my inability to specifically recall the *Haylett* authority should cast doubt upon the reasonableness of my belief. However even aside from the fact that he is trying to distort my words, his point is moot. In *Badiali v. N.J. Mfrs. Ins. Grp.*, 429 N.J. Super. 121, 126 (App.Div. 2012) this Court held that as a matter of law, the mere existence of unpublished case law supporting NJM's rejection of the arbitration award precluded a finding of bad faith against NJM, regardless of whether NJM relied on or was aware of that unpublished case.

5. Mr. Kearney is incorrect that a showing of bad faith is not necessary to impose sanctions under the statute (or under the rule); and further this position is contrary to his own arguments that he had asserted previously.

Within Mr. Kearney's April 28, 2023 certification, he agreed that a showing of bad faith is required under the statute, while (incorrectly and inconsistently) arguing that he did not need to show bad faith, because he was seeking sanctions under *R. 1:4-8*. Specifically, Mr. Kearney had argued: "At paragraph 53 of his certification he writes that *Tagayun* holds movants bear the burden of proving bad faith. That is a correct statement of law when seeking fees against a party under *N.J.S.A. §2A:15-59* ..." (See Pa178).

[2] In his original non-conforming Respondent brief, Mr. Kearney argued that the cases I had cited (as to reasonableness of attorney fees) were inapplicable because those cases only dealt with plaintiffs. (See Pra4, which is the relevant page of that version of his brief). Apparently he realized that this was a meritless argument, so when he submitted the corrected version 2 days later, he then deleted it.

But yet in the fifth point of his Respondent brief, he now inconsistently argues: "The Appellant's reading of the frivolous litigation statute *N.J.S.A. §2A:15-59* is incorrect and does not indicate a burden of proof for bad faith."

However his motion for sanctions was made under *R. 1:4-8* and not the statute. (See Pa75). And in his Oct 17, 2022 certification in further support of his motion for sanctions (i.e. in reply to my Oct 10, 2022 opposition), he made the distinction that his motion for sanctions was based on the rule and not based on the statute, thus arguing that *Lewis v. Lewis*, 132 NJ 541 (1993) was inapplicable. (See Pa107).

But the distinction is moot, as this Court has clearly held that either under the statute, and/or under the rule, the party seeking sanctions must show bad faith. "The burden of proving ... a non-prevailing party acted in bad faith ... is on the party who seeks fees and costs under the Frivolous Litigation Statute, or ... under Rule 1:4-8." *Bove v. AkPharma Inc.*, 460 N.J. Super. 123, 151 (App. Div. 2019).

And in *Bove*, supra, 460 N.J. Super. at 148, this Court held:

> "For purposes of imposing sanctions under *Rule 1:4-8*, an assertion is deemed `frivolous' when `no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" *United Hearts, LLC v. Zahabian*, 407 N.J. Super. 379, 389, 971 A.2d 434 (App. Div. 2009) (quoting *First Atlantic*, 391 N.J. Super. at 432, 918 A.2d 666).
>
> Sanctions imposed under this rule "are specifically designed to deter the filing or pursuit of frivolous litigation[.]" *LoBiondo v. Schwartz*, 199 N.J. 62, 98, 970 A.2d 1007 (2009). A second purpose of the rule is to compensate the opposing party in defending against frivolous litigation. *Toll Bros., Inc. v. Twp. of W. Windsor*, 190 N.J. 61, 71, 918 A.2d 595 (2007). However, because the nature of litigation conduct warranting sanctions under *Rule 1:4-8* has been strictly construed, *Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 1:4-8 (2019)*, ***Rule 1:4-8* sanctions will not be imposed against an attorney who mistakenly files a claim in good faith**. *Horowitz v. Weishoff*, 346 N.J. Super. 165, 166-67, 787 A.2d

> 236 (App. Div. 2001); see also *First Atlantic*, 391 N.J. Super. at 432, 918 A.2d 666 (holding that an objectively reasonable belief in the merits of a claim precludes an attorney fee award); and *K.D. v. Bozarth*, 313 N.J. Super. 561, 574-75, 713 A.2d 546 (App. Div. 1998) (declining to award attorney's fees where there is no showing the attorney acted in bad faith). [Emphasis added]

Mr. Kearney must realize that his argument is meritless, so that explains why he then attempts to create a showing of bad faith out of thin air, by concocting an argument that I initiated this case out of "principle". This is clearly false; and if anything, in reality it should be easily inferred that the reverse is true. [3]

Moreover, the above concoction is directly contradicted by what he had written elsewhere in his brief, wherein Mr. Kearney expressed no doubt that I believe in the merits of my case, and wherein he repeatedly asserted that I "misunderstand" the law. For example: "... Appellant clearly does not understand the issues ..."(Db1, Db11); "... it is clear that Appellant is confused about the issues ... " (Db12); "This argument further shows that Appellant does not actually understand the issues in this present suit." (Db13); and "Once again, Appellant clearly does not understand the issues ..." (Db14).

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[3] On Db20, Mr. Kearney indirectly concedes to the deficiencies in his motion papers, but argues those deficiencies were inconsequential. However he also indirectly concedes that his *R. 1:4-8* letter was deficient - this fact alone requires the reversal of sanctions. See e.g. *Bove, supra,* 460 N.J. Super. at 149.

Also on Db20, he also misstates a fact about his own case that he had filed against his former law partner where he lacked standing. He falsely stated that he "did not further pursue the case after receiving a R. 1:4-8 letter". However eCourts clearly shows that soon after it was initially dismissed (w/o prejudice), he then filed an amended complaint; and he then spitefully named his own former co-plaintiff as a defendant (i.e. after she had written to the court saying that she had no idea of Mr. Kearney's actions). The case was settled a year and a half later. (Pa86-87, ¶¶29-39; Pa94-104)

But as I argued in my principal brief, even assuming arguendo if I did misunderstand the law, sanctions should not be imposed because a litigant is wrong about the law. See *Tagayun v. AmeriChoice*, 446 N.J. Super. 570 (App.Div. 2016).

Interestingly and tellingly, although I cited *Tagayun* repeatedly in my principal brief, he makes no mention of that authority anywhere in his Respondent brief. [4]

6. Mr. Kearney concedes there was no objective basis behind the sanctions award. Instead he argues that this Court should uphold that subjective determination, with no analysis having been performed whatsoever, simply because the judge would have a better idea than me as to "what attorneys at different skills levels charge." [2]

While that may be true, it does not relieve the judge of his duties to objectively calculate the lodestar, as detailed within *Rendine v. Pantzer*, 141 N.J. 292 (1995). [5]

CONCLUSION

For all of the reasons set forth in this brief and within my principal brief, I respectfully submit that this Court must reverse the trial court's rulings in their entirety. Thank you.

Respectfully submitted,

Steven D'Agostino

Steven D'Agostino

P.S. At the very end of my principal brief, I asked this Court to explicitly award me my *R. 2:11-5* costs incurred in this appeal, which I approximated to be around $1,300. But just to be clear, that $1,300 did not include the costs I incurred during the trial court proceedings, nor does it include the hundreds of dollars per month in interest charges I have been incurring since November of 2023. (On Oct 26, 2023 I paid Mr. Kearney $7,070 on my Discover Card, so as to prevent him from taking all of my possessions in an attempt to execute upon the sanctions judgment). Please also be advised that my sister has paid Mr. Kearney $2,430 in full to settle her portion of the $8,900 judgment. Thus Mr. Kearney has already received a total of $9,500 from both of us combined.

[4] There also were many other arguments that Mr. Kearney did not even try to refute.

[5] *Rendine* includes an instruction that: "Trial courts should not accept passively the submissions of counsel to support the lodestar amount." Id. at 335