
Superior Court of New Jersey
Appellate Division
DOCKET NO. A-000897-23T4

CIVIL ACTION

SHARYN PRIMMER, **APPEAL**

Plaintiff/Respondent **On Appeal From:**

v. **Superior Court, Chancery Division**
Family Part- Somerset County
Docket No FM-18-709-19

Michael Harrison **Honorable Robert G. Wilson PJFP**

Defendant/Appellant **Superior Court of New Jersey**
Appellate Division
Docket No. A-1590-20
Honorable Haney Mawla, J.A.D.

Superior Court, Chancery Division
Family Part-Somerset County
Docket No. FM-18-709-19
Honorable Robert Ballard, Jr. JSC

BRIEF AND APPENDDIX
FOR
APPELLANT MICHAEL HARRISON

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PRELIMINARY STATEMENT

The Appellant/Defendant in this matter is Michael Harrison. He is an attorney at law who has actively practiced law in the State of New Jersey for forty-seven (47) years. He is representing himself in this action. This is being brought to the attention of the Court so that it understands that, as an attorney, Mr. Harrison is quite familiar with the procedure and the workings of the Court. This case has proceeded through a motion, a plenary hearing, an appeal and then a second motion before the Trial Court. In each hearing the Courts ignored and failed to make a decision on the singularly most devastating financial issue in this case. This issue will be identified below.

Mr. Harrison will not ask the Court to make new law on this case. The law is well settled. Mr. Harrison will not contend that any facts are different than as presented in the Trial Court and adopted by the Trial Court. In fact, Mr. Harrison asks this Court to adopt the undisputed testimony of the Plaintiff in this case. This is not a "he said, she said" case/argument. THE FACTS ARE UNDISPUTED. SO HOW IS IT THEN, THAT, IF THE FACTS ARE UNDISPUTED AND THE LAW IS UNDISPUTED WE END UP IN THE APPELLATE DIVISION AGAIN ON THIS MATTER? Again, it is because in each of the three (3) appearances before the Courts, they have failed to address a single, financially devastating issue.

Michael Harrison understands that this preliminary statement presents a rather unique approach to the introduction of an appeal. What he asks is for this Court to review the facts of this case in relation to the single most devastating issue (the imposition of two penalties) in this case and to make the Right Decision. In Order to do this there may be some procedural hurdles to surmount, BUT IS IT NOT THE DUTY OF THE COURT TO ARRIVE AT THE FAIR AND CORRECT DECISION? As Justice Earl Warren stated, *It is the spirit and not the form of law that keeps justice alive.*

PROCEDURAL HISTORY

On February 16, 2018, the Plaintiff filed a Complaint in the Law Division, seeking damages for Defendant's alleged breach of the parties' palimony Agreement. On March 26, 2018, the Defendant filed an Answer, with a Counterclaim. On August 17, 2018, the Defendant filed an Amended Counterclaim (on leave granted), which added a claim against Plaintiff for fraud-in-the-inducement.

On March 13, 2019, the Law Division Ordered that the action be transferred to the Chancery Division, Family Part. On October 25, 2019, the Trial Court denied the parties' cross-motions for summary judgment. The case was then tried in the

Family Part over two days, on March 9 and March 10, 2020.(Trial Transcript T-2, March 9, 2020)

The Trial Court gave its decision on the record in Court on June 22, 2020, and issued its final Order on June 30, 2020 (DA 3- Pages A17-A26) . The Court inter alia enforced the Parties' Agreement, entering respective damages awards for what the Court found were breaches by both Plaintiff and Defendant.

However, because of a clerical error, the Order was not served on the parties until February 10, 2021, after the time to appeal the Order had elapsed. Therefore, the Trial Court issued an Order on April 16, 2023, amending the entry date of its rulings and making that Order its final Order for purposes of the time to appeal. In the same Order (DA 3, Pages A17-A26) , the Court revised the award it had made to Defendant based on Plaintiff's breach. The Defendant timely filed his Notice of Appeal on April 26, 2021. Briefs were filed by both parties and on May 6, 2022, the Appellate Division rendered its decision (DA 4, pages A27-A50) . On May 16, 2022, Defendant made a motion for Reconsideration of the Court's decision. On June 2, 2022, the Appellate Division denied the Motion for Reconsideration without comment.

On or about August 16, 2023, Defendant filed a motion seeking among other things to Enforce Plaintiff's obligation to pay Defendant $ 70,000.00, eliminating

the $100 per day penalty, and seeking attorney's fees. Plaintiff filed opposition and a cross motion. On October 13, 2023, the Court entered its Order (DA 5, Pages A51-A56)

***Trial Transcripts- T1 is the Motion Hearing before Honorable Robert G. Wilson, PJFP on 10/13/2023, Family Part, Somerset County FM-18-709-19.

T2 is the Trial Transcript before Robert Ballard, Jr. JSC on March 9, 2020, Family Part, Somerset County FM-18-709-19.

STATEMENT OF FACTS

There are numerous issues in this case, but for purposes of this appeal, this Brief will focus on the singular issue (and an associated issue dealing with the imposition of attorney fees). This case involves an agreement between the parties that has been characterized as a "palimony" agreement. There was/is a written agreement (DA 1, Pages A1-A16) between Harrison and Primmer to "settle" their issues relating to their finances and support resulting from a breakup of a long term relationship. Plaintiff and Defendant were never married. The one issue, which is the most devastating financially, is the penalties that have been assessed pursuant to this agreement on two (2) occasions against this appellant. The penalties are for the alleged failure to make the required monthly payments of $1,500 (DA 1, paragraph 4, Page A4) to the Plaintiff. It is our position that these penalties were wrongly imposed by the Courts below.

There is no dispute as to the contents of the Agreement (DA 1, pages A1-A16). And for the purposes of this appeal we will not include any disputed facts. There will be no "he said, she said." Every fact set forth herein will be an indisputable fact as expressed in testimony by Plaintiff, in the plenary hearing which took place

before the Honorable Robert Ballard on March 9 and March 10, 2020, which culminated in the first penalty imposed against Defendant in the Court Order dated June 30, 2020 (DA 2, page A25, Paragraph 2). The second penalty was imposed by Honorable Robert Wilson after a motion hearing on October 13, 2023 (DA 5, paragraph 1, pages A51-A52).

1. In the referenced Agreement the Plaintiff and Defendant agreed to equally share responsibility for the down payment of a condominium in Bedminster, where the Plaintiff would reside. Specifically, the down payment on the Bedminster home was $140,000.00 and the parties agreed to each be responsible for one-half, or $70,000.00. (paragraph 1-DA 1, page A3)

2. Plaintiff made a representation in paragraph 1 of the Agreement (DA 1, PAGE A3) that she did "not have access to such funds" to pay her share of the down payment, and so the Agreement indicates "AS **SHARYN DOES NOT HAVE ACCESS TO SUCH FUNDS THEN MICHAEL SHALL FRONT LOAD THE DOWN PAYMENT REQUIRED FOR CLOSING". (Paragraph 1-DA 1, page A3)**

3. Based upon that representation Defendant agreed to "front load" the entire down payment himself.(Paragraph 1-DA 1, Page A3)

4. There is no dispute that Defendant relied upon Plaintiff's representation that "AS SHARYN DOES NOT HAVE ACCESS TO SUCH FUNDS THEN MICHAEL SHALL FRONT LOAD THE DOWN PAYMENT REQUIRED FOR CLOSING." Plaintiff was asked during cross examination at trial the following (Page 76, lines 2-8, trial transcript T2) .

Q. "And you know, did you not, that Mr. Harrison was relying on this representation in the contract that you did not have $70,000.00. (Trial transcript T2-Page 76-lines 2-6)

A. "I assume he was but …yes. I'll say yes. Okay" (Trial transcript T2 Page 76 lines 5-6)

5. And testimony from the Defendant on this issue was that this was not an easy lift for Defendant financially as he was forced to secure a HELOC loan to come up with the entire down payment. This was the uncontested testimony at trial (Trial transcript T2, pages 131, lines-21-25 and 132, lines 1-2).

6. At trial, Primmer admitted that she in fact did have "access" to well more than $70,000.00 at the time that she made the representation. (Trial transcript T2 page 74 line 7 through page 76 line 8)

7. At trial Primmer was asked the following question:

Q. Well, the question is you in fact did have access to $70,000.00 when you signed the Agreement? (Trial Transcript T2 page 73 lines 12-13)

A. I did. (Trial Transcript T2, Page 73- lines 12 to 14)

8. In fact, during cross examination, Primmer acknowledged all the accounts to which she had access at the time. (Further, all this information was also set forth in paragraphs 19-24 of the Stipulations of Facts . At the time she made the representations in the Agreement, Primmer actually possessed over $260,000.00 found in three bank accounts which were available to her (Trial Transcript 2 page 74- Line 7 to Page 76- Line 1). These funds were in addition to significant other funds which she owned. And when asked "But you didn't tell anybody (about the funds). The question asked of Plaintiff was that "you (Plaintiff) simply said I don't have $ 70,000.00 Right? (Trial transcript , page 73-lines 16-18)

Answer by Plaintiff: Right. (Trial transcript T2 2, Page 73 Line 21)

9. The Court below indicated that the Appellate decision concluded that Ms. Primmer was a credible witness. We ask this Court to adopt this same conclusion, that Ms. Primmer was a credible witness, in the sense that what she said was perceived as being true, when it was false. Since Ms. Primmer admitted in her trial testimony that she lied in making the representation that

she did not have access to available funds to pay her portion of the down payment, then she is a credible liar, not worthy of any belief whatsoever.

10. This is incredibly significant in that the Defendant has twice been penalized related to this $70,000.00 payment as will be discussed herein (DA 3, page A25 paragraph 2 and DA 5, page A A51 and A52, paragraph 1). It is clear that Primmer lied. The question is what impact her ability to credibly lie should have on the outcome of the case.

11. In Judge Ballard's decision he never mentioned this misrepresentation as it relates to the assessment of the first penalty. Likewise, the Appellate Division never mentioned this misrepresentation as it relates to the assessment of the first penalty. And there was no mention, even though this issue represents the single most devastating financial issue in this case.

12. It is an indisputable fact that Primmer misrepresented her finances. This misrepresentation was a FACT. And this misrepresentation was not known to the Defendant until discovery occurred in this case. (Trial Transcript T2, page 129 line 20-Page 130 line 5), (Also Transcript trial T2, page 161 lines 2-15)

13. This misrepresentation is central to the issue of the penalties assessed against the Defendant. And that is because the issue of the payment or non-payment of the $70,000.00 is the reason for the assessment of the penalties

against the Defendant. In other words, the alleged non-payment by the Defendant relates to the $70,000.00, and the misrepresentation relates to this $70,000.00.

14. Defendant was required to pay the Plaintiff $ 1,500.00 per month from the signing of the agreement for the life of the Plaintiff. (DA 1, page A4, paragraph 4)

15. Defendant made six (6) years of payments of $1,500.00 per month to Plaintiff without interruption. In other words, he made 72 consecutive payments. Plaintiff indicated in testimony that payment stopped in June or July 2017 (Trial Transcript 2, page 128, lines 3-4). That would equate to 72 consecutive payments. THIS IS UNDISPUTED.

16. Defendant made a demand to Plaintiff during the sixth year after the signing of the Agreement for Plaintiff to pay him the $70,000.00 that she owed him (Letter introduced into evidence at trial) Trial Transcript T2, Page 89 line13-Page 90 Line 3. THIS IS UNDISPUTED.

17. Defendant refused to make the payment despite her promise in Paragraph 1 of the Agreement: “This sum shall be paid by Sharyn to Michael within three years of the closing date without interest…” and despite the fact that she had funds available funds to do so at the outset, of which Defendant was unaware at

that time. (It first became known to him in discovery in the lawsuit initiated by Primmer) Trial Transcript T2, Page 129 Line 20-Page 130 Line 5.

18. After having made six (6) years of uninterrupted payments, Defendant utilized a self-help remedy and stopped making payments of the $1,500.00 for 46 months. This totals $69,000.00, which is less than what was owed by Primmer. From that point forward Defendant has made every payment of $1,500.00 per month (No trial transcript reference since the payments resumed after the trial concluded.

19. The Trial Court penalized Defendant for not making payments during this self-help period in the amount of $100.00 per day and calculated that Defendant owed Plaintiff the amount of $108,300.00 as the penalty (DA 3, Page A25, paragraph 1). The Trial Court's decision was characterized by the appellate Court as "not made … (with) robust findings." This was an understatement, as there was no mention of the fact that Primmer had available funds at the time of the signing of the Agreement or that she had LIED about same.

20. Had Primmer not made that misrepresentation and paid Harrison, the assessment of penalties against Harrison would have been a non-issue.

21. For the Court below to assess the penalties there was a remarkably simple condition precedent that was required. The condition precedent is that Plaintiff

did not actually have the $70,000.00 readily available. So, the real question is: DID PLAINTIFF ACTUALLY HAVE THE $70,000.00 WHEN SHE SAID THAT SHE DID NOT HAVE THAT MONEY? THE ANSWER IS THAT SHE DID HAVE THE $70,000.00. THIS FACT IS INDISPUTABLE. THE FACT THAT SHE LIED AND MISREPRESENTED THAT SHE DIDN'T HAVE IT SHOULD NOT AND CAN NOT INURE TO HER BENEFIT.

22. The Court should keep in mind that the reason for the assessment of penalties was to make certain that Plaintiff had available funds to pay her expenses. INASMUCH AS PLAINTIFF KEPT THE FUNDS THAT WERE AVAILABLE TO PAY DEFENDANT, HOW CAN IT BE SAID THAT PLAINTIFF DID NOT HAVE THE FUNDS TO PAY HER EXPENSES. HOW, THEREFORE, IS THE OBVIOUS MISREPRESENTATION, LYING, AND DECEITFUL CONDUCT NOT WORTHY OF DISCUSSION BY THE COURT BELOW OR BY THE APPELLATE DIVISION?

23. In a very real sense, Primmer, in fact, had the $70,000.00. She held onto/kept the funds that were due to Harrison and did so by misrepresentation and deception.

24. Essentially, the Trial Court rewarded Primmer's lies and deception by penalizing Defendant in the amount of $108,300.00. Further, the Court

rewarded Primmer for what the Appellate Division characterized as an "egregious" breach of the Agreement.

25. Defendant understands that since the Appellate division did not comment on this issue that there may be an objection from Plaintiff that Defendant is attempting to re-litigate this issue in violation of the rule on "the law of the case" re: the initial penalty). (Even though the Appellate division ignored what was the most financially devastating issue in the case). The reason that the Appellate Division ignored this issue is that it was more concerned with making a statement related to the Moynihan palimony case (which was a very current issue of interest in the legal community). In so doing, the Appellate division abandoned its responsibility to fully and fairly decide all important issues. AN INJUSTICE WAS DONE. CAN IT BE UNDONE? IF JUSTICE IS TO BE SERVED, IT MUST BE UNDONE!

26. Now the Court below Judge Wilson, seeks to again penalize Defendant (an additional $119,000.00) (DA 5, pages A51-A52 paragraph 1). WITHOUT ANY SUPPORTING FACTS IN ITS OPINION OR ORDER despite these facts:

(a). At the time of the signing of the Agreement Plaintiff had available funds to pay to Defendant, but LIED about same and hid this fact for over 6 years. These monies, at all relevant times, were INDISPUTABLY always available to Plaintiff.

(b). Even if this were not so, Defendant never made any real attempt to sell the property that was supposed to be sold to pay Plaintiff. In her testimony Plaintiff indicated that the property "was last listed in 2012 and then it went off" (Trial Transcript T2, page 66 lines 20,21). PLAINTIFF never proceeded in good faith, and the Appellate Division called her breach "egregious."

(c). Both the Trial Court in its June 30, 2020 , Order DA 3 and the Appellate Division (DA4) Ordered Plaintiff to pay the $70,000.00 and, assuming it was paid at that time there would be no additional penalties to Defendant. Both Courts indicated it was owed so why should there be an additional penalty after the Order indicated that Plaintiff owed Defendant the $70,000.00?

(d). Contrary to what the Court said in the motion hearing, Defendant was the only one that proceeded in good faith having made 72 consecutive payments while Plaintiff never once attempted to address the money that she owed to Defendant and while she continued to hide behind her LIES. AT NO TIME DID THE DEFENDANT ACTUALLY OWE MONEY TO THE PLAINTIFF (If the setoff of Defendant is considered or the LIE is recognized by this Court).

(e). In the October 13, 2023, Order of the Court below, Paragraph 5, Page A52, it is stated as follows:

Defendant's request to declare that Plaintiff's obligation to re-pay the sum of $70,000.00 under the parties' settlement agreement accrued on or about June 14, 2014, is GRANTED.

If the obligation of Plaintiff accrued on June 14, 2014 and she owed that money to Defendant at the time the only logical conclusion is that Plaintiff was essentially paid $70,000.00 in advance at that time. Following this reasoning to its logical conclusion, how can Defendant be penalized for not paying $70,000.00 in 2017 when Plaintiff had that money in a very real sense SINCE 2014. So, essentially Judge Wilson's reasoning is inconsistent with Judge Ballard's decision of June 30, 2020 the Appellate decision, and its own decision to penalize Defendant an additional $119,000.00.

27. The Ruling of the Court below again penalizes the Defendant and rewards the Plaintiff for her lies and bad faith litigation, contrary to the law and the facts of this case.

28. It is significant that the Court below never made the findings of fact and the conclusions of law on which to predicate an additional penalty. This litigant clearly questions whether or not the Court below was in possession of the facts of the case.

29. This litigant again asks the question how the obvious misrepresentation of Plaintiff cannot be addressed when that is the reason that devastating and undeserved penalties (Initial and current) were assessed against Defendant.

30. Just to review the facts relating to this issue that this Court is asked to consider (And is a review of previously cited facts):

(a.) The penalties that have been assessed against Defendant relate solely to the allegation that Defendant failed to pay to Plaintiff $70,000.00 in monthly payments beginning six years after the agreement became effective. The Court has pointed to the penalty provision in the contract which assesses a penalty of $100.00 per day. The reason for the penalty was to insure that Plaintiff received sufficient funds from Defendant in order to meet her living expenses.

(b.) Plaintiff was required under the agreement to pay $70,000.00 to Defendant pursuant to the contract.

(c.) Plaintiff was given a suspension of her obligation to pay the $70,000.00 to Defendant because she represented to Defendant in the agreement that she did not have the $ 70,000.00 at the time that she signed the agreement (DA1, page A3, Paragraph 1).

(d.) Plaintiff admitted in testimony that Defendant relied upon Plaintiff's false representation.

(e.) Defendant, in his testimony on the issue of reliance, indicated that he relied upon Plaintiff's representation. Plaintiff did not contest this fact.

(f.) Plaintiff lied. She admitted that she had significantly more than $70,000.00 in available funds when she signed the agreement. This lie was not disclosed to Harrison until almost seven (7) years after the signing of the agreement.

(g.) Plaintiff actually had the money that she indicates was not paid to her and even though she had the money it was her position that Defendant Harrison should have to pay a penalty, because it was ok for her to LIE AND CHEAT.

This begs the question: Why is it equitable or fair or okay for Plaintiff to lie, cheat and deceive Defendant for seven (7) years, make false representations and retain monies that Harrison should never have been required to pay to Primmer? paid to Harrison? If the $70,000.00 had been initially paid by Primmer, the issue does not arise and there would have been no penalties. Since equity treats as done that which ought to have been done, the Judgments of the Courts below must be reversed.

FACTS DEALING WITH THE ASSOCIATED ISSUE- IMPOSITION OF LEGAL FEES BY THE COURT BELOW

1. Defendant Michael Harrison brought a motion which primarily attempted to eliminate the initial penalty of $108,300.00 imposed on Defendant. (Not granted) Order of Court Judge Wilson, DA 5)
2. Plaintiff filed opposition and cross moved to reduce this amount to judgment against Defendant Michael Harrison. (Granted) (Order of Court Judge Wilson DA5)
3. Plaintiff further cross moved to have the Court impose an additional penalty of $119,000.00 on Defendant Michael Harrison for non-payment of the $70,000.00 (which, of course, Plaintiff actually had) from 4/16/21-10/13/23. Without any supporting facts or opinion the Court granted the imposition of an $119,000.00 additional penalty against Harrison.
4. The Court further Ordered Defendant Michael Harrison to pay Plaintiff's counsel fees relative to the Motion and Cross motion in the amount of $4,000.00 (DA 5, page A55, paragraph 26)
5. Defendant Michael Harrison seeks the elimination of this Counsel fee and the imposition of a counsel fee on Plaintiff as Plaintiff in bad faith attempted to formalize and add to the penalty on Harrison. Plaintiff knowingly moved forward on this request relying upon an intentional misrepresentation wherein she lied, cheated and deceived. Plaintiff's counsel was complicit in

this effort to defraud Harrison and to defraud the Court. (To be further discussed)

ARGUMENT AND LEGAL SUPPORT

1. THE INITIAL TRIAL COURT, THE APPELLATE DIVISION AND THE COURT BELOW ERRED in failing to consider the issue of Common Law Fraud by Plaintiff, i.e. the intentional misrepresentation of Plaintiff as it relates to the imposition of two (2) penalties on Defendant.

THIS ISSUE WAS NOT DISCUSSED/RAISED BELOW

Common law fraud in New Jersey is the intentional misrepresentation of material facts presented to and relied upon by another to the other's detriment. It is a principle established hundreds of years ago in English common law. In order to prevail on a claim for common law fraud, a claimant must show (1) an intentional misrepresentation that is a fact (2) a belief by the Defendant that the claims were false (3) Defendant's intention that a (claimant) would rely upon the factual misrepresentation (4) a reasonable reliance of the (claimant) on the misrepresentation and (5) damages that result. See *Gennari v Weichert Co. Realtors*, 148 NJ 582, 610 (1997).

As indicated in the Procedural History and Statement of Facts above, Plaintiff intentionally misrepresented a critical fact which Defendant relied upon and which led to the wrongful imposition of penalties on Defendant by the Courts. It is undisputed that Plaintiff represented to Defendant in their Agreement, "As Sharyn does not have access to such funds then Michael shall front load the down payment required for closing." Plaintiff admitted that she had access to the funds (and, in fact, had access to considerably more than the required funds). Plaintiff knew that she had these funds, but intentionally lied and hid this fact for more than seven years. There is no question that Plaintiff intended Defendant to rely upon her misrepresentation. She admitted same in her testimony during trial. Obviously, Defendant relied upon Plaintiff's representation and, in fact, front loaded the deposit that Plaintiff stated that she did not have. Further, Plaintiff admitted in testimony that Defendant relied upon that representation. Last, but not least, the Defendant suffered damages as he was penalized by the Court in the amount of over $227,000.00 as the Court below ignored the fact that Plaintiff lied, cheated and deceived and was actually in possession of the monies she claimed she had not received from Defendant.

2. <u>THE LAW OF THE CASE DOCTRINE AS IT APPLIES TO THE INITIAL TRIAL COURT DECISION AND THE APPELLATE</u>

REVIEW OF THE INITIAL COURT IMPOSITION OF THE FIRST PENALTY OF $ 108,300.00

THIS ISSUE WAS NOT DISCUSSED/RAISED BELOW

Plaintiff has and will claim that the Defendant is estopped from litigating the issue of the imposition of the First Penalty of $ 108,000.00 based on the Doctrine of the Law of the Case. Her reliance on that doctrine is misplaced under the facts of this case. In this case, the initial Trial Court never considered the effect of Plaintiff's intentional misrepresentation as it related to the imposition of the penalty on Defendant.

The facts are very clear that Plaintiff did not pay Defendant the $ 70,000.00 that she owed. She lied and said she didn't have the funds when she clearly did possess same. She held onto the money and claimed that she never received these monies. HAD THE TRIAL COURT CONSIDERED THESE LIES AND THE INTENTIONAL CONTINUED WITHHOLDING OF THESE FUNDS THE PENALTY WOULD NOT HAVE BEEN IMPOSED. SHE HAD THE MONEY AND, THEREFORE, COULD NOT CLAIM THAT SHE WAS NOT PAID.

The initial Court's decision was characterized by the Appellate Court as "not made … (with) robust findings". The sum and substance was that this issue was for all intents and purposes not litigated. This same issue, i.e. the effect of Plaintiff's

intentional misrepresentation as it related to the imposition of the penalty on Defendant was, likewise, never discussed in the Appellate Decision despite the fact that the issue was and is the most devastating financial issue in the case.

The very clear reason that the Appellate Court did not opine on this issue is that it felt compelled to discuss the Moynihan palimony case which was a high profile issue and at that time was of current importance in the legal community. Here is where the Plaintiff will argue the principle of the law of the case.

The law of the case is generally guided by a fundamental legal principle … that once an issue has been fully and fairly litigated it ORDINARILY is not subject to re-litigation between the same parties in subsequent litigation. However, the law-of-the-case doctrine is a non-binding rule. It is a discretionary rule that calls on one Court to balance the value of judicial deference for the rulings of a coordinate (court) against those factors that bear on the pursuit of justice and, particularly the search for truth. *Lombardi v. Masso*, 207 NJ at 538-39 (quoting *Hart v. City* of Jersey City, 308 N.J. Super 487, 498 (App. Div. 1998). The doctrine should not and cannot be applied if the decision is clearly erroneous and enforcement would cause manifest injustice. As discussed earlier, the decision to apply a penalty is clearly erroneous and enforcement would cause manifest injustice to Defendant.

The law of the case was most recently decided and discussed in the April 22, 2015 New Jersey Supreme Court decision in State v K.P.S. 221 NJ 266 (2015). While the facts of that case are dissimilar to this case the legal principles espoused in that case are clear and unassailable, especially as it applies to this case.

The principles of collateral estoppel are the underpinnings of the Law of the Case (*State v Reldan*, 100 N.J. at 209). Application of the doctrine is controlled by the answer to the question as to whether a party has had his day in Court (*McAndrew v. Mularchuk*, 38 NJ 156, 161 183A 2d 74 (1962). In *State v. K.P.S.,supra*, 221 NJ 266 the Court cited Zirger 144 NJ at 338, " In short, collateral estoppel will not apply if a party did not have a "full and fair opportunity to litigate the issue". The Court then went on to say (quoting Joshua Segal in "Rebalancing Fairness") "EVERY LITIGANT IS ENTITLED TO A DAY IN COURT. TO ENSURE THIS BASIC RIGHT TO BE HEARD, COURTS DO NOT APPLY COLLATERAL ESTOPPEL WHEN IT WOULD BE INEQUITABLE OR CONTRARY TO THE INTERESTS OF FAIRNESS AND JUSTICE".

In this case Defendant was not heard on this issue (the wrongful imposition of a penalty without consideration of the misrepresentation of Plaintiff and the withholding of monies due upon the signing of the agreement) in the initial Trial Court or in the Appellate Division. This litigant was not afforded the right to be heard. Further, the interests of Fairness and Justice are implicated here as there is

more than clear and convincing evidence (In fact the evidence is beyond a reasonable doubt) that Plaintiff committed a fraud on the Defendant that the Court ignored that fraud and essentially rewarded Plaintiff for what could be considered a criminal undertaking.

3. **THE LAW OF THE CASE DOES NOT APPLY TO THE SECOND PENALTY IMPOSED BY THE COURT BELOW IN THE AMOUNT OF $118,000.00**

   THIS ISSUE WAS NOT DISCUSSED/RAISED BELOW

Defendant herein is also appealing the decision of the Court below that imposed the additional/second penalty of $118,000.00 on the Defendant. The law of the case is inapplicable here as this case is ripe for appeal. The imposition of any penalty on the Defendant is unwarranted as previously discussed. However, this penalty was imposed without any facts or legal theory considered by the Judge to support the imposition. Certainly, the fraud of the Plaintiff was not considered. Without a basis for a decision it is impossible to adequately contest the Court's Order. It is interesting to note that Judge Wilson rudely dismissed the inquiries of my counsel into the reasons for arriving at his decision. On two (2) occasions he inappropriately commented that Defendant should sue the lawyer that he believed was involved in the negotiation of the subject agreement. Respectfully, he should

have been more concerned about the facts of the case and the wrongful and devastating financial impact of his rulings than the inadequacy of the agreement.

4. ONE POLICY OF EQUITY IS THE DOCTRINE OF UNCLEAN HANDS, WHICH STATES THAT A COURT SHOULD NOT GIVE RELIEF TO A WRONGDOER IN A SUIT WHO ACTED AGAINST THE PRINCIPLES OF FAIRNESS.

In Rolnick v Rolnick A2d 793 (App Div) the Court stated as follows:

Our Supreme Court has stated that:

"This Court has frequently explicated our public policy concerning matrimony and divorce in a wide variety of contexts. The source of that policy is the Divorce Act of 1972, N.J.S.A. 2A:34-1 *et seq.* The polestar of that policy is fairness, equity, flexibility and solicitous concern for the welfare and happiness of the individuals involved. [*Newburgh v. Arrigo, 88 N.J. 529* , 552-53, 443 A.2d 1031 (1982) .

The basic equitable maxim of unclean hands is that "[a] suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." *A. Hollander Son, Inc. v. Imperial Fur Blending Corp.,* 2 N.J. 235, 246, 66 A.2d 319 (1949); *accord Johnson v. Johnson,* 212 N.J. Super. 368, 384, 515 A.2d 255 (Ch.Div. 1986); *Pollino v. Pollino, 39 N.J. Super. 294* , 298-99, 121 A.2d 62 (Ch.Div. 1956). "In simple parlance, it merely gives

expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Faustin v. Lewis,* 85 N.J. 507 , 511, 427 A.2d 1105 (1981). While "[u]sually applied to a plaintiff, this maxim means that a court of equity will refuse relief to [any] party who has acted in a manner contrary to the principles of equity." *Johnson, supra,* 212 N.J. Super. at 384, 515 A.2d 255.

The rule is that while general iniquitous conduct will not operate to bar plaintiff from relief by reason of unclean hands, iniquitous conduct relating to the particular matter or transaction to which judicial protection is sought will operate to bar relief. See 1 *Herr, Marriage, Divorce and Separation* (1938), § 149[.] Where the relief sought by the plaintiff is the result of his own wrongdoing, where the unclean hands of the plaintiff [have] infected the very subject matter in litigation, the plaintiff is barred from relief in a court of equity. [*Pollino, supra,* 39 N.J. Super. at 299, 121 A.2d 62].

See also Feldman v. Urban Commercial, Inc., 78 N.J. Super. 520, 533, 189 A.2d 467 (Ch.Div. 1963); *aff'd,* 87 N.J. Super. 391 , 209 A.2d 640 (App.Div. 1965). Moreover:

A court of equity can never allow itself to become an instrument of injustice. *Associated East Mortgage Co. v. Young,* 163 N.J. Super. 315 , 330, 394

A.2d 899 (Ch.Div. 1978)[.] [N]or will equity allow any wrongdoer to enrich himself as a result of his own criminal acts. *Jackson v. Prudential Ins. Co. of America,* *106 N.J. Super. 61* , 68, 254 A.2d 141 (Law Div. 1969). In this respect, equity follows the common law precept that no one shall be allowed to benefit by his own wrongdoing. *Neiman v. Hurff,* 11 N.J. 55, 60, 93 A.2d 345 (1952). Thus, where the bad faith, fraud or unconscionable acts of a petitioner form the basis of his lawsuit, equity will deny him its remedies. *Goodwin Motor Corp. v. Mercedes Benz of N.A., Inc.,* *172 N.J. Super. 263* , 411 A.2d 1144 (App.Div. 1980). [*Sheridan v. Sheridan,* *247 N.J. Super. 552* , 556, 589 A.2d 1067 (Ch.Div. 1990)].

See also Pollino, supra, 39 N.J. Super. at 304, 121 A.2d 62.

Furthermore, "`Equity will not aid a fraud doer.'" *Id.* at 299, 121 A.2d 62 (quoting *Herder v. Garman,* 106 N.J. Eq. 13, 149 A. 636 (Ch. 1930)). The doctrine of equitable fraud was explained by our Supreme Court in *Jewish Center of Sussex Cty. v. Whale,* as follows:

A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment. See *Foont-Freedenfeld v. Electro-Protective,* *126 N.J. Super. 254* , 257 [314 A.2d 69] (App.Div. 1973), aff'd, *64 N.J. 197* [314 A.2d

68] (1974). The elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom, see Pomeroy, *supra* at 422; *Gordon v. Schellhorn,* *95 N.J. Eq. 563* , 573-74 [123 A. 549] (Ch. 1924), are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud. *Equitable Life Assurance Soc'y v. New Horizons, Inc.,* 28 N.J. 307, 314 [146 A.2d 466] (1958). See also *Metropolitan Life Ins. Co. v. Tarnowski,* *130 N.J. Eq. 1* , 3 [20 A.2d 421] (E. A. 1941); *Hernig v. Harris,* *117 N.J. Eq. 146* , 150-51 [175 A. 169] (Ch. 1934). Thus, "[w]hatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther and includes instances of fraudulent misrepresentations which do not exist in the law." 3 J. Pomeroy, *supra,* at 486-88. [86 N.J. 619, 624-25, 432 A.2d 521 (1981)].

Thus, where "a party seeks only equitable remedies, he or she need meet only the lesser burden; it is not necessary to show scienter." *Bonnco Petrol, Inc. v. Epstein,* *115 N.J. 599* , 609, 560 A.2d 655 (1989).

Ordinarily, plaintiff should have raised the issue of fraud or unclean hands as a defense to defendant's request for modification in the plenary hearing which resulted in the July 1991 order. However, in this matter she failed to do so, and instead addressed the issue for the first time on the subsequent motion which gave rise to the November 1991 order under review. Nevertheless, plaintiff's actions in this regard were entirely justified in this case because the trial court had

specifically refused to consider the issue of changed circumstances relating to alimony, an issue very closely related to that of changed circumstances concerning the escalator clause. Thus, it was clear that the trial court would have similarly refused to consider plaintiff's fraud claims at the earlier hearing. Therefore, plaintiff had no duty to raise an argument which she knew would be rejected. *Cf. State v. Worlock,* *117 N.J. 596* , 625, 569 A.2d 1314 (1990). Her fraud claims were thus properly raised before the trial court on the subsequent motion…..

Consequently, the trial court should have addressed plaintiff's claims of fraud or unclean hands which might have barred defendant's equitable request for modification, either at the plenary hearing or at the subsequent motion hearing. Because "it is axiomatic that all material factual disputes must be resolved on testimony," *Dworkin v. Dworkin, supra,* 217 N.J. Super. at 525, 526 A.2d 278; *Hallberg v. Hallberg,* 113 N.J. Super. 205, 208, 273 A.2d 389 (App.Div. 1971), a remand is warranted on the issue of defendant's fraud or unclean hands. On this remand, the trial court should focus on whether or not defendant fully disclosed and reported his income as such related to past payments."

In the case at bar, there can be no dispute that plaintiff had unclean hands and committed fraud. The iniquitous conduct began at the inception of the Agreement. Plaintiff was obligated to pay to defendant $ 70,000.00 as her part of the down payment for the condominium she was to receive (A condominium valued at

approx. $ 400,000.00). She indisputably represented that she didn't have the $ 70,000.00 when she signed the Agreement. She LIED. Her testimony was that she had over $ 260,000.00 in liquid funds in three bank accounts plus significant other monies at the time of the signing of the Agreement. She admits that she kept the existence of these funds secret and never told Defendant about same. After 72 months of making monthly payments of $ 1,500.00 to plaintiff and plaintiff's refusal to pay defendant the $ 70,000.00 that she owed to him, defendant stopped making payments for 46 months (amounting to $ 69,000.00). Defendant then complains to the Court that she does not have the monies that were promised to her in order to meet her expenses, when, in fact, she clearly has those funds in her possession. This is a fraud on defendant and a fraud on the Court. What she asked the Court to do in imposing a penalty is for the Court to become an instrument of injustice. And as indicated above, A court of equity can never allow itself to become an instrument of injustice. Nor, as further indicated, will equity allow any wrongdoer to enrich himself as a result of his own criminal acts. The trial Court in the instant case refused to consider plaintiff's fraudulent, deceitful acts. These acts should have been addressed. The Appellate Division then ignores this issue, which is the most financially devastating issue in this case, the conclusion being that this issue is not important enough for discussion. How can it not be important enough for discussion. Very significant penalties were imposed. There would have been no

penalties if the fraud was not permitted to go unaddressed. And finally the Court below on motion imposes a second penalty without a discussion of plaintiff's fraud. THIS COURT NEEDS TO UNDERSTAND THE FACTS. Plaintiff had the $ 70,000.00 in her possession. How can she ask for penalties related to her allegation of non-receipt of those funds. Again, this is a situation where there is evidence beyond a reasonable doubt that plaintiff committed fraud. Plaintiff should be penalized for her immoral, dishonest behavior. Instead the Courts below have rewarded the plaintiff for her criminal behavior. Again, keep in mind this is a Court of Equity.

5. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

THIS ISSUE WAS NOT DISCUSSED/ RAISED BELOW

In addition to the express terms of a contract, the law provides that every contract contains an implied covenant of good faith and fair dealing. This means that, even though not specifically stated in the contract, it is implied or understood that each party to the contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract. *Wade v. Kessler Institute*, 172 N.J. 327,345 (2002). To act in good faith and deal fairly, a party must act in a way that is honest and faithful to the agreed purposes of the contract.

A party must not act in bad faith, dishonestly, or with improper motive to destroy or injure the right of the other party to receive the benefits of the contract. Thus, if there is a contract and one of the parties ("actor") acts in bad faith or with improper motive to destroy or injure the right of the other party to receive the benefits or reasonable expectations of the contract, the actor has breached the implied covenant of good faith and fair dealing. (*Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.,* 182 NJ 210, at 230-231; *Wilson v. Amerada Hess Corp.,* 168 NJ 236, at 251 (citations omitted); *Sons of Thunder, Inc. v. Borden, Inc.*, 448 NJ 396, at 420. See also *Wade v. Kessler Institute*, supra, at 327; *Palisades Properties, Inc. v. Brunetti*, 44 NJ 317.

For purposes of the singular issue being argued in this appeal, the Defendant claims that the Plaintiff breached the implied covenant of good faith and fair dealing by 1.) mis-representing that Plaintiff did not have her share of the down payment (the $70,000.00 previously discussed) and her intentional withholding of the monies (THRU TODAY) and 2.) her intentional failure to sell her Toms River property to obtain funds that she said she didn't have (which she did). 3.) Her insistence that she could wait ad infinitum to pay back Defendant the monies owed to him.

To prevail on this claim, the Defendant herein must prove each of the following three elements by a preponderance of the evidence: First, the Defendant herein

must prove that some type of contract existed between the parties. There can be no breach of the covenant of good faith and fair dealing unless the parties have a contract. Second, the Plaintiff must prove that the Defendant acted in bad faith with the purpose of depriving the Plaintiff of rights or benefits under the contract. Third, the Plaintiff must prove that the Defendant's conduct caused the Plaintiff to suffer injury, damage, loss or harm. See *Wade v. Kessler Institute*, supra 172 N.J. 327 (2002).

A. Was there a contract between the parties?

There is no doubt a contract between the parties. (See DA 1, pages A1-A16)

B. Did the Defendant act in bad faith with the intent to deprive the Plaintiff of rights or benefits under the contract?

The indisputable facts of this case is that Plaintiff never had any intention on following through on her ONE obligation under the contract i.e. Her ONE obligation under the contract was to give Defendant the $70,000.00 which was her share of the down payment on the Condominium. From the signing of the Agreement it is indisputably clear that Plaintiff had no intention to pay to Defendant the $70,000.00 that she owed to him. She lied when she signed the Agreement when she said that she did not have the $70,000.00 when, in fact, she had significantly in excess of said amount on the date that she signed the

Agreement. Further, at no time did Plaintiff have any intention of paying to Defendant the $70,000.00 She never made any real attempt to sell her property to pay Defendant and always insisted that she could hold off paying Defendant ad infinitum. THESE FACTS ARE INDISPUTABLE - AND ARE PREVIOUSLY CITED IN HER TESTIMONY IN THE INITIAL TRIAL. AND THE PAYMENT OF THE $ 70,000.00 WHICH PLAINTIFF HAD IN HER POSSESSION WAS HER ONLY OBLIGATION UNDER THE AGREEMENT.

C. Whether the conduct of the Plaintiff herein caused the Defendant to suffer injury, damage, loss or harm.

Unquestionably Defendant suffered harm. Plaintiff deprived Defendant of the $70,000.00 that she owed to him and then continued to lie and said she did not have the funds causing the Court to wrongfully impose penalties on Defendant amounting to over $227,000.00.

In summary, Defendant herein has proven by more than a preponderance of the evidence: (1) the existence of a contract; (2) that the Plaintiff acted in bad faith with the intent to deprive the Plaintiff of his reasonable expectations under the contract; and (3) the Defendant herein has sustained injury or loss as a result of such action. Accordingly, Defendant has proven that Plaintiff has breached the covenant of good faith and fair dealing and Defendant should not be penalized for

Plaintiff's bad faith in the execution of the subject Agreement. To do so would be to reward Plaintiff for her bad faith.

6. THE AWARD OF ATTORNEY'S FEES TO COUNSEL FOR PLAINTIFF IS UNWARRANTED AND COUNSEL FEES SHOULD HAVE BEEN AWARDED TO DEFENDANT

THE AWARD OF ATTORNEYS FEES TO PLAINTIFF WAS CONTAINED IN THE ORDER AND JUDGMENT OF ROBERT G WILSON PJFP AT PARAGRAPH 26 (DA 5, PAGE A55)

The seminal case in this State on counsel fees in a matrimonial matter is Williams v Williams 59 NJ 229 (1971). In Williams, the Court held that the award of counsel fees in a New Jersey Divorce Action is within the discretion of the Court. But there are limitations in that consideration. One of the primary factors that must be considered is the good or bad faith put forward by the parties. In this case the Plaintiff is attempting to obtain monies from Defendant in reliance on FRAUD. How could the Court below find that admitted reliance on fraud is evidence of good faith. Accordingly, this Court should vacate the Order to require Defendant to pay counsel fees to Plaintiff and remand the matter to the Court below to be heard by a different Judge.

PERSPECTIVE AND CONCLUSION

While perhaps not relevant, the history of the relationship that led to the Agreement that is the subject of this Appeal is instructive. This was a long term living arrangement between Plaintiff and Defendant. During the relationship Defendant was the sole provider. The reason was that Plaintiff claimed that she never had anything, except her salary from work. She hid all of her assets from Defendant. Everything that she did was consistent with that narrative.

During the course of this litigation, Defendant learned that she Plaintiff had significant assets totaling well over One Million Dollars. She had gone to great lengths to hide these assets. For example, when her god-child was turning 17 Plaintiff wanted her to have a car so Plaintiff asked Defendant to buy the god-child a new car which he did (without contribution from Plaintiff who stated she had no money to help out) (T2 ,page 117, lines 8-16). And when the arrangement/relationship was ending, Plaintiff sought out three of Defendant's closest friends to have conversations to tell them that she was destitute and needed them to appeal to Defendant to put together a comfortable support package for Plaintiff.

Based on my experience with Plaintiff and the conversations that Defendant had with those three (3) friends Defendant felt compelled to try to provide a comfortable living situation for Plaintiff. Testimony was offered which supports this account. This is the background which led me to enter into a very generous one-sided agreement.

Apparently, the Court below agreed with this assessment and offered an opinion on two (2) occasions during the course of the motion hearing that I should sue my lawyer. The fact is that I didn't have a lawyer and my primary concern in entering into the Agreement was not my protection, but to make certain that Plaintiff was comfortably provided for during her lifetime.

One provision in the Agreement became extremely problematic and is the reason that we are in this Court today. There is the significant penalty provision that Defendant agreed to that has created the problem and issues that are being discussed herein. The reason that Defendant did not contest that provision when it was included in the Agreement is that it was his intention to fully comply with the terms of the Agreement. Defendant, therefore, had no concern over the potential imposition of a penalty. Defendant takes full responsibility for being stupid (perhaps not the correct characterization) and putting himself in this position. Defendant does not ask this Court to extricate him from same. What Defendant is asking is that the Court recognize the FRAUD of the Plaintiff and not penalize

him for the lies and deceit of the Plaintiff. Defendant is entitled to this consideration.

This Agreement provided, among other things that Defendant pay Plaintiff a monthly amount of $1,500.00, buy her a house and pay for her taxes and Homeowners Association Fees during her lifetime. In short, it provides Plaintiff with a very comfortable package. Her only obligation was to contribute to the down payment on her house.

Plaintiff agreed to be responsible to pay half of the down payment (i.e. $70,000.00),however, she represented that she did not have those funds and the Defendant would have to frontload this sum of money for her. (Her fallback position was that she would sell a property that she had won in a litigious battle involving her estranged, but natural father).

Regardless, Plaintiff intentionally misrepresented her financial situation by stating in the Agreement that she did not have the $70,000.00. The fact is that she had significantly more than that amount in liquid funds when she signed the Agreement.

For 72 consecutive months, Defendant faithfully paid Plaintiff the monthly amount of $1,500.00. Just prior to the conclusion of the 72 months Defendant demanded the $70,000.00 from Plaintiff that she owed to him and was to pay him within three

(3) years of the signing of the Agreement. She refused. Defendant later utilized the self-help remedy of stopping the $1,500.00 monthly payments. He stopped the payments for 46 months and then resumed same through today. In other words, he withheld $69,000.00 from Plaintiff to offset the $70,000.00 that she owed to him. While Defendant believes that the self-help remedy was consistent with the law given the circumstances, let us, for arguments sake, assume that same was wrongful and that he was not in compliance with his monthly obligation.

HOWEVER, is it not true that in order for the penalty provision to "kick in" the condition precedent would have to be that Plaintiff had to do without the monthly payments, i.e. that same was not in her possession. Keep in mind that the reason for the penalty provision was to insure that Plaintiff had the $1,500.00 monthly payments in order to pay her bills. SO THE QUESTION THAT COMES BEFORE THIS COURT IS QUITE SIMPLE. WAS THERE EVER A TIME WHEN PLAINTIFF DID NOT HAVE IN HER POSSESSION THE MONIES THAT SHE CLAIMS WERE NOT PAID ON A TIMELY BASIS. THE ANSWER IS NO. OR TO STATE IT ANOTHER WAY DID SHE OR DIDN'T SHE HAVE THE MONEY. THE ANSWER IS THAT PLAINTIFF HAD THE $ 70,000.00 AT THE INCEPTION OF THE AGREEMENT, BUT CHOSE TO LIE AND DECEIVE AND NOT MAKE THE PAYMENT TO DEFENDANT. SHE KEPT THE MONEY. VERY SIMPLY, SHE HAD THE MONEY. Parenthetically, the Court

should be aware that Defendant did not find out about her lies and deception and the withholding of that money until after this litigation commenced (And this $ 70,000.00 has always remained in the possession of Plaintiff- THRU TODAY). What makes her behavior shocking and egregiously criminal is that she seeks to be rewarded for her lies and deceitful behavior, by extracting a penalty from Defendant, who is the only party that has acted in good faith during the term of the Agreement.

This fact and the associated legal theory of a wrongful and intentional misrepresentation, which are beyond dispute, have been ignored by the initial trial Court, the Appellate Court, and now, the Court below. The initial Trial Court wrongfully imposed a penalty, the appellate division then ignored this issue, and most recently the Court below imposed a second penalty. Plaintiff has never been without these "critical" funds so Defendant questions why Plaintiff is entitled to receive the penalty monies. IT APPEARS THAT THE COURT HAS REWARDED PLAINTIFF FOR HER LYING AND DECEITFUL CONDUCT AND HER INTENTIONAL WITHOLDING OF THE FUNDS (WHICH SHE SAID SHE DID NOT HAVE).

Plaintiff will, of course, complain that this issue has been argued and decided by the prior Courts. Defendant's position is that it was ignored by the initial trial Court; the Appellate Division chose to ignore the issue despite the fact that it is the

singularly most devastating financial issue in this matter; and the Court below assessed the second penalty without any supporting reasons. As an attorney Defendant certainly understands the procedural difficulties in now trying to undo the damage done in the Three Courts that have mishandled this issue/matter. THE LAW REQUIRES THAT DEFENDANT BE GIVEN HIS DAY IN COURT AND THAT THE COURT MAKE A DECISION THAT IS CONSISTENT WITH THE INTERESTS OF FAIRNESS AND JUSTICE. THAT HAS NOT BEEN DONE. FURTHER, FROM A MORAL PERSPECTIVE IT WOULD BE UNJUSTIFIABLE TO FAIL TO RESCIND THE PENALTIES THAT HAVE BEEN IMPOSED. OTHERWISE THE COURTS WILL BE COMPLICIT IN BEHAVIOR THAT FRAUDULENTLY EXTRACTS MONIES FROM THE DEFENDANT.

SHARYN PRIMMER, Plaintiff/Respondent, v. MICHAEL HARRISON, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION DOCKET NO. A-000897-23T4 Civil Action On appeal from SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, FAMILY PART SOMERSET COUNTY DOCKET NO. FM-18-709-19 Sat below: Hon. Robert G. Wilson, P.J.F.P. Hon. John P. McDonald, J.S.C. Hon. Robert A. Ballard, Jr., J.S.C.

Appellate Brief of Plaintiff/Respondent

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PRELIMINARY STATEMENT

Defendant's appeal is nothing more than an attempt to get a *sixth* bite at the apple. Defendant negotiated and entered into a Settlement Agreement in 2011. He ceased complying with and sought to have that Settlement Agreement vacated beginning in 2017, culminating in trial in 2020. He subsequently appealed the Trial Court's decision in 2021, resulting in a published opinion by this Appellate Court.

Defendant filed a motion for reconsideration of that opinion and was denied. Defendant then sought relief from the New Jersey Supreme Court in 2022, and was denied cert. Still failing to comply with the clear terms of the Settlement Agreement and the prior Order of the Court, Defendant filed a Motion in the Trial Court in 2023. His contested relief was soundly and rightfully denied.

Mr. Harrison begins his brief by stating that he has actively practiced law in the State of New Jersey for forty-seven years. Obviously, then, he knows how Orders and Decisions work, not to mention Contracts. In fact, Defendant has owned his own practice since 1980. Although his primary area of expertise is debt collections, he did handle at least one family court matter, and he has represented his firm in Superior Court, District Court, and the Third

Circuit Court of Appeals. Debt collection is a practice area that requires the ability to read and interpret a contract and to read and interpret a statute.

The "single" issue he asks this Court to review was previously considered and addressed by the Superior Court (twice), this Appellate Division once already, and the New Jersey Supreme Court declined to take up the issue. It is a term specifically included in the Agreement that has been upheld at every stage of this litigation.

PROCEDURAL HISTORY

On November 17, 2011, Plaintiff filed a Complaint against Defendant bearing Docket number FM-18-554-12, establishing the long marriage-like relationship between the parties, the promises of support made by Defendant throughout the relationship, the personal sacrifices made by Plaintiff in reliance of said promises, and Defendant's breach of his representations and duties to Plaintiff. (A3)

To resolve Defendant's breach of his promises made to Plaintiff during their relationship, the parties entered into a Settlement Agreement fully executed on November 16, 2011, referenced in the Complaint. (A1)

Paragraph 23 of the Settlement Agreement acknowledges that the "Agreement shall be considered a contract by the parties duly enforceable in the Superior Court of New Jersey under the concept of this being a palimony

case and same having been settled by the terms and conditions contained herein." (A11)

Because the matter was settled and there were no outstanding issues at the time, and although Defendant did not file an Answer or otherwise respond, Plaintiff allowed the Complaint to be administratively dismissed.

Following Defendant's breach of the Agreement in June 2017 and failure to cure the breach, Plaintiff brought suit against Defendant. (A33) On February 16, 2018, Plaintiff filed a Complaint in Law Division, seeking enforcement of the Settlement Agreement. (A33) On August 16, 2018, Defendant filed an Amended Answer and Counterclaim, alleging that the Agreement was void due to violation of the Statute of Frauds and fraud in the inducement, but also that Plaintiff had breached the contract. (A33-34)

On March 13, 2019, the Presiding Judge of the Civil Division ordered the transfer of the matter to the Family Part. A Motion and Cross-Motion for Summary Judgment were heard and denied on October 25, 2019. (A34)

Despite attending an Early Settlement Panel and Mediation, the parties were unable to resolve the issues and the matter was set down for a plenary hearing on the threshold issue of whether the Settlement Agreement is enforceable. Trial was held on March 9 and 10, 2020. (2T, 3T)

The trial court gave its oral decision through a virtual court proceeding on June 22, 2020, (4T) and entered an Order on June 30, 2020, enforcing the Settlement Agreement and calculating damages as of the date of the Order. (A25) That Order was erroneously not served on counsel for the parties until February 10, 2021. A subsequent Order was entered on April 16, 2021, correcting an error in the calculation of interest from the June 2020 Order and confirming the April 16, 2021 Order as the final Order. (A17) Defendant thereafter appealed, and Plaintiff cross-appealed. (A27)

The Appellate Division released its published decision on May 6, 2022. (A27)

Defendant filed a motion with the trial court on August 16, 2023, essentially asking the trial court to overturn much of the Appellate Division's confirmation of the initial trial order. (1T) Plaintiff filed opposition and a cross-motion. (Pa001) The Court entered an Order on October 13, 2023. (A51) Defendant thereafter filed the instant appeal.

STATEMENT OF FACTS

I. The Parties' Relationship

The parties were in a long-term marital-type relationship commencing in 1988, when they began to cohabitate. (A1, 2T 30:4-8, 30:22-31:4) The parties never married, and no children were born of the relationship. In 2011, following Defendant's termination of the relationship, the parties entered into a written Settlement Agreement, which became the subject of the trial below. (2T 48:1-13) At the time, the parties lived together in a home in Chester, and continued the day-to-day financial arrangement they had throughout the previous twenty-three years. (2T 43:21-44:3)

II. The Settlement Agreement

The parties purchased a $389,000 townhome together in Bedminster, New Jersey, in June 2011, where Plaintiff would live after moving out of the parties' shared home in Chester. (A3) The parties agreed to equally share the $140,000 down payment for the Bedminster home. (A3) Plaintiff did not have access to $70,000 cash at the time the down payment was required, so Defendant agreed to pay the full amount of $140,000 up front. (2T 49:2-14) As reflected in the Settlement Agreement, Plaintiff agreed to repay the $70,000 to Defendant, and if she did not within three years, "interest will begin to accrue at 1% per annum until said sum is paid." (A3)

Defendant financed the remainder of the purchase and is solely responsible for payment of same. (A4) The mortgage application was signed by Plaintiff after Defendant and the loan officer filled out the application. (2T 43:16-20)

The Agreement recited that the parties "desire[d] to confirm their separation and make arrangements therewith, including the settlement of all questions relative to their property rights, their support welfare, and other rights and obligations growing out of this relationship." (A2)

For approximately six years, the parties abided by the agreement without incident.

III. Defendant's Breach of the Agreement

In June 2017, Defendant first breached the Agreement when he unilaterally stopped paying his monthly support obligation. (2T 53:25-54:8)

On August 9, 2017, Defendant's prior counsel wrote a letter to Ms. Primmer alleging that the Agreement was never signed. (2T 52:1-53:13) Ms. Primmer discovered that her signed copy of the Agreement had been removed from the file cabinet in her garage. On August 21, 2017, Plaintiff's prior counsel provided Defendant's prior counsel with a copy of the signed agreement from her file.

On November 1, 2017, Defendant unilaterally chose to engage in "self-help" and set forth the ways he would breach Settlement Agreement prior to any judicial determination that said Agreement is void. (2T 127:23-128:4) This letter, four months after Defendant's initial breach, was the first mention of the $70,000 repayment. (Id.)

At this point, of course, the $70,000 plus the contractual interest that Plaintiff owes to Defendant is more than subsumed by the vast sums owed to Plaintiff by Defendant. Defendant's failure to pay the $1500 per month from July 2017 until June 2021, and the attendant contractual penalty provision, has created additional indebtedness from Defendant to Plaintiff. Defendant's claim that he had contacted Plaintiff about the missing payment is entirely unsupported by any kind of evidence. (2T 51:13-25) Indeed, his first claim was that the Settlement Agreement had never been signed, which was easily disproven. (2T 52:1-20)

IV. Financial Disclosure in 2011

The Settlement Agreement makes clear that "each [party] has made a full disclosure of all relevant financial information to the other of his or her financial worth and income" (A2).

The Settlement Agreement does not involve the distribution of savings accounts, investment accounts, or retirement accounts between the parties. (A1)

In 2011, no request was made of Plaintiff to produce financial records of any kind or to answer any questions regarding her assets. (2T 59:23-25; 82:20-83:2) Even if Defendant was not an astute enough attorney to think of asking for documentation prior to the drafting of the Settlement Agreement, in reviewing the written waiver of same, he knew it was an option open to him. However, it seems clear from Defendant's position during this litigation, including his motion *in limine*, that his foremost concern was that he not be required to provide any information about his own financial position. (2T 11:22-13:2)

By the time Defendant's intention to remain in breach was clear and this litigation commenced, it was too late for either party to easily obtain 2011 financial information from their respective financial institutions. (2T 81:19-21)

The parties had been in a family-type relationship, living together for twenty-three years at the time this Settlement Agreement was negotiated and signed. (2T 30:22-31:4; 33:8-18; 36:24-37:15)

Certainly, by virtue of occupying the same space and interacting on a daily basis, each party had a general idea of the assets of the other. (2T 32:6-9)

For example, Plaintiff inadvertently came across Defendant's 2009 tax return when looking for her own documents, which confirmed that Defendant's income was $918,000. (2T 143:2-6) At the time the settlement discussions were ongoing, Defendant's reported income was $57,000 per month. (2T 144:2-14)

Additionally, Defendant was aware, prior to 2011, that Plaintiff maintained a 401(k) retirement account, as the parties joked about it. (2T 78:17-79:6) The value of Plaintiff's 401(k) in 2011 was obviously different than it was in 2018. There had been the stock market collapse in 2009, plus additional contributions were made by her and matched by her employer after 2011. (2T 80:11-81:8)

Plaintiff's assets in 2018 are not indicative of her assets in 2011. A substantial portion of her assets were the result of saving subsequent to the entry of the Settlement Agreement.

V. The $70,000

When the parties were purchasing the townhouse in April 2011, some five months before executing the Settlement Agreement, Plaintiff was acutely aware that she had been saving money her entire working life, from at 18 to 59, and if she removed $70,000 from those savings, she would be jeopardizing her retirement. (2T 50:22-51:4) $70,000 was more than a year's gross income

to Plaintiff. (2T 51:5-6) At the time that the $70,000 was needed (either when the contract was entered into in April 2011 or at the closing in June 2011), Plaintiff had no idea what her ongoing financial picture would be. No agreement had been reached regarding monthly support, no would it be for months yet to come. (2T 44:1-3) While it may have been an incomplete statement, it was entirely accurate for the Settlement Agreement to read that "Sharyn does not have access to such funds," when those funds are specifically required for closing in June 2011.

The parties had discussed that the $70,000 due to Defendant would be paid upon the sale of Plaintiff's property in Toms River. (2T 49:10-14; 122:16-18) Plaintiff did immediately list the property for sale (2T:50:9-11), however it did not sell and then after Hurricane Sandy in fall 2012, property values in that area fell substantially and the property was removed from the market. (2T 49:18-50:11)

In fact, Plaintiff had initially listed the property in April 2011, as Defendant knew, in anticipation of the purchase of the Bedminster property and her need to reimburse Defendant for the $70,000. (2T 49:22-24; 96:17-21) However, it did not sell prior to the June 2011 closing on the Bedminster property, nor the execution of the Settlement Agreement later in the fall of 2011. (2T 49:18-21) Plaintiff further extended the listing into 2012, but

understandably removed the listing following Hurricane Sandy and its impact on the real estate market in and around Toms River. (2T 50:5-11) The timing of the down payment was a more significant factor in Plaintiff's inability to access $70,000 than the actual dollar amount.

Defendant elected to secure a HELOC loan against the Chester house to pay the down payment, but provided no proof to indicate that it was necessary. (2T 131:21-22) It is equally likely that he, too, did not feel comfortable liquidating other assets or utilizing that much of his available cash. $140,000 was less than two months' income for him at the time, although it was approximately 35% of the purchase price of the townhome. And since Defendant provided no financial information of any kind, it is impossible to say what his net worth was in 2011, or what it had grown to by 2018.

Mr. Harrison admits that no financial information was exchanged or even requested in 2011 prior to the parties signing the Settlement Agreement. His "mediator" never reviewed financials from either party. (3T 12:13-17; 66:3-4) There was no discovery exchanged. (3T 13:22-14:5; 99:13-22) Having lived with Plaintiff for more than twenty years, however, Defendant was aware of Plaintiff's financial condition at the time he signed the Settlement Agreement. (2T 32:6-9) He knew that he financially contributed to the relationship by paying the housing costs, while Plaintiff paid for their

groceries. (2T 31:23-25) The Settlement Agreement simply enumerated that support going forward. Defendant has been the beneficiary of this lack of information exchange. The Court found:

> There is no requirement on attorneys to engage in discovery if the goal of the parties is to reach a resolution quickly and amicably. Clients have the right to make the final decision as to whether, when and how to settle their cases and as to economic and other positions to be taken with respect to issues in the case…. Neither party provided their financials. They entered into this transaction based upon a lengthy and long relationship and this court will not utilize the statute of frauds to accomplish a fraud. The parties were well aware, had independent counsel and the court is going to uphold the agreement…. In this case I found, as I went through the facts of this matter, as I indicated, that neither party provided a full disclosure. There were no CIS's filled out. The parties knew or should have known of the relative positions of each other. But that Ms. Primmer never indicated, number one, that she had no monies, but that she had no liquidity. Mr. Harrison took that for what it was worth; did not provide any disclosure of his assets either and the parties entered into what they thought was a fair agreement.
>
> (4T 23:3-9, 15-20; 24:6-16)

VI. The Penalty

The record from the previous trial is clear – Defendant's initial "justification" for stopping the monthly support payments was his false allegation that the Settlement Agreement was not signed. (2T 52:1-53:13) It had nothing whatsoever to do with the $70,000.

The Court's Order following trial enforced the Settlement Agreement. It enforced the $1500 per month support payment from Defendant to Plaintiff, which he ceased paying in July 2017 and only resumed paying in July 2021. (A25) It enforced the contractual $100 per day penalty for late payment of support from Defendant to Plaintiff, support which has still not been paid nearly 2500 days later. (A17) It enforced the payment from Defendant to Plaintiff for the cell phone in the amount of $1450. (A25) And it enforced Plaintiff's repayment to Defendant of $70,000 plus 1% annual interest from June 2014 through June 2020 through credit/offset. (A17)

The trial testimony confirms that Plaintiff never denied that she owed Defendant $70,000 pursuant to the Settlement Agreement and that if she did not pay it within three years she would be charged 1% annual interest on that amount. (2T 103:12-22) Plaintiff's obligation came with a specific penalty provision and Defendant's obligation came with a specific penalty provision, both of which were enforced by the trial court and confirmed by the Appellate Division.

As a consequence, at the time the Order was entered on June 30, 2020, Defendant owed Plaintiff a total of $161,750. (A25) On that same date, Plaintiff owed Defendant $74,306.41. (A17) Basic logic, as well as the

language of the Order, calls for those amounts to be offset, with Defendant owing Plaintiff a net amount of $87,443.59 as of June 30, 2020.

The amount due and owing to Plaintiff has continued to grow because Defendant has continually refused to comply with the Order for the last four years, so the court-enforced $100 per day penalty continues to run and accrue. As of October 13, 2023, the net amount owed to Plaintiff from Defendant was $224,343.59. (A51)

The Court already determined that Defendant's "self-help" by failing to pay the monthly support obligation in 2017 was a violation of the Settlement Agreement and was not justified by the $70,000 repayment obligation. He made this argument at trial, and the Court rejected it: "I reject Mr. Harrison's contention that he has no further obligation to pay the $1500 support obligation and to require the plaintiff to disgorge those payments already received. That was the agreement between the parties. He stopped paying at his own risk." (4T 27:25-28:5)

"I do find that the agreement is valid and enforceable; that Mr. Harrison is to pay $1500 per month going back to the breach date, which would – so the first missed payment was actually July 5, 2017. And that those monies are owed…. I am going to award 1083 days of penalty at $100 day, which is

$108,300. So the total amount due for the missed payments is $157,800 through June 22nd, which is today…" (4T 25:11-15; 26:5-8)

Defendant's request that the Court rewrite the agreement now, after a full trial on the issue and appellate practice, is outright frivolous. It is essentially a renewal of his request for recission of this portion of the Agreement.

Defendant continues to misread the language contained in the Court's Order. It does not Order Plaintiff to pay Defendant $70,000. It is written in the passive voice, and reads "Defendant is awarded $75,306.41, this sum representing $70,000 plus 1% annual interest for six years from June 2014 through June 2020." (A17) Upon receipt of the Order, Plaintiff had no action to take. The action was Defendant's – the relevant paragraph of the Order reads "Defendant shall pay to plaintiff back support in the amount of $52,000, this being the sum of $1,500 per month from July 2017 through June 2020. Defendant shall also pay to Plaintiff a penalty in the amount of $108,300, this being a sum of a $100 per day penalty assessed over a nonpayment period of 1,083 days." (A25)

As Plaintiff's Certification in 2023 demonstrated, she made repeated efforts to move the satisfaction of both provisions of the Order forward. (Pa001) A letter was sent on March 1, 2023 to Defendant's attorney at the time (Pa013), and Plaintiff filed an Order to Reduce to Judgment on August 10,

2023 (Pa016) – both documents reflect the full credit of the $70,000 plus interest to Defendant.

STANDARD OF REVIEW

The Appellate Division's review of a trial judge's factual findings of a non-jury trial is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). Such findings are binding "when supported by adequate, substantial, credible evidence." Id. at 411-412; see Gnall v. Gnall, 222 N.J. 414, 428 (2015). "We review the Family Part judge's findings in accordance with a deferential standard recognizing the court's 'special jurisdiction and expertise in family matters.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016), quoting Cesare at 413.

Reversal is warranted only in cases when the trial court's factual findings are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Fagliarone v. Twp. of No. Bergen, 78 N.J. Super. 154, 155 (App.Div. 1963); certif. den., 40 N.J. 221 (1963).

Despite being couched as an appeal of a motion Order, Defendant is again attempting to reverse the outcome of a trial and the findings of Judge Ballard.

LEGAL ARGUMENT

I. THE COURT CORRECTLY FOUND THAT DEFENDANT FAILED TO PROVE THAT PLAINTIFF COMMITTED FRAUD. THIS ISSUE WAS FULLY LITIGATED AT THE TRIAL LEVEL AND IN THE FIRST APPEAL. (A27)

At the outset, Defendant's claim that the issue of fraud was not discussed/raised below is preposterous. He made a claim of fraud in his Counterclaim, raised it in his motion for summary judgment, raised it in his motion *in limine*, and testified about it. Following the trial decision, Defendant based a section of his initial appeal on his claims of fraud.

"Fraud of course is never presumed; it must be clearly and convincingly proven." Albright v. Burns, 206 N.J. Super. 625, 636 (App.Div. 1986), citing Williams v. Witt, 98 N.J. Super. 1, 4 (App.Div. 1967); Gerard v. DiStefano, 84 N.J. Super. 396, 399 (Ch.Div. 1964). Questions of fraud are inherently factual and require analysis of "the subjective elements of willfulness, intent or good faith." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1954).

Defendant presented no proof that Plaintiff ever misrepresented her assets during the negotiation of the Settlement Agreement. Indeed, the Agreement sets forth in the fourth "Whereas" clause that each party "has made a full disclosure of all relevant financial information to the other of his or her

financial worth and income." (A2) Given the issues addressed in the Settlement Agreement, the only relevant financial information was the parties' approximate annual income. The Settlement Agreement addresses ongoing support, not a distribution of assets.

N.H. v. H.H. rejects the proposition that "full and broad discovery" is necessary for a fair and equitable settlement to be reached. 418 N.J. Super. 262, 281 (App.Div. 2011). The New Jersey Supreme Court rejected the very argument Defendant makes, that despite waiving further discovery and confirming that the entire Agreement is fair and equitable, if he had known more about Plaintiff's financial situation at the time, he would not have signed it. Miller v. Miller, 160 N.J. 408 (1999)

The parties exchanged exactly the same amount of documentation, which is say, none. (2T 134:18-20; 182:3-183:9) In fact, Defendant has not even asserted that any requests for documentation were made, nor at any time prior to the litigation has he suggested that the exchange of documentation was intended. Mr. Cohen confirmed that Defendant did not give him access to his financial records any more than Plaintiff did. (3T 66:4) However, having lived together for some twenty-three years, the parties had an idea of each other's general financial circumstances. (2T 32:6-9; 59:7-12) Specifically, Mr. Harrison knew that Ms. Primmer had a 401(k) retirement account because it

had been the topic of some teasing by him and his brother-in-law during the relationship. (2T 78:17-79:22) At minimum, Defendant knew that Ms. Primmer was employed full time with an established employer – it would have been incredibly surprising if a retirement account of some type was not offered by that employer.

Defendant testified at trial that in their very first conversation, Ms. Primmer told him that she had a checking account and the property in Toms River. (2T 112:1-7) Although she does not recall having any specific discussion about her assets (2T 59:18-25), if such a conversation did happen, it completely destroys Defendant's assertion that Ms. Primmer was dishonest about her assets, since her checking account is what accounted for almost all of her liquid assets, as she testified to at length during her cross-examination. (2T 74:7-75:4; 77:14-80:15) Mr. Harrison admitted on the stand that he knew about her checking account from the beginning of their split.

Even putting that aside, Mr. Harrison lived with Ms. Primmer for twenty-three years and had access to financial records, including tax returns, that she kept at home. He saw the mail from financial institutions that came to her at the house. Indeed, given that Mr. Harrison had an office of his own outside of the home, it is likely that more of Plaintiff's financial records were accessible to Defendant than the reverse.

Mr. Harrison alleged in his testimony that although Plaintiff did not have access to any of his financial documents, Plaintiff knew about his financial situation because his largest asset, a property in Florida, was being foreclosed on, and she know about it. (2T 118:18-119:14) If that was true and it was what Plaintiff had to rely on, then Plaintiff's understanding of Defendant's finances would have been woefully inaccurate, which would only have been to her own detriment. What knowledge Plaintiff had regarding Defendant's financial picture is largely the result of his own flamboyancy – he took her to his house on Long Beach Island, and there was testimony from both parties about Defendant's ownership of horses. (2T 32:10-24; 148:14-150:11) There is no reason to believe, though, that Plaintiff had the benefit of the full picture of Defendant's finances any more than Defendant had the full picture of Plaintiff's.

Mr. Harrison wanted Ms. Primmer to move out of the Chester home. The first step taken in the untangling of their life together, in February 2011, was their looking at various townhome complexes of his choosing so that Ms. Primmer could consider where she wanted to live. (2T 40:19-41:4) Mr. Harrison spoke with a realtor to get information about available units, and it was the realtor who identified the townhouse in Bedminster that was ultimately purchased. (2T 41:9-11; 62:21-63:1) The parties looked at various townhouses

at various price points, with varying property tax circumstances, and jointly decided to purchase the one in Bedminster. (2T 61:6-62:20)

Ms. Primmer's sentiment about feeling almost destitute is both understandable and relatively true. After twenty-three years of promising lifelong support, Defendant had pulled the rug out from beneath Plaintiff, and was kicking her out of her home. Plaintiff had a small annual income and moderate retirement savings, likely not enough to sustain her retirement for more than a few years. She had no emergency fund in case of illness or job loss. She knew that she had to sell the land in Toms River to pay for her portion of the down payment of her townhome. What reasonable adult would look at her financial situation at almost sixty years of age and not feel that things were dire after living a secure life for twenty-three years with the promise that it would continue forever?

Defendant testified that he wanted to make sure that Plaintiff had a place to live free and clear and wanted to contribute money that she would be able to save towards her retirement. (2T 120:2-10) Reading the Agreement, it seems he got exactly what he wanted. (A1)

Defendant testified that he is dissatisfied with the Agreement he signed in 2011 and claims now that if he had known she had retirement savings, he would never have agreed to pay support for the rest of Ms. Primmer's life. (2T

130:19-25) As a reminder, the Agreement does provide for modification after ten years in the event that Mr. Harrison sold his practice or it was impacted by a change in the healthcare industry. (A10) Given the disparity of their financial pictures, the more than twenty-year length of their relationship, the parties' ages at the time, and the fact that no assets, including retirement accounts, were being divided, no other outcome seems possible. Additionally, Defendant does not have to pay support to Plaintiff for the rest of her life. The Settlement Agreement includes two buyout provisions, that would have allowed him to stop paying support as early as 2018, seven years after signing. (A6-7)

The fact that both Defendant and Mr. Cohen argued at trial that a 50/50 split on the down payment of the townhouse part of a "generous" agreement is simply gaslighting. Defendant's income is twenty times that of Plaintiff. In 2011, Plaintiff was earning $50,000 per year. (2T 88:16-18) In 2020, following a job change, Plaintiff was earning only $43,000 per year. (2T 88:23-24) She was removed from a million dollar house in Chester where she had lived for twenty-three years into a townhome. (2T 105:21-23) $70,000 to Plaintiff is more than a year's salary. For Defendant, it was less than one month's.

It is also worth noting that there is no indication that the decision to make a $140,000 down payment on a less than $400,000 townhome was anyone's other than Mr. Harrison's. Perhaps if the down payment had been

$40,000, splitting it would not have been so daunting for Ms. Primmer. That, however, would presumably not have satisfied Mr. Harrison, since he would have taken a larger mortgage.

"[I]f one of the partners is not economically self-sufficient, albeit a wage earner, the promise of support by the other is no less legally significant than if she were entirely economically dependent." In re Estate of Roccamonte, 174 N.J. 381, 393 (2002) "The fact that plaintiff chose to be employed cannot reasonably be deemed to result in her forfeiture of the support promise in view of her modest salary, the gross disproportion between her economic means and her partner's, and the gross disproportion between her earnings and the standard of living provided by [her partner]." Id. at 394

It is also notable that neither Mr. Cohen nor Defendant acknowledge the undeniable fact that there was consideration given by Plaintiff that Defendant valued higher than money – moving out of the house in Chester so that Defendant could move his paramour and their child into the house in time for the child's third birthday party. That is why the move date was "in cement." (2T 174:3)

Additionally, while Ms. Primmer will own the townhome free and clear once the mortgage is paid off, she has not made any claim for her portion of the equity in the Chester home where she lived and contributed to the

improvements, maintenance, and upkeep for twenty-three years. (2T 105:21-106:2)

If there was a disparity in bargaining power, Defendant certainly had the advantage, not Plaintiff.

The trial Court observed that in order for fraud to be proven, "the party must establish that there was a material misrepresentation of a presently existing or past fact and the maker's intent that the other party rely upon it and, of course, detrimental reliance by that party. I do not find that that has been demonstrated in this case…." (4T 26:16-22)

"A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." Jewish Center of Sussex County v. Whale, 86 N.J. 619, 624 (1981), see Foont-Freedenfeld v. Electro-Protective, 126 N.J. Super. 254, 247 (App.Div. 1973), aff'd, 64 N.J. 197 (1974)

Defendant overstates the situation when he argues that Plaintiff "misrepresented" her assets. Plaintiff's testimony is clear that although her total assets exceeded $70,000 in 2011, that was a result of some forty-one years of savings accumulation. At age 59, Plaintiff was looking at fewer than

ten working years left. At the time, she was earning $50,000 per year. (2T 88:16-18)

It was perfectly rational, and not a deliberate falsehood, for Plaintiff to state in response to Mr. Harrison asking "can you give me $70,000" that she did not feel that she had $70,000 available *for the purpose* of paying her half of the down payment of the townhouse. (2T 63:11-15) The assets that Defendant now expects her to have utilized were her lifetime savings and a 401(k) retirement account, against which she could only have taken a loan, and which had taken a hit following the 2008 financial crisis. (2T 77:14-79:6) She never stated that she did not have $70,000 in aggregate.

Mr. Harrison never asked about Ms. Primmer's savings accounts, checking accounts, or retirement accounts, only about whether she could pay $70,000 towards the down payment. (2T 60:1-13) It would, in fact, have been wholly irresponsible for Plaintiff to have spent approximately one-third of her assets on a down payment, given the overall circumstance at the time. (2T 63:19-23) The only place in the Settlement Agreement where Ms. Primmer's financial situation is mentioned is in paragraph 1, the content of which is specifically limited to the down payment. (A2)

It also cannot be ignored that at the time the down payment was required, in April 2011, or even when the purchase went through in June 2011,

no other settlement terms, let alone the Settlement Agreement, had been negotiated. Plaintiff had no idea what level of ongoing support she would have from Defendant. (2T 43:21-44:3) She also didn't know what her monthly expenses would be, or if she would be able to pay back a 401(k) or other short-term loan rather than having Mr. Harrison advance the down payment. (2T 64:6-10; 80:2-9) Mr. Harrison, throughout the relationship, had paid all of the household bills, while Ms. Primmer paid the grocery bills and her car payment. (2T 117:17-20; 118:6-16) The absence of an Agreement at the time of the closing is one reason Plaintiff did not move out of the Chester home until September 2011.

Mr. Harrison took the lead on the purchase of the townhouse, including the securing of a mortgage. He simply handed Ms. Primmer paperwork and said she had to sign it. (2T 86:17-24; 99:4-101:17) It is clear that neither he nor the bank took Ms. Primmer's portion of the paperwork seriously, since Mr. Harrison left off Ms. Primmer's employment information and the Toms River property about which Mr. Harrison undeniably knew. (2T 101:19-102:11) Defendant went to "the guy [he] had always used as a mortgage loan officer" to process this mortgage. (2T 133:13-17) Ms. Primmer had no direct contact with the bank regarding the mortgage: no meeting, no phone call, no correspondence. (2T 99:4-15)

It is also impossible to consider this $70,000 question to be material to Defendant. He testified that $70,000 was a "significant amount of money." (2T 115:25-116:2) Defendant's earned income in 2009 was approximately $918,000. (2T 143:2-6)

In April 2011, at the time he was applying for the mortgage for the townhouse, his monthly income was approximately $57,000 (2T 143:20-144:14) Defendant claims his income for 2009 and 2010 was unusual (2T 188:11-13) but refused to provide any tax returns or other documentation in support of that contention, even though if that were true, he would have grounds under the Agreement for a recalculation of support. In 2010 alone, Defendant spent approximately $158,000 on his horses. (2T 150:10-20) Of course, it is his 2009 and 2010 income level that is most relevant regarding the $70,000 in question, since the down payment was made near the beginning of 2011.

If $70,000 was "significant" to him, there is no adjective to adequately express what it was to Plaintiff. Certainly, when one compares Plaintiff's assets at the time, approximately $200,000 plus the property in Toms River and the unknown value of her 401(k), to Defendant's 2011 assets of $3,353,431.00, and considering that for the previous twenty-three years it had been Defendant's income and assets that had determined their lifestyle and

which had provided her with support that she relied on (2T 118:3-16), it is a mere drop in the bucket for Defendant.

Additionally, the matter as to which the mistake was made did not relate to a material feature of the contract – the material feature of the contract is that the townhouse would be purchased so that Plaintiff could move out of Defendant's house. The portions of the agreement pertaining to the down payment were logistical, not material. Defendant's advancing of the entire down payment for the townhouse is but one provision in the totality of the Settlement Agreement. (A1) Indeed, as a percentage of the total support agreed to, it is quite small.

Under the Agreement, Defendant is responsible for $18,000 per year in direct payments to Plaintiff, another approximately $24,000 per year in payments for the townhouse, and another $600 or so per year for Plaintiff's cell phone. His upfront costs in 2011 under the agreement (outside of the $140,000 down payment) were approximately $53,520. (A1) So by the time Defendant reached the first buyout benchmark of seven years, he would have paid $351,720 under the agreement. Adding to that the $450,000 buyout amount at the seven year mark, the minimum total value of the Settlement Agreement is approximately $800,000. The $70,000 on which he is placing such weight is less than 10% of the totality of the agreement. That cannot be

deemed so material as to constitute fraud. Defendant's claim that if he had a fuller idea of Plaintiff's assets he would have refused to advance the funds so Plaintiff could move out of the Chester house sooner lacks credibility.

Significantly, too, Defendant has not suffered any detriment as a result of fronting the $70,000. He claims to believe that he could simply have refused to purchase the townhouse or enter into the agreement, and that would have been the end of it. He has tried to avoid, throughout this case, disclosing what his full financial picture was in 2011, claiming it is not relevant. Although Ms. Primmer did not attempt to negotiate a better deal for herself than the one memorialized in the agreement, an objective analysis of the parties' financial circumstances in 2011 makes it obvious that had Mr. Harrison not entered into this Agreement but instead had gone through the litigation and trial, his obligations to Ms. Primmer would have been significantly higher.

Presumably, since 2011, Defendant continued to live his indulgent lifestyle, owning multiple homes, owning racehorses, and maintaining his membership in a country club. Certainly there was no testimony or evidence at trial to the contrary. He suffered no detriment by entering into the Settlement Agreement.

Even giving Defendant the benefit of all doubts, he did not come close to establishing that Plaintiff knowingly misrepresented her financial situation to

Defendant, and particularly not that she intended for him to detrimentally rely on such misrepresentation.

At the conclusion of trial, the judge rejected Defendant's claim of fraud. "[T]he court cannot find that Ms. Primmer committed a fraud on Mr. Harrison in any way…" (4T 24:19-20)

The Appellate Division declined to disturb the trial court's ruling. (A49-50)

Not satisfied, Defendant made the same claim in his motion in 2023, in an attempt to convince the trial court to throw out Judge Ballard's Order and the Appellate Division's decision. (1T 27:2-28:7) "I find that defendant is continuing to seek relief based on allegations of fraud from now close to 15 years ago that the trial court has already rejected after a full trial and that the Appellate Division affirmed and said it was not worth talking about." (1T 45:25-46:4) Apparently, Defendant needs to hear specifically from the Appellate Division that there was no finding of fraud.

II. THE TRIAL COURT DID NOT ERR IN ENFORCING THE AGREEMENT INCLUDING THE PENALTY PROVISIONS. (A53)

Defendant has failed to provide a factual or legal basis to overturn the trial court's decision. There was no determination of fraud by Plaintiff, a finding that was upheld by the Appellate Division.

To be clear, penalties were not imposed on Defendant due to any actions of Plaintiff. The specifically negotiated penalty within the Agreement states that Defendant shall pay $1,500 to Plaintiff on the first day of each month and not later than the fifth of the month. Payments after the fifth incur a late fee of $100 per day. (A4) It is undisputed that Defendant stop making the monthly payments of $1,500 in July 2017. Instead, he engaged in self-help. Had he, in 2017, simply filed for enforcement of the Agreement and sought an Order requiring Plaintiff to take steps to pay the $70,000 plus interest, he would not have incurred the penalty. Instead, he breached the Agreement. Both parties had the appropriate, negotiated, contractual penalties assessed to their failures to pay. Defendant is simply angry that his penalty, as negotiated, is greater than Plaintiff's.

The trial Court specifically determined that Defendant's "self-help" by failing to pay the monthly support obligation beginning in 2017 was a violation of the Settlement Agreement and was not justified by the $70,000 repayment obligation. He made this argument at trial, and the Court rejected it: "I reject Mr. Harrison's contention that he has no further obligation to pay the $1500 support obligation and to require the plaintiff to disgorge those payments already received. That was the agreement between the parties. He stopped paying at his own risk." (4T 27:25-28:5)

"I do find that the agreement is valid and enforceable; that Mr. Harrison is to pay $1500 per month going back to the breach date, which would – so the first missed payment was actually July 5, 2017. And that those monies are owed…. I am going to award 1083 days of penalty at $100 day, which is $108,300. So the total amount due for the missed payments is $157,800 through June 22nd, which is today…" (4T 25:11-15; 26:5-8)

Defendant's ongoing failure to bring the support payments current resulted in the continued imposition of the same contractual penalty. Judge Wilson was bound by the Appellate Division decision and applied that decision to the facts before him.

To be clear, too, Defendant is incorrect when he avers that the Appellate Court determined that the trial Court did not make "robust findings." That observation was limited to the trial Court's determination to not award Plaintiff counsel fees and was certainly not a reflection on the trial Court's determination of Defendant's fraud claims. (A49)

Defendant is also wrong in focusing on the principle of the "law of the case." State v. K.P.S., 221 N.J. 266 (2015) addresses circumstances in which a co-defendant had erroneously been denied the opportunity to be heard on a separate appeal. A published Appellate Decision upholding the trial court's decision is not a non-binding legal principle, it is, in fact, a binding

determination. The trial court's decision to apply the contractual penalty was already reviewed and upheld on Mr. Harrison's own direct appeal. The trial transcript, the transcript of the trial court decision, and the Appellate Decision all repeatedly reference Defendant's allegations of fraud.

Defendant is now attempting to use new "magic words" by claiming that Plaintiff came to the Court with unclean hands. However, the trial Court determined, based on findings of fact and conclusions of law, that Plaintiff did not defraud Defendant. That finding was upheld by the Appellate Division. There are no unclean hands.

Similarly, the Court's factual findings prohibit Defendant from arguing that Plaintiff breached the implied covenant of good faith and fair dealing. Indeed, the trial court specifically found that "based on the positions of the parties at that time I find that they were negotiating in good faith." (4T 27:4-6) As the court observed, "for the most part I found Ms. Primmer to be credible; um, relatively straightforward. At time there were things that she could not recall but for the most part I did not have any reason to doubt her credibility." (4T 9:18-22) In contrast, it was testimony by Mr. Harrison that the trial court found "the least believable." (4T 12:24)

Defendant's argument that Plaintiff had no intention of repaying him at the time she entered into the Agreement is belied by the extensive factual

record. The parties had discussed that the $70,000 due to Defendant would be paid upon the sale of Plaintiff's property in Toms River. (2T 49:10-14; 122:16-18) Plaintiff did immediately list the property for sale (2T:50:9-11), however it did not sell and then after Hurricane Sandy in fall 2012, property values in that area fell substantially and the property was removed from the market. (2T 49:18-50:11)

In fact, Plaintiff had initially listed the property in April 2011, as Defendant knew, in anticipation of the purchase of the Bedminster property and her need to reimburse Defendant for the $70,000. (2T 49:22-24; 96:17-21) However, it did not sell prior to the June 2011 closing on the Bedminster property, nor the execution of the Settlement Agreement later in the fall of 2011. (2T 49:18-21) Plaintiff further extended the listing into 2012, but understandably removed the listing following Hurricane Sandy and its impact on the real estate market in and around Toms River. (2T 50:5-11)

III. THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF COUNSEL FEES WHEN SHE PREVAILED ON THE MOTION (A55)

An award of counsel fees and costs in family actions is left to the discretion of the trial court. Williams v. Williams, 59 N.J. 229, 233 (1971). Reversal of a trial court's award of fees is appropriate when a trial court

abused its discretion, exceeded its authority or made a determination unsupported by the record. Id.; Handelman v. Handelman, 17 N.J. 1, 7 (1954).

Paragraph 31 of the Settlement Agreement reads "Should either Sharon [sic] or Michael fail to abide by the terms of this Agreement, the defaulting party shall indemnify the other for all reasonable expenses and costs, including attorney's fees, incurred in successfully enforcing this Agreement." (A13)

Even in the absence of specific contractual language, R. 4:42-9, R. 5:3-5, and RPC 1.5(a) provide for an award of counsel fees following an analysis of specific factors.

R. 5:3–5(1)(c) in turn provides:

> **Award of Attorney Fees.** Subject to the provisions of R. 4:42–9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, parenting time, equitable distribution, separate maintenance, enforcement of interspousal agreements relating to family type matters and claims relating to family type matters in actions between unmarried persons. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective financial circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in

addition to the information required to be submitted pursuant to R. 4:42–9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

R. 4:42–9(b) further provides in relevant part:

(b) Affidavit of Service. Except in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider the rendition of paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorneys' services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client. For purposes of this rule, paraprofessional services shall mean those services rendered by individuals who are qualified through education, work experience or training who perform specifically delegated tasks which are legal in nature under the

> direction and supervision of attorneys and which tasks an attorney would otherwise be obliged to perform.
>
> Mani v. Mani, 183 N.J. 70, 94 (2005)

A weighing of the R. 4:42-9 and R. 5:3-5(1)(c) factors is required in this case even without the specific contractual provision for fees. Neither party is required to prevail entirely in order for there to be at least a partial counsel fee award. The relative financial resources of the parties and their reasonableness and good faith weigh significantly in favor of Defendant being responsible for Plaintiff's counsel fees.

Defendant brought a motion to overrule the Appellate Division's decision. Plaintiff filed a Cross-Motion to enforce. Plaintiff prevailed. Plaintiff's counsel provided a separate Certification of Services as required by R. 4:42-9. (1T 58:22-59:13) Defendant, however, failed to order the transcript of Judge Wilson's reasons for the attorney's fee award. (A56)

Based on the Court's decision, however, there are certainly some indications as to why fees were awarded. "I find that defendant is continuing to seek relief based on allegations of fraud from now close to 15 years ago that the trial court has already rejected after a full trial and that the Appellate Division affirmed and said it was not worth talking about." (1T 45:25-4) Additionally, the trial Court determined that Defendant's application was

defective and not filed in accordance with the rules of court. (1T 46:24-47:13; 48:19-22)

The parts of Defendant's application that were granted by the Court were those with which Plaintiff was already in agreement. Where Defendant sought to have Judge Wilson overturn the Appellate Division and write a different agreement between the parties, that relief was denied. (1T 50:9-17; 52:10-13; 52:20-53:8)

Judge Wilson stated "The request to find defendant in violation of litigant's rights for failure to abide by the parties' settlement agreement and prior order of the court is granted. I am convinced that he has willfully failed to comply with his obligations, um, and so that relief is granted." (1T 55:9-15)

Defendant is the only one convinced that Plaintiff engaged in fraud. The trial court was not convinced and the Appellate Division was not convinced. He continues to refuse to accept the findings of the Court and to comply with the Orders thereof.

CONCLUSION

Defendant has failed to provide a compelling legal argument as to why any portion of the decisions below should be overturned. His brief is an attempt to simply reassert the testimony of Defendant and Defendant's witness as though it were unchallenged and not properly assessed by the trial court, and as though the initial appeal did not occur. It is respectfully submitted that, for all of the foregoing reasons and authorities cited herein, Defendant's arguments be rejected in full.

Respectfully submitted,
HEYMANN & FLETCHER, ESQS.

_____
ALIX CLAPS, ESQ.
Attorney for Plaintiff/Respondent

Dated: May 10, 2024

Superior Court of New Jersey
Appellate Division
DOCKET NO. A-000897-23T4

SHARYN PRIMMER,

Plaintiff/Respondent

v.

Michael Harrison

Defendant/Appellant

CIVIL ACTION
APPEAL

On Appeal From:

Superior Court, Chancery Division
Family Part- Somerset County
Docket No FM-18-709-19
Honorable Robert G. Wilson PJFP

Superior Court of New Jersey
Appellate Division
Docket No. A-1590-20
Honorable Haney Mawla, J.A.D.

Superior Court, Chancery Division
Family Part-Somerset County
Docket No. FM-18-709-19
Honorable Robert Ballard, Jr. JSC

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ARGUMENT IN REPLY TO BRIEF OF PLAINTIFF/RESPONDENT

THERE IS ONE ISSUE AND ONLY ONE ISSUE IN THIS CASE. THERE ARE NO CROSS APPEALS

Plaintiff brings up numerous issues in this case, mischaracterizes the facts, attempts to turn and twist the facts and lies in order to place defendant in a very bad light. But, at the end of the day, there is only one issue for the Court to contemplate and, accordingly I will not address plaintiff's attempts to deflect from the issue on appeal. The issue very clearly is did the Courts below err in assessing two (2) significant monetary penalties against the defendant?

The settlement agreement between the parties (Defendant Appendix Al-A16) is the document that sets forth the understanding of the parties with respect to their obligations regarding their separation and the financial aspects of the separation. In the very first paragraph of the Agreement, Paragraph 1 (Defendant Appendix A3) it states as follows:

"Michael and Sharyn purchased a townhome unit together in Bedminster. The down payment shall be equally shared by Michael and Sharyn. As Sharyn does not have access to such funds then Michael shall front load the down payment required for closing. Sharyn shall pay to Michael the sum as designated by calculating the down payment and dividing by two. ($ 140,000 divided by two equals$ 70,000.) ...

This is the first paragraph of the Agreement and the only obligation that Sharyn (plaintiff) has to Michael (defendant). There is a specific representation made by Sharyn when she states "As Sharyn does not have access to such funds ..." The word "access" is defined in the Britannica dictionary as to be able to use, enter, or get near (something). The legal term "access to" means the right to use. And the

common parlance of "access to" is also the right to use. Sharyn unequivocally states that she did not have access to the$ 70,000.00 (at the time of the signing of the agreement) that was her responsibility set forth in Paragraph 1. So, did Sharyn have access ("the right to use")$ 70,000.00 at the time of the signing of the Agreement. The answer, without any dispute, is YES. Did she intentionally misrepresent her financial situation in this paragraph. Again, the answer is YES. As previously outlined in Defendant's Brief (pages 15 and 16) Plaintiff admitted that she did have "access" to well more than $ 70,000.00 at the time that she made the misrepresentation. In fact, Plaintiff was asked the following question:

Q- "Well. The question is you in fact did have access to$ 70,000.00 when you signed the Agreement? (Trial Transcript T2 page 73 lines 12-13)

A- I did (Trial Transcript T2, Page 73-lines 12-14)

In fact, during cross examination, Primmer acknowledged all the accounts to which she had access to at the time consisting of 3 bank accounts which totaled over$ 260,000.00. (See page 16 of Defendant's Brief- also Trial Transcript 2 page 74-Line 7 to Page 76 Line 1). When asked "But you didn't tell anybody (about the funds Plaintiff answered by stating "Right" (See Defendant Brief page 16 and Trial transcript page 73 lines 16-18). And there is no dispute that Defendant relied upon Primmer's misrepresentation as she testified as follows:

Q- "And you know, did you not, that Mr. Harrison was relying on this representation in the contract that you did not have$ 70,000.00 (Trial transcript T2-Page 76 lines 2-6)

A- "I assume he was but ...yes. I'll say yes, Okay" (Trial transcript T2 Page 76 lines 5-6)

THIS LIE/ INTENTIONAL MISREPRESENTATION IS VERY CRITICAL TO THE ANALYSIS OF WHY MR HARRISON SHOULD NOT BE PENALIZED AS WILL BE DISCUSSED LATER.

In the first paragraph of this Agreement which sets forth Primmer's sole obligation under the Agreement she lies. Plaintiff, in her brief points out that the

Agreement makes clear that "each (party) has made a full disclosure of all relevant financial information to the other of his or her financial worth and income" (citing A2). This is an obvious misstatement/lie. Plaintiff makes an agreement, but with the intent to deceive and cheat from the outset. She obviously had no intention of paying Harrison the$ 70,000.00 which she promised and had access to. And at no time did Plaintiff make any effort to pay Harrison (This Agreement is now 13 years old). So what is her rationale for lying when she stated that she did not have access to$ 70,000.00 at the signing of the Agreement. Her rationale is contained on page 6-7 of Plaintiff's brief wherein she states" When the parties were purchasing the townhouse in April 2011, some five months before executing the Settlement Agreement, Plaintiff was acutely aware that she had been saving money her entire working life, from 18 to 59 and if she removed$ 70,000 from those savings, she would be jeopardizing her retirement (2T 50:22-51:4) $ 70,000was more than a year's gross income to Plaintiff. At the time that the$ 70,000 was needed (either when the contract was entered into in April 2011 or at the closing in June 2011), Plaintiff had no idea what her ongoing financial picture would be. No Agreement had been reached regarding monthly support, nor would it be for months to come (2T 44:1-3). While it may have been an incomplete statement, it was entirely accurate for the Settlement Agreement that "Sharyn does not have access to such funds," when those funds are specifically required for closing in June 2011." This rationale is as dishonest as it gets. First and foremost the representation was made at the time she signed the Agreement. She knew exactly what she was getting as a support package, which was a very generous support package. And she had access to funds significantly greater than$ 70,000.00. So What is Sharyn saying?? It is quite clear. She is saying despite the fact that you are giving me a support package, I have no intention of paying you what I promised because I worked hard to save these monies. I will be hiding money from you so that I don't have to pay you.

THIS Court should keep in mind that she NEVER paid Harrison the $70,000.00 or any part of it. SO HOW CAN ANY COURT IGNORE A FINDING OF AN INTENTIONAL MISREPRESENTATION THAT IS GIVEN WITH THE INTENT TO DECEIVE.

Plaintiff further has the audacity to state on Page 6 of her Brief that "For approximately six years, the parties abided by the agreement without incident." If we dissect this statement utilizing the relevant facts to place same in context, Plaintiff is saying Harrison, in good faith followed through on his promises for six years (72 straight months of payments) while Primmer continued her deception that she didn't have the funds, so she wouldn't have to pay him and, in fact, didn't pay him. Harrison, not yet aware of Plaintiff's financial situation, and after having made requests to be paid which were ignored, stopped paying the$ 1,500.00 monthly payment for 46 months (which totals$ 69,000.00 or$ 1,000.00 less than Primmer was withholding). Plaintiff, then files suit, her contention being that she did not receive the 46 payments that Defendant withheld. And here is the critical point that each of the Courts have ignored. In order for Plaintiff to legitimately make that complaint wouldn't the precondition have to be that she was deprived/didn't have the funds which she needed to live. It could not be more plain that Plaintiff had those funds. In fact she had$ 70,000.00 in her possession that she intentionally hid. AGAIN THE COURT MUST UNDERSTAND THAT THE PURPOSE OF THE PENALTY WAS TO ASSURE PLAINTIFF THAT SHE WAS ALWAYS IN POSSESSION OF FUNDS NECESSARY FOR LIVING. PLAINTIFF HAD THOSE FUNDS WHICH SHE INTENTIONALLY HID (AND WHICH SHOULD HAVE BEEN INITIALLY PROVIDED TO HARRISON). SO HOW IS IT THAT A COURT COULD MAKE A FINDING THAT THE PRECONDITION NECESSARY FOR PLAINTIFF'S PENALTY CLAIM EXISTED UNDER THOSE CIRCUMSTANCES.

There can be no doubt or dispute that Plaintiff's hands were caught in the proverbial "cookie jar". Plaintiff begins her legal argument that Defendant failed to prove that Plaintiff committed Fraud. This is incorrect for a number of reasons. First and foremost, the issue of fraud was never discussed by any of the Courts as it related to the penalties that were imposed. Nor did any Court state that Plaintiff did not commit Fraud. The only discussion of plaintiff's intentional misrepresentation occurred in the context of a request for rescission of the Agreement at the Trial Level. And the apparent finding of the Court, which was never fully articulated, was that the misrepresentation was not sufficiently substantial for a finding of rescission of the Agreement. While defendant

vigorously disputes this finding, nonetheless, this is not an issue that has been raised in this appeal (Although a finding sua sponte by this Court that rescission is appropriate would not hurt defendant's feelings). Nonetheless, No Court has ever addressed the issue of fraud as it relates to the imposition of the two penalties. Plaintiff maintains that this is Defendant's sixth bite at the apple and at the same time maintains that there has never been a finding of fraud. Very simple explanation, fraud (despite how obvious same is) has never been discussed/ nor ruled upon in the context of the imposition of the penalties.

THIS COURT IS BEING ASKED TO RULE ON THE FOLLOWING QUESTIONS:

1. Did the Plaintiff intentionally misrepresent her financial situation when she signed the Agreement i.e. That she didn't have access to $70,000.00 at the time of the signing of the Agreement.

   THE ANSWER CAN ONLY BE YES. (Undisputed testimony)

2. What was the amount of money withheld by defendant after making 72 straight months of monthly payments of$ 1,500.00

   THE ANSWER IS$ 69,000.00. THERE CAN BE NO DISPUTE TO THIS FIGURE.

3. What was the reason for the penalty provision?

   THE ANSWER IS THAT THE PENALTY IS THERE TO ASSURE THAT FUNDS ARE RECEIVED ON A TIMELY BASIS IN ORDER FOR PLAINTIFF TO PAY HER BILLS

4. The precondition to permit the imposition of the penalty is that plaintiff did not have in her possession the monies in which to pay her bills?

   THE ANSWER IS CLEARLY THAT IF PLAINTIFF HAS HER MONEY IN HER POSSESSION ON A TIMELY BASIS A PENALTY CANNOT BE IMPOSED PURSUANT TO THE AGREEMENT.

5. Did plaintiff have the $69,000.00 in her possession?

AT ALL TIMES PLAINTIFF HAD MORE THAN THE $69,000.00 IN HER POSSESSION. SHE HAD$ 70,000.00 WHICH SHE FRAUDULENTLY WITHHELD SO HOW CAN IT BE SAID THAT SHE DIDN'T HAVE THE MONEY THAT SHE IS COMPLAINING ABOUT?

6. Was this not a sufficiently important issue that should have been discussed and ruled upon?

IT IS THE MOST FINANCIALLY DEVASTATING ISSUE IN THIS MATTER. TO PUT IT IN PERSPECTIVE, PLAINTIFF IS COMPLAINING ABOUT LATE PAYMENTS OF $1,500.00 YET THE PENALTIES TOTAL$ 227,000.00 WHICH IS THE EQUIVALENT OF OVER 150 MONTHS (OVER 12 YEARS) OF PAYMENTS OR TO PUT FURTHER PERSPECTIVE ON THE NUMBER IT IS MORE THAN HALF OF THE AMOUNT OF THE PURCHASE AMOUNT OF PLAINTIFF'S EXPENSIVE TOWNHOUSE.

DOES THIS COURT HAVE THE POWER TO DO THE RIGHT THING AND TO RESCIND THESE DRACONIAN PENALTIES

This action is venued in the Chancery Division. The Chancery Division is a Court of Equity. Equity is currently recognized as a distinct body of law, administered by various modern courts.[1] The evolution of procedures within courts of equity has guided the application of equitable principles. Originating from the diverse rules of the early Courts of Chancery, today's courts can exercise equitable jurisdiction while maintaining their inherent discretionary abilities to address new forms of injustice (Hepburn, Samantha (2016). *Principles of equity and trusts* (Fifth ed.). Annandale), Page 5 . Equity is not an independent body of law; rather, it is synonymous with corrective justice and complements common law to counterbalance its inflexible rules (Mason, Anthony (1998). "The impact of equitable doctrine on the law of contract (United Kingdom)". *Anglo-American Law Review* ***27*** *(1): 1. ISSN 0308-6569..* **Courts of Equity have the ability to perform**

corrective justice. This is what needs to be done in this matter. Otherwise the message that this matter sends is that a Litigant can commit fraud and be rewarded for what is essentially a criminal act. To be more specific Plaintiff Sharyn Primmer lied, deceived, and cheated the defendant. To allow her to profit by it would be an unconscionable miscarriage of justice.

Further, defendant should not be required to pay attorney's fees that have been assessed in favor of a plaintiff who has advanced dishonest positions in this matter and in the process abused this Court system.

CONCLUSION

There is an obvious hypocrisy/contradiction in how the Courts below have handled this one issue of the wrongful imposition of penalties against the defendant.

THE HYPOCRISY- The Courts below have taken the position that Harrison could not utilize self-help, yet isn't this exactly what Plaintiff has done. She decided that she didn't want to pay Harrison and kept the money that Harrison was entitled to in her possession. So, it's ok for her to do that (and to lie about it in the process). So why is it that Plaintiff is allowed to lie, illegally utilize "self-help" and there are no consequences. Yet, when Harrison utilizes self-help {without lies or misrepresentations after proceeding in good faith for 6 years} he is penalized$ 227,000.00???

And why is it that the Courts below have not even once discussed or addressed the issue of the wrongful imposition of penalties as it relates to Plaintiff's deceitful conduct. Can it be that defendant failed to address this issue at any level ? Absolutely Not. It has been addressed at every level- Plaintiff would seem to agree as she indicates this is the sixth bite at the apple.

Could it be that this is not an important issue. As previously indicated this is and was the most financially devastating issue in this matter. And for the any of the Courts (including the Appellate Division) say otherwise would be nothing short of DISHONEST.

So this Court finds itself in a difficult position. The Courts below have mishandled this issue at every level so how does this Court procedurally rectify an obvious wrong? The answer is for this Court to summon the courage to recognize the errors of the Courts below and DO THE RIGHT THING- In other words, correct the injustice that has been done. As Sophocles said, "All men make mistakes, but a good man yields when he knows his course is wrong, and repairs the evil. The only crime is pride."