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INNOVATION OPTICS, INC. AND ALAN GREENBERG, Appellants vs. COREY M. NOTIS, M.D., P.A., d/b/a ASSOCIATES IN EYE CARE, COREY M. NOTIS, M.D., RIVER CITY EYE ASSOCIATES LLC, ASSOCIATED RETINAL CONSULTANTS LLC, d/b/a NJ RETINA, ASSOCIATES IN EYECARE OPTICAL, CHRISTOPHER SANCHEZ, ABC COMPANIES 1-20, said names being fictitious; and JOHN DOES 1-50, said names being fictitious, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001468-23 Sat Below: Hon. Thomas J. Walsh, J.S.C. LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-3354-19 Civil Action

BRIEF ON BEHALF OF PLAINTIFFS INNOVATION OPTICS, INC. AND ALAN GREENBERG IN SUPPORT OF THEIR APPEAL

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PRELIMINARY STATEMENT

Plaintiff Innovation Optics, Inc. ("Innovation Optics"), and its principal, Plaintiff Alan Greenberg ("Greenberg," collectively, "Plaintiffs"), respectfully submit this Brief in Support of their Appeal of (1) the Trial Court's August 6, 2021 order granting summary judgment (the "Summary Judgment Order"); (2) the Trial Court's order awarding as a sanction $72,984.95 in attorneys' fees and costs on November 19, 2021 (the "Sanctions Order") and (3) the Trial Court's order denying reconsideration of the Summary Judgment Order and denying, in part, reconsideration of the Sanctions Order on February 4, 2022 (the "Reconsideration Order").

This case involves a nearly twenty-year relationship between Plaintiff Alan Greenberg, an optician, and Defendant Corey M. Notis, ("Notis"), an ophthalmologist, during which Greenberg operated an optical shop next to, and as part of, Notis' practice. That relationship came to a crashing end after Defendant Associated Retinal Consultants LLC, d/b/a NJ Retina ("NJ Retina"), proposed to purchase Notis' business, thereby inducing Notis to demand that Plaintiffs vacate the premises (on two months' notice). In response, among other claims, Plaintiffs brought a claim for tortious interference against NJ Retina based upon Plaintiffs' reasonable belief that (1) NJ Retina was aware of Plaintiffs' relationship with Notis, but made an offer anyway, and (2) either NJ

Retina then demanded that Notis kick out Greenberg or NJ Retina's offer spurred Notis to do so. To date, the transaction between NJ Retina and Notis has not yet been consummated.

The Trial Court initially denied NJ Retina's motion to dismiss those claims. However, on August 6, 2021—while paper discovery was ongoing and before a single deposition was taken—the Trial Court granted summary judgment solely because, in its view, no claim for tortious interference could lie where there was no subsequent transaction:

> I don't understand how there can be a theory that the . . . defendant herein . . . interfered with the tortious [sic] relationship, given the fact that there was no transaction that took place. . . . [I]t's undisputed the transaction never took place. That the New Jersey Retina backed away from the situation. And under those circumstances, I don't see . . . any possible way of meeting the four part standard under Printing Mart versus Sharp Electronics.

(1T 25:8-23). That ruling was obviously in error. A subsequent "transaction" is not required to set forth a claim for tortious interference.

The Trial Court then compounded this error by finding that Plaintiffs' claim was frivolous (because, it reasoned, at "some point" Plaintiffs became aware that no transaction occurred) and awarded a staggering $72,984.95 in sanctions against Plaintiffs and their attorneys:

> [O]nce the plaintiff knew that there was no deal . . . I don't find there was any conceivable cause of action for . . . intentionally interfering with a prospective economic opportunity and I do find that further pursuing the litigation was frivolous.

(2T 18:8-14). Thereafter, on reconsideration, the Court altered its order so that it applied only to Plaintiffs (and not their counsel), but still held sanctions to be appropriate based on the Court's assumption that there could not possibly be a claim against NJ Retina without a subsequent transaction:

> [I]t's difficult for me to see and the same reason I've said in the past, if there was ever a commutable [sic] cause of action for this interference with the prospective economic opportunity or in any event as I said, the transaction never took place.

(3T 21:3-7).

In neither of these orders, however, did the Trial Court include detailed findings of fact and conclusions of law, as required by Rule 1:7-4, establishing the basis for the sanctions. Indeed, the sum total of the Trial Court's "findings" with respect to the reason for, and the amount of, the sanctions consists of:

> I think the laboring [oar] in the litigation has gone to the [Notis] defendants more so to N.J. Retina, but still, they have to at the very least stay in and monitor and represent their client's interest . . . and I've looked over the certification, the hours are reasonable for the type of attorneys that are working in the case in this area in this expertise and I think they're entitled to at least 50 percent of the fees that they suffered in this case . . . .

(2T 18:3-23).

The Trial Court erred in its interpretation and application in all three motions. Accordingly, Plaintiffs request that the Appellate Court reverse the Trial Court's Summary Judgment Order and Sanctions Orders and remand.

PROCEDURAL HISTORY

On September 24, 2019, Plaintiffs filed their initial complaint against Defendants Notis; Corey M. Notis, M.D., P.A.; River City Eye Associates, LLC (collectively, the "Notis Defendants"); and NJ Retina. (P50a-P79a).[2] The complaint alleged that NJ Retina knew, or should have known, that Plaintiffs and the Notis Defendants had an ongoing pre-existing business relationship; that NJ Retina tortiously interfered with that relationship by its offer to purchase the Notis Defendants' business, (P62a-P66a); and that these discussions resulted in the Notis Defendants discontinuing their business relationship with Plaintiffs. (Id.).

In response, on November 20, 2019, NJ Retina filed a motion to dismiss the complaint, arguing that the tortious interference claims against it should be dismissed because NJ Retina never entered into a transaction with the Notis Defendants. (P260a-P265a). In support of this motion, NJ Retina provided a certification in which one of its executives averred that there had been no transaction to date. (P260a-P262a). On January 2, 2020, the court denied NJ Retina's motion to dismiss. (P263a-P265a). In the months thereafter, the parties

[2] "P. . . a" refers to Plaintiff/Appellants' appendix. A separate Table of Appendix is included within the appendix documents.

engaged in limited paper discovery. (P270a, P349a-P398a, P421a-P422a, P570a-P582a).

While discovery was ongoing, but before any depositions had been taken, Plaintiffs filed a motion for leave to file a second amended complaint. (P271a-P272a). NJ Retina responded to this motion by filing a "Cross-Motion"[3] for Summary Judgment on June 29, 2021. (P275a-P276a). On August 6, 2021, the Trial Court granted[4] NJ Retina's Cross-Motion for Summary Judgment, holding:

> However, . . . I don't understand how there can be a theory that . . . the moving party in this case could have possibly . . . interfered with the tortious relationship, given the fact that there was no transaction that took place.
>
> [I]t's undisputed the transaction never took place. That the New Jersey Retina backed away from the situation.
>
> And under those circumstances, I don't see how they meet the -- how -- how there's any possible way of meeting the four part standard under Printing Mart versus Sharp Electronics.

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[3] NJ Retina's "Cross-Motion" was made in response to a Motion to File an Amended Complaint and thus did not "relate[] to the subject matter of the original motion." R. 1:6-3(b); (P271a-P272a, P275a-P276a). It thus was not a proper cross-motion. The Trial Court, nevertheless, over Plaintiffs' objection, treated NJ Retina's motion as a cross-motion.

[4] The Trial Court entered summary judgment in favor of NJ Retina on Plaintiffs' claims of tortious interference, unjust enrichment, declaratory judgment, and civil conspiracy. (P1a-P2a, P14a-P16a). Plaintiffs appeal from the Order entirely to the extent that summary judgment was premature. Plaintiffs also appeal from the Order's dismissal of Plaintiffs' tortious interference and civil conspiracy claims on account of the Trial Court's misapplication of the law in holding that, because there was no subsequent transaction, there can be no possible claim against NJ Retina.

(1T 25:8-13, 25:17-23).[5] This holding was obviously in error because there is no need for a subsequent transaction in order to demonstrate tortious interference.

Based upon the dismissal of the tortious interference claim, the Trial Court then dismissed the civil conspiracy claim:

> [S]imilarly, there's no conspir - -- there's no conspiracy here. Two or [more] persons acting in concert to commit an unlawful act or commit a lawful act by unlawful means. There's nothing unlawful that -- that -- that's been alleged or . . . certainly proven thus far in discovery that they did anything that was unlawful, other than trying [to] buy -- and buying another business.

(1T 25:24-26:6). The Trial Court also granted summary judgment to dismiss Plaintiffs' declaratory judgment and unjust enrichment claims. (P1a-P2a).

Shortly thereafter, on August 25, 2021, NJ Retina filed a motion for sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1 (the "Frivolous Litigation Statute"). (P423a-P424a). In support thereof, NJ Retina argued that it was frivolous for Plaintiffs to assert a claim of tortious interference without the existence of a subsequent transaction. (P423a-P424a). In opposition, Plaintiffs asserted that their claim was not frivolous and sanctions were not warranted, as prevailing case law provided Plaintiffs a good-faith basis to

[5] 1T = transcript of August 6, 2021.

believe that they could satisfy the required elements of a tortious interference claim. (2T 10:22-12:9, 13:6-18).[6]

Nevertheless, the Trial Court determined, "I do find that he had the right to bring the complaint. He had the right to do some discovery but at *some point* I think that the litigation became frivolous in nature." (2T 18:15-18 (emphasis added)). Critically, however, the Trial Court made no further analysis as to when that "point" occurred, or what happened in the litigation to render it suddenly frivolous. (2T 17:12-18:14). Additionally, the Trial Court did not provide any analysis justifying the amount of fees awarded. (2T 18:15-25). Instead, the Trial Court made a conclusory finding that "I think [NJ Retina's counsel are] entitled to at least 50 percent of the fees that they suffered in this case." (Id.).

On December 9, 2021, Plaintiffs, together with their law firm, Weiner Law Group LLP (collectively, the "Sanctioned Parties"), filed a motion for reconsideration of the Sanctions Order. (P610a-P611a). The Sanctioned Parties maintained that the Sanctions Order should be reconsidered as it was based on the Trial Court's misapplication of the law, as (1) the existence of a subsequent transaction was not a required element of a cause of action for tortious interference and (2) the Court had failed to provide findings of fact and

[6] 2T = transcript of November 19, 2021.

conclusions of law that explained its basis for finding that, at some undefined point, the claim became frivolous. (3T 5:22-6:2, 7:11-15).[7]

In ruling on the reconsideration motion, the Trial Court declined to alter its holding that at "some point" Plaintiffs' claim for tortious interference became frivolous,[8] finding "it's difficult for me to see and the same reason I've said in the past, if there was ever a commutable [sic] cause of action for this interference with the prospective economic opportunity or in any event as I said, the transaction never took place." (3T 21:3-7).

The Court did, however, reconsider the parties which it sanctioned. (3T 22:15-23:12). The Trial Court decided that it had improperly granted sanctions against Plaintiffs' attorneys, and that sanctions should be directed only against Plaintiffs:

> Now, the part that will be granted is that to the extent that the order visited these fees on the law firm as well as the client, that was an order that was inartfully drafted as far as I'm concerned.
>
> The law presumes that the lawyer is acting on behalf of the client and with the client's instructions and acquiescence . . . . [I]t's the

[7] 3T = transcript of February 4, 2022.

[8] We presume. Although the Trial Court did not modify the amount of fees it awarded to NJ Retina, its reasoning on reconsideration stated both that "the sanction in this case [is] appropriate and go back to the beginning -- and go back to the beginning of this case;" and that "I imposed half of the fees because I have them the benefit of the doubt quite frankly that maybe they thought there was something that NJ Retina knew and realized that there was an interference that would give them a cause of action until they did at least some discovery." (3T 19:25-20:2, 22:9-14).

> client's responsibility to . . . retain the lawyer to pursue the litigation and it's the lawyer's responsibility to determine the strategy with I'm sure the consultation with the client and that's always been the case . . . .
>
> But the responsibility is on the client, not the lawyer and so the award of fees is . . . as to the plaintiff, not to the plaintiff's counsel.

(3T 22:15-23:12). Plaintiffs sought leave to file an interlocutory appeal regarding the Sanctions Order, and the Reconsideration Order.[9] (P646a-P648a). Leave to file the appeal was denied on March 18, 2022. (P649a-P650).[10]

After the Trial Court's Summary Judgment Order, the on-going discovery continued as to the other defendants. (P270a, P651a-P654a). On April 14, 2023, discovery closed. (P654a). On June 28, 2023, the Trial Court denied the Notis Defendants' motion for summary judgment on each of Plaintiffs' remaining claims except for four of Plaintiffs' nineteen counts. (P655a-P674a). The final remaining claims against the Notis Defendants—i.e., those not previously disposed of by the August 6, 2021 Summary Judgment Order being appealed here—were resolved between the parties dismissed with prejudice through

[9] See Innovation Optics, Inc. et al. v. Corey M. Notis, M.D., P.A., et al., AM-000373-21, M-003457-21 (2022).

[10] In denying Plaintiffs' Motion, this Court wrote that "the interests of justice would not be served by permitting appellate review" because "it does not appear from the record that the trial judge certified the monetary sanction award" and thus "NJ Retina would therefore be unable to invoke any of the processes to enforce judgments and to secure payment." (P649a-P650a).

stipulation on January 15, 2024. (P675a). This Appeal follows as to the Summary Judgment Order, the Sanctions Order, and the Reconsideration Order.

STATEMENT OF FACTS

Innovation Optics Moves its Successful Union Office to Notis' Building

Greenberg is a licensed optician who founded Innovation Optics, an optical store, in approximately 1978. (P360a). In the early 2000s, Greenberg agreed with Dr. Notis, an ophthalmologist, to move Innovation Optics to a building Notis had purchased. (P355a). Also in this building was Notis's ophthalmology practice, Defendant Corey M. Notis, M.D., P.A. d/b/a Associates in Eyecare ("Associates in Eyecare"). (Id.).

Prior to that time, Greenberg had had a successful independent optical practice in Union for more than a decade. (P354a-P355a, P360a). Greenberg recalled that before moving Innovation Optics into Notis' building in Union, Notis promised that he would not abandon Greenberg for any reason once Greenberg moved to Notis' building. (P355a). Greenberg saw that moving his optical within a doctor's building would mean its current customers would likely begin visiting Notis for their medical needs, and because of that, the other eye doctors in the area with whom Greenberg had cultivated relationships would no longer refer patients to Innovation Optics. (Id.).

Innovation Optics and the Notis Defendants Form a Single Integrated Practice

Through their mutual efforts, both Innovation Optics and the Notis Defendants succeeded in that location and took advantage of certain synergies that developed between the businesses. (P362a-P363a, P366a-P369a). This arrangement continued seemingly smoothly for around fifteen years. (Id.) Either by design, or through a course of conduct and understanding throughout the years, the parties worked closely in serving the patients visiting Associates in Eyecare and Innovation Optics, eventually reaching the point where they were, or so it would seem to the typical patient, parts of the same unified eye care business. (Id.).

Indeed, even though the Notis Defendants had no official ownership interest in Innovation Optics, they placed their name on Innovation Optics' door, not only causing Innovation Optics' customers to associate the name "Associates in Eyecare" with Innovation Optics business, but also causing them to believe that the businesses were one and the same. The Notis Defendants also billed for some of Innovation Optics' services, caused their prescriptions to be printed in Innovation Optics' optical, and represented to at least one insurance company that they owned a majority interest in Innovation Optics' Union location. (P366a, P784a).

NJ Retina Offers to Buy Associates in Eye Care

Unbeknownst to Greenberg, beginning no later than 2016, Notis began having discussions with NJ Retina about the potential sale of his practice—including his portion of the enterprise at the shared location in Union Township. (P283a, P779a). Notis' discussions with NJ Retina continued "regarding the possible purchase of the assets of his practice Corey M. Notis MD PA at his two office locations: 900 Stuyvesant Avenue and in Union, New Jersey and 155 Morris Avenue in Springfield Township, New Jersey." (P283a).

In March 2019, Notis' discussions with NJ Retina culminated in a letter of intent (the "LOI") sent from NJ Retina to Dr. Notis with an offer to purchase his practice. (P283a, P749a-P755a). The LOI specifically stated that Notis would be provided with a credit for the establishment of an "Optical Start Up" in Union, despite the fact that there was an existing optical shop—Plaintiffs'—located next to, and integrated as a part of, the Union office. (P755a). In other words, NJ Retina's offer to purchase Notis' practice specifically contemplated that a new optical shop would be opened in place of Innovation Optics. Summary Judgment was granted before Plaintiffs could explore this issue in discovery, but given the fact that talks between Notis and NJ Retina had been proceeding for several years, the LOI specifically refers to NJ Retina's "due diligence," and NJ Retina's offer was for millions of dollars, it is difficult to

believe that NJ Retina was not aware of the existence of Plaintiffs' optical shop. (P749a-P750a).

Notis Defendants Demand that Greenberg Vacate His Business

Greenberg learned of the discussions between Notis and NJ Retina in December 2018, at a meeting with Associate in Eye Care's practice manager. (P389a-P390a). At that meeting, Greenberg was abruptly informed that—after more than two decades as part of an integrated business—Greenberg would need to vacate the premises in two months' time so that the Notis Defendants could open their own optical shop in the space vacated by Greenberg. (P389a). To add insult to injury, the Notis Defendants asked to purchase Innovation Optics' furniture so it would appear to the customers that there was no change in the optical practice. (Id.).

The Notis Defendants Open a Competing Optical Next Door

The Notis Defendants did eventually open an Optical in Union, NJ, but not until January 2021—twenty-two months after it was mentioned in NJ Retina's LOI and two years after Innovation Optics was informed it was being asked to leave the building. (P345a). When it did so, the Notis Defendants' opened their "optical start up" right next door to Innovation Optics' Union location—mere inches away from Plaintiffs' business. (Id.). This meant that for a significant period of time, Innovation Optics' customers saw two

competing optical practices, located inches away from each other, both with the name "Associates in Eyecare" on the door. (Id.; P369a).

On March 29, 2019, Innovation Optics served the Notis Defendants with a cease and desist letter, demanding that they terminate all efforts to interfere with Innovation Optics' business, in light of their mutual agreements and pre-existing business relationships. (P400a-P402a). The actions continued and Plaintiffs filed this action on September 24, 2019.

LEGAL ARGUMENT

As demonstrated in the Points below, reversal and remand are necessary to correct and redress several critical errors made by the Trial Court in deciding NJ Retina's motion for summary judgment, as well as in the subsequent application for fees and in Plaintiffs' motion for reconsideration of the earlier orders. In Point I below, Plaintiffs demonstrate that the Trial Court's dismissal of Plaintiffs' tortious interference claim was predicated on its erroneous belief that a subsequent transaction was a necessary element of this tort. The legal definition of tortious interference does not hinge on the completion of a transaction, but rather on the wrongful and intentional acts that disrupt a business relationship or potential economic advantage. This Point further demonstrates that the Trial Court's decision to grant summary judgment before

depositions and before Plaintiffs had an opportunity to prove their case was premature.

Point II addresses the Trial Court's award of sanctions against Plaintiffs. In this Point, Plaintiffs demonstrate that the award of sanctions here was an abuse of discretion because (A) it was "based upon consideration of irrelevant or inappropriate factors," and "amounted to a clear error of judgment," in that the absence of a "subsequent transaction" does not render the claim frivolous, because there is no such requirement anywhere in the case law; (B) the Trial Court failed to articulate sufficiently detailed findings of fact and conclusions of law to support its sanctions orders; and (C) the Trial Court imposed sanctions without a specific and justified finding of "bad faith" on the part of Plaintiff—a necessary finding if, as the Court held, the sanctions would apply to Plaintiffs only, and not their counsel.

POINT I

THE SUMMARY JUDGMENT ORDER DISMISSING PLAINTIFFS' TORTIOUS INTERFERENCE CLAIM WAS BASED UPON A BASIC MISUNDERSTANDING OF THE LAW OF THAT TORT (P1a-P2a, 1T 21:5-25:8)

Because the propriety of the Trial Court's order on summary judgment is a legal, not a factual question, the review of a summary judgment order is *de novo*. See Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). In considering an appeal of an order granting summary judgment, the appellate court utilizes

the same standard as the trial court on the same motion record. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); see also Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). When "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, shows no genuine issues of material fact, then "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). On appeal, as is the case below, the Court must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). Appellate review affords no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018).

A. The Trial Court Erred by Requiring a Transaction Between NJ Retina and the Notis Defendants Because a Subsequent Transaction Is Not an Element of the Tort

In deciding NJ Retina's motion for summary judgment, the Trial Court assumed that because no final transaction ever commenced between Notis and NJ Retina, there was no cognizable legal theory under which NJ Retina could be held liable to Plaintiffs. Tortious interference, however, does not require the

completion of any transaction, but rather focuses on the improper actions taken to disrupt a potential economic advantage or business relationship.

The Trial Court's preoccupation with whether or not a transaction occurred between NJ Retina and the Notis Defendants—a conclusion the Trial Court had begun to assert long before any evidence or briefing on the issue was presented to it (1T 22:9-13)—caused the Trial Court to ignore the necessary elements of Plaintiffs' claims. As noted above, Plaintiffs asserted that NJ Retina tortiously interfered with their contracts with the Notis Defendants and their prospective economic relationships. To establish that claim, Plaintiffs would need only to show:

(1) a "protectable right—a prospective economic or contractual relationship";

(2) interference that "was done intentionally and with 'malice'";

(3) "there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits"; and

(4) "the injury caused damage."

Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989) (citations omitted). In its reasoning for its Summary Judgment Order, the Trial Court held that, as to the first element, "[h]ere, as far as I'm concerned, it's undisputed that plaintiffs and that Dr. Notis had a business relationship that was

mutually beneficial since 2002." (1T 25:5-8). The Trial Court, however, did not address any of the remaining elements of the claim, instead continuing:

> However, I don't – I – I just – I don't understand how there can be a theory that the – that the de – defendant herein that's the moving party in this case could have possibly in- -- interfered with the tortious relationship [*sic*], given the fact there was no transaction that took place.

(1T 25:8-13). However, the existence of a subsequent transaction is not a required element in a cause of action for tortious interference.

To the best of our knowledge, no court has ever held that the existence of a subsequent transaction, or even a financial benefit to the interferer, is a required element of a claim for tortious interference. Indeed, just the opposite is true. In case after case, courts have found such claims to not only be not frivolous, but indeed actionable. See Van Horn v. Van Horn, 56 N.J.L. 318, 323 (E. & A. 1894) (holding that the defendant tortiously interfered with the plaintiff's business by making false statements concerning the plaintiff, which resulted in the plaintiff's supplier terminating its business with the plaintiff, with no economic benefit to the defendant); Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 222-23 (Sup. Ct. 1942) (finding that agents of the defendant tortiously interfered with the plaintiff's employment by making false statements about the plaintiff despite the lack of economic benefit conferred upon the defendants); DiMaria Constr., Inc. v. Interarch, 351 N.J. Super. 558,

570 (App. Div. 2001) (affirming jury verdict finding that the defendants tortiously interfered with the plaintiff's construction project out of personal interest and without economic benefit to the defendants); Daruwala v. Merchant, No. A-1310-13T3, 2015 WL 6829646, at *9 (N.J. App. Div. Nov. 9, 2015)[11] (reversing dismissal of tortious interference with contract claim where the plaintiff's employer failed to renew the plaintiff's employment for the following year after the receipt of the defendant's defamatory phone call, even though the interfering party did not realize any form of benefit as a result of its actions).[12]

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[11] As to all unpublished opinions cited herein, we are aware of no contrary unpublished opinions. R. 1:36-3. Copies of this cases are provided in Plaintiffs' appendix.

[12] See also Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1169-70 (3d Cir. 1993) (finding that the actions of the defendant directly resulted in franchisees abandoning their contracts with the plaintiff, a quick-lube franchisor, and finding that whether the exiting-franchisees ultimately signed franchise agreements with the defendant was of no consequence); Varrallo v. Hammond Inc., 94 F.3d 842, 848-49 (3d Cir. 1996) (finding that the plaintiff set forth facts to establish that the defendant tortiously interfered with his employment by carrying out various wrongful acts for personal motives, and not business purposes); ADP, LLC v. Ultimate Software Grp., Inc., No. 16-8664, 2018 WL 1151713, at *1, *6 (D.N.J. Mar. 5, 2018) (holding that action of mailing threatening letters to employees constituted sufficient ground for counterclaims for tortious interference regardless of whether letter-sender reaped an economic benefit as a result of its interference); ThermoLife Int'l LLC v. Connors, No. 2:13-4399, 2014 WL 1050789, at *3 (D.N.J. Mar. 17, 2014) (finding that the plaintiff had properly pleaded claims for tortious interference where defendant did not realize any economic gain from its interference); Murray v. Cty. of Hudson, No. 17-2875, 2018 WL 3000333, at *5-6 (D.N.J. June 15, 2018) (finding that although the defendants did not earn a financial benefit from their actions, a tortious interference claim existed where they knowingly took deliberate action or permitted

Each of these cases support the proposition that the existence of a subsequent transaction, or even an economic benefit to the interferer, is not a required element of a claim for tortious interference. And a rule that required a "subsequent transaction" would make no sense whatsoever. Such a rule would mean that an intentional tortfeasor could be excused for inducing another to breach a contract with a third party so long as it also broke the promises it made to induce the breaching party to breach. Under the Trial Courts' analysis, two wrongs would always make a right.

B. There Were Genuine Issues of Material Fact with Respect to Each Element of Plaintiffs' Tortious Interference Claims

In this case, Plaintiffs alleged both that NJ Retina tortiously interfered with Plaintiffs' contracts with the Notis Defendants and with Plaintiffs' prospective economic relationships. (P111a-P115a). The elements for these claims are largely coextensive: (1) the existence of some "protectable right—a prospective economic or contractual relationship"; (2) interference with that relationship that "was done intentionally and with 'malice,'" meaning only that the "harm was inflicted intentionally and without justification or excuse"; (3) "there was a reasonable probability that the victim of the interference would

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deliberate actions to occur against the plaintiffs for the purpose of causing them harm at work and to their business).

have received the anticipated economic benefits" and (4) "the injury caused damage." Printing Mart-Morristown, 116 N.J. at 751-52 (citations omitted).

Under a tortious interference claim, whether an act was done "intentionally and without justification or excuse" does not require subjective ill will, but rather requires "an evaluation of the nature of and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and the interference, and the relationship between the parties." Main St. at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 152 (App. Div. 2017) (quoting Nostrame v. Santiago, 213 N.J. 109, 122 (2013)).

Here, the facts support the existence of each element of the tort: It was, in the trial court's words "undisputed that plaintiffs and that Dr. Notis had a business relationship that was mutually beneficial since 2002" (1T 25:5-8); there was every reason to believe (and there still is)[13] that, having made a multimillion dollar offer to purchase the Notis Defendants' business, a sophisticated party such as NJ Retina did so knowing about the existence of the optical that was on the premises; and the offer unquestionably caused the rupture of that nearly 20-year "mutually beneficial" relationship, thereby damaging plaintiffs. The Trial

[13] Although the Trial Court declined to reconsider the Summary Judgment Order, while ruling on the motion to reconsider, the Trial Court acknowledged "that there was some probably due diligence." (3T 21:1).

Court's focus on whether or not there was a transaction between the Defendants distracted it from the questions of disputed material fact and reasonable inferences supporting Plaintiffs' claim, including:

- That NJ Retina "engaged in preliminary discussions with [Dr. Notis] . . . at his two office locations: 900 Stuyvesant Avenue in Union, New Jersey . . . ." (P283a, P750a, P779a).
- That NJ Retina provided a letter of intent to Dr. Notis that included an adjustment (i.e., an expense that did not lower the value of the practice) to EBITDA for "Union NJ Optical Start Up," thereby acknowledging that their offer contemplated a new optical shop to replace Plaintiffs'. (P755a).
- That the LOI was explicitly based upon "the due diligence we have conducted to date based on the information that [the Notis Defendants] have provided," including, one can infer, regarding the "Union NJ Optical Start Up." (P750a).
- That, in defense of this action, NJ Retina had stated that it had no "familiarity" with or "communications . . . regarding" Plaintiffs, but explicitly did not state that NJ Retina was unaware that there was an independently owned optical shop in the building. (P284a).

- That conversations between NJ Retina and the Notis Defendants continued even after NJ Retina would have been aware of Plaintiffs and the claims they asserted. (P757a, P759a, P762a, P764a, P766a, P768a).

As discussed below, at the very least, Plaintiffs should have been granted more time to complete discovery from NJ Retina. If, however, the Court chose to decide the motion prior to the close of discovery, these facts establish a genuine issue of material fact as to each of the elements of tortious interference.

The Trial Court compounded its error by dismissing Plaintiffs' conspiracy claim solely because the Trial Court had decided that Plaintiffs could not establish their tortious interference claims. (See 1T 23:24-24:16, 25:24-26:6 ("[S]imilarly, . . . there's no conspiracy here. . . . There's nothing unlawful . . . that's been alleged or . . . certainly proven thus far in discovery that they did anything that was unlawful, other than trying and . . . buying another business.")). Accordingly, because the tortious interference claim should have survived summary judgment, so, too, should have the conspiracy claim—which had also previously survived a motion to dismiss. See, e.g., Main St. at Woolwich, LLC, 451 N.J. Super. at 152–53 ("On remand, if plaintiffs have sufficiently pled claims for tortious interference . . . [it] may serve as the underlying tort required for a claim for civil conspiracy.").

C. Necessary Discovery Was Still Actively On-Going at the Time the Trial Court Entered Summary Judgment

"Generally, summary judgment is inappropriate prior to the completion of discovery." Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988)). "When 'critical facts are peculiarly within the moving party's knowledge,' it is ***especially*** inappropriate to grant summary judgment when discovery is incomplete." Velantzas, 109 N.J. at 193 (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981), overruled on other grounds by Brady v. Dep't of Pers., 149 N.J. 244 (1997)) (emphasis added). Upon a motion for summary judgment if "discovery on material issues is not complete[,] the respondent must . . . be given the opportunity to take discovery before disposition of the motion." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.3 on R. 4:46-2; see also Lenches-Marrero v. Law Firm of Averna & Gardner, 326 N.J. Super. 382, 387-88 (App. Div. 1999) (holding that the "motion court should have permitted plaintiff a brief adjournment of the motion for summary judgment" in order to depose relevant witness "in light of" later-learned discovery).

Discovery in this matter was far from complete by the time the Court entered summary judgment. In fact, in the month before NJ Retina moved for summary judgment, the Trial Court had just granted an extension of the deadline

for discovery—a deadline that was set for a date that was ***over three months*** after NJ Retina filed its motion. (P270a). This is not a situation where discovery was "nearly" complete or that the facts that would be discovered were a forgone conclusion. In actuality, at the time NJ Retina filed its motion, not a single witness had been deposed. In fact, on the day NJ Retina filed its motion, a motion to compel further document discovery was also pending. (P273a-P274a, P421a-P422a). While "[a] motion for summary judgment is not premature merely because discovery has not been completed," the types of information that have yet to be collected are relevant to the Court's determination of the motion. See, e.g., Friedman v. Martinez, 242 N.J. 449, 472–73 (2020) (citations omitted).

As explained above, under a tortious interference claim, whether an act was done "intentionally and without justification or excuse" does not require subjective ill will, but rather requires "an evaluation of the nature of and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and the interference, and the relationship between the parties." Main St. at Woolwich, LLC, 451 N.J. Super. at 152 (quoting Nostrame, 213 N.J. at 122). However, "when motive, intent and the credibility of witnesses are involved"—i.e., the necessary elements of a tortious interference claim—

judgment on the papers is inappropriate:

> It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

G & W, Inc. v. Borough of E. Rutherford, 280 N.J. Super. 507, 514 (App. Div. 1995) (quoting Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962)); see also Jones v. Jones, 242 N.J. Super. 195, 206 (App. Div. 1990) ("[W]e have repeatedly held that issues hinging upon a party's mental state are not appropriate for resolution by way of summary judgment."); see generally Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.2 on R. 4:46-2.

This is precisely the type of evidence Plaintiffs were prevented from obtaining prior to judgement being entered on their claims. Instead of giving Plaintiffs an opportunity to depose NJ Retina witnesses, the Trial Court, after having just extended the discovery end date, entered the Summary Judgment Order against Plaintiffs because they had not collected the information the Court wanted to see as quickly as it would have liked. Indeed, the Trial Court later mused that, if it were in Plaintiffs' shoes, it would do exactly what it prevented Plaintiffs from doing:

> [A]t that point I said, well, I would expect that what you would do is at least just take a deposition of NJ Retina ask them the Watergate question, what did you know and when did you know it[,] and then

> I think you'll be able to make an informed decision on whether -- whether they should be let out or not.

(3T 21:21-22:2). Plaintiffs expected to do that too. Depositions of NJ Retina witnesses would not have been a fishing expedition or merely an attempt to salvage Plaintiffs' claims either. Rather, they would have directly addressed NJ Retina's knowledge of Innovation Optics' optical shop at the time it offered a LOI that explicitly included an expense for the "Union NJ Optical Start Up." "Where a party, opposing a motion for summary judgment, is unable to file supporting affidavits because the critical facts are peculiarly within the moving party's knowledge, the motion should be denied until the opposing party has had an opportunity to complete discovery." Martin, 179 N.J. Super. at 326.

Ultimately, the premature decision to grant summary judgment effectively denied Plaintiffs the ability to uncover and present the vital evidence needed to demonstrate the malice and lack of justification behind NJ Retina's actions—elements central to their tortious interference claim. Given the significant gaps in discovery, particularly in light of the nature of the evidence needed for a tortious interference claim, it is essential that this Court reverse and remand the Trial Court's Summary Judgment Order.

POINT II

THE TRIAL COURT'S SANCTIONS ORDERS SHOULD BE REVERSED BECAUSE (A) THEY WERE BASED UPON THE CONSIDERATION OF IRRELEVANT OR INAPPROPRIATE FACTORS; (B) WERE NOT SUPPORTED BY PROPER FINDINGS OF FACT, AND (C) FAILED TO CONSIDER WHETHER THERE WAS PROOF OF BAD FAITH (P18a-P19a, P35a-P36a, 2T 13:21-19:1, 3T 19:22-25:5)

An award of sanctions and order for reconsideration are reviewed pursuant to the abuse of discretion standard. United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 390 (App. Div. 2009); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Accordingly, a trial court's discretionary order should be overturned if the order "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (citing Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002)).

Because a fee-shifting request acts as an exception to the American Rule, "whereby litigants are expected to bear their own counsel fees," our courts "have approached fee-shifting requests under the Frivolous Litigation Statute and Rule 1:4-8 restrictively." Bove v. AkPharma Inc., 460 N.J. Super. 123, 147 (App. Div. 2019). Sanctions are to be awarded only in "exceptional cases." Id. at 151 (citation omitted). Accordingly, a complaint is frivolous only "when no rational

argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable." Id. at 148. Further, sanctions are inappropriate "[w]hen the [non-prevailing party's] conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim." Id. at 151 (second alteration in original) (citation omitted). Indeed, "[w]here the pleading party had an objectively reasonable and good faith belief in the merits of the claim, attorney's fees will not be awarded." Id. at 152. Importantly, "a grant of a motion for summary judgment . . ., without more, does not support a finding that the [non-prevailing party] filed or pursued the claim in bad faith." Id. (alteration in original) (citation omitted). Further, "'[t]he burden of proving that the non-prevailing party acted in bad faith' is on the party who seeks fees and costs." Id. at 151.

A. The Sanctions Orders Should Be Reversed Because They Were "Based upon Consideration of Irrelevant or Inappropriate Factors and Amount to a Clear Error in Judgment"

In this case, Plaintiffs' claims were not frivolous. The imposition of sanctions based solely on the absence of a transaction subsequent to the alleged interference reveals not only a misunderstanding of both the nature of the tortious interference claim, as discussed above in Point I.A., but also the legal standards governing frivolous litigation. At the time of filing, from Plaintiffs' perspective, this appeared to be (and still appears to be) a classic case of tortious

interference: Plaintiffs had a long-standing relationship with the Notis Defendants (3T 20:3-19; see also P354a-P356a, P366a-P369); that relationship ended (3T 20:17-19; see also P356a-P357a); and Greenberg was told that this relationship was ended because a potential sale to NJ Retina (P389a). The only missing element (NJ Retina's knowledge and intention) remains solely in NJ Retina's possession, but the abrupt nature of the relationship's end, the "credit" for a new optical in Plaintiffs' place, and the fact that NJ Retina conducted due diligence which must have alerted it to Plaintiffs' presence, (P750a-P755a), lead to the reasonable inference that the conduct was not sanctioned by the "rules of the game" to which Plaintiffs were accustomed. See, e.g., Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 198-99 (App. Div. 1995) (identifying elements of claim); Printing Mart-Morristown, 116 N.J. at 757 (citations omitted) ("In other words, was the interference by defendant 'sanctioned by the 'rules of the game.'" There can be no tighter test of liability in this area than that of the common conception of what is right and just dealing under the circumstances."). These facts have never been disproven, nor would learning that a transaction never occurred invalidate these facts. Thus, even from the outset, Plaintiffs properly asserted their claims in the appropriate bounds of their cause of action. Their actions reflected an honest legal strategy, not an intent to harass or unnecessarily prolong litigation. Thus, it is clear that

Plaintiffs approached the claim with a reasonable belief in its validity, which should exempt them from punitive financial penalties designed for clearly baseless litigation.

A trial court's decision awarding sanctions should be overturned when it "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (quoting Masone, 382 N.J. Super. at 193). See also Bove, 460 N.J. Super. at 146 (citing same standard).

In this case, the decision to sanction Plaintiffs and their counsel hinged solely on the absence of a subsequent transaction, which is an inappropriate factor for determining the frivolousness of a tortious interference claim because a subsequent transaction is not a requirement of the claim. This is, however, the only factor that was cited by the Trial Court as the basis on which it imposed sanctions, repeatedly:

- They "had discourse between counsel that they provided a certification showing A[.] that there was . . . never any transaction, [and B.] a Letter of Intent that was never signed." (2T 14:5-8).

- "[T]he first time that I had a chance to speak to the parties and I was questioning why -- why N.J. Retina was even in the case that there was never any deal. . . ." (2T 17:18-20).
- "[O]nce the plaintiff knew that there was no deal[,] despite Mr. Berutti's feeling [that] the Court is wrong, I don't find there was any conceivable cause of action for intentional infliction -- intentional infliction -- for intentionally interfering with a prospective economic opportunity and I do find that further pursuing the litigation was frivolous." (2T 18:8-14).
- "Obviously, I do find that he had the right to bring the complaint. He had the right to do some discovery[,] but at some point I think that the litigation became frivolous in nature[.]" (2T 18:15-18).
- "They . . . ha[d] . . . these basically that you have to call conversations with NJ Retina and NJ Retina was interested in coming in and apparently buying out the practice or the assets of the Notis defendants; that there was probably due diligence and then offer was made which was rejected and so against that, I don't -- it's difficult for me to see and the same reason I've said in the past, if there was ever a commutable cause of action for this interference with the prospective

economic opportunity or in any event as I said, the transaction never took place." (3T 20:22-21:7).

Relying on the absence of a transaction alone to impose sanctions demonstrates a clear error in judgment. Indeed, the Trial Court issued both the Sanctions Order and the Reconsideration Order without applying the appropriate legal standard, and while ignoring the facts presented before it. Consequently, as the Trial Court has not articulated any other factor that went into its consideration, the decision to impose sanctions was an error in judgment and necessitates overturning the Sanctions Order and Reconsideration Order. Therefore, reversal is warranted.

B. The Trial Court Failed to Provide Sufficiently Detailed Findings of Fact and Conclusions of Law

An award of attorney's fees as a sanction under both Rule 1:4-8 and the Frivolous Litigation Statute requires detailed findings of fact and conclusions of law supporting each element of the award, as set forth in Rule 1:7–4. See Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 547 (App. Div. 2009) (reversing a Rule 1:4-8 sanction in part because the court failed "to set forth findings pursuant to Rule 1:7-4"). Indeed, findings of fact supporting a court's decision are specifically required "so that parties and the appellate courts [are] informed of the rationale underlying" the trial court's legal

conclusions. Gormley v. Gormley, 462 N.J. Super. 433, 449 (App. Div. 2019) (alteration in original). As this Court explained:

> When a prevailing party seeks sanctions against an attorney under Rule 1:4-8 and against a party under [the Frivolous Litigation Statute], it is incumbent upon the trial judge to consider the respective responsibility of each. And, under Rule 1:7-4 (a), the trial judge is required to make specific findings of facts and conclusions of law to each claim. . . . Neither the parties nor an appellate court should be required to extrapolate, from minimal remarks, the judge's justification for a sanction award. The order must be clear not only to support the conclusion, but also to identify the conduct the sanctions are designed to deter. Moreover, an analysis of the reasonableness of the fees awarded as a sanction must be stated.

Konefal v. Landau, No. A-2781-18T2, 2020 WL 2466216, at *4 (N.J. App. Div. May 13, 2020) (second and third emphasis added) (citing Savona v. Di Giorgio Corp., 360 N.J. Super. 55, 63 (App. Div. 2003); Alpert, Goldberg, Butler, Norton & Weiss, P.C., 410 N.J. Super. at 547; and City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 125 (App. Div. 2009)).

This is precisely the issue with the Sanctions Order. Indeed, the Trial Court's findings of fact and conclusions of law, as stated on the record, are wholly inadequate and essentially nonexistent. The Trial Court merely stated:

> So, the question is whether the litigation was frivolous. Again, I'm not going to go back over the whole -- the Court's reasoning at the time. . . . That's what I recall the conversation as being and of course it took two years of litigation and summary judgment motion . . . . I don't find there was any conceivable cause of action for . . . intentionally interfering with a prospective economic opportunity and I do find that further pursuing the litigation was

> frivolous. . . . He had the right to do some discovery but at some point I think that the litigation became frivolous in nature[.]

(2T 17:12-13, 18:1-2, 18:9-14, 18:17-18) (emphasis added).

The Trial Court's approach to awarding sanctions failed to meet the requisite explicit findings of fact and detailed legal conclusions as mandated by Rule 1:7-4. The vague remarks made by the Trial Court fall short of providing a clear, justified rationale for the sanctions imposed, renders the decision procedurally deficient and denies the parties a meaningful opportunity to understand or challenge the basis of the decision.

1. The Trial Court's Opinion Fails to Specifically Identify at What Point the Tortious Interference Claim Allegedly Became Frivolous

As this Court has made clear, "reasonable fees may be awarded only from that point in the litigation at which it becomes clear that the action is frivolous." Bove, 460 N.J. Super. at 150. Critically, however, the Trial Court never stated at what point the tortious interference claim suddenly became frivolous, or what information became available to Plaintiffs to render it so.

It cannot be the point at which Plaintiffs supposedly learned that there was no transaction, because the Court denied NJ Retina's motion to dismiss on January 2, 2020, even though that motion contained a certification from Rick Turk (thus effectively turning the motion into one for summary judgment), which specifically stated that there was no transaction. (P260a-P262a). See

United Hearts, L.L.C., 407 N.J. Super. at 394 (finding that case that survived summary judgment motion could not have been frivolous before that time). Nor could it be simply at the point at which NJ Retina produced documents. See id. at 392 (holding that "[a]though Zan's counsel insisted that these documents showed that there was no factual or legal basis to plaintiff's claims, the production of the documents did not render the complaint frivolous" because counsel "was not obligated at that stage of the proceedings to accept the documents and the statements contained therein at face value"). So what additional information could there be that suddenly rendered the action frivolous? The Court's decision does not say.

2. The Trial Court Failed to Provide Sufficient Findings of Fact Concerning the Appropriate Amount of the Sanction

"To award attorney's fees pursuant to Rule 1:4–8(d)(2), the court must set forth findings pursuant to Rule 1:7–4 that reasonable attorney's fees were actually incurred as a direct result of a frivolous claim as opposed to imputed." Est. of Finnegan v. Finnegan, No. A-1589-13T2, 2014 WL 7506758, at *5 (N.J. App. Div. Jan. 12, 2015). Indeed, "[t]o this end the first inquiry of the court should be into the hours spent by the attorneys." Rendine v. Pantzer, 141 N.J. 292, 337 (1995). A court must calculate the "lodestar," i.e., "the number of

hours reasonably expended multiplied by a reasonable hourly rate." Id. at 334-35.

Furthermore, an analysis of the reasonableness of an attorney fee awarded as a sanction must be stated on the record. See, e.g., City of Englewood, 406 N.J. Super. at 125 (citation omitted) (holding that a Trial Court must analyze the relevant factors and "state its reasons in the record for awarding a particular fee"); R.M. v. Supreme Court of N.J., 190 N.J. 1, 12-13 (2007) (vacating and remanding counsel fee award where lower court failed to explain how or why it arrived at award); Feliciano v. Faldetta, 434 N.J. Super. 543, 549 (App. Div. 2014) (requiring courts to make findings on each element of the lodestar fee).

Such findings are nonexistent in the Sanctions Order. The Trial Court failed to offer any detailed analysis as to the number of hours worked or hourly fee charged by NJ Retina's counsel, or what the lodestar fee should be in this case. Instead, the Trial Court merely eyeballed NJ Retina's submission and noted in passing:

> I think the laboring [oar] in the litigation has gone to the [Notis] defendants more so to N.J. Retina, but still, they have to at the very least stay in and monitor and represent their client's interest . . . and I've looked over the certification, the hours are reasonable for the type of attorneys that are working in the case in this area in this expertise and I think they're entitled to at least 50 percent of the fees that they suffered in this case.

(2T 18:3-7, 18:19-23) (emphasis added). Did the Trial Court find the time devoted to the action reasonable, but the rates charged to NJ Retina twice what a reasonable rate would be? Or, did the Trial Court find the hourly rate reasonable, but the actual time spent unreasonable? Since the Trial Court omitted any determination of when the claim became frivolous, which fees were or were not included in its Order, and whether those fees were reasonable, Plaintiffs cannot tell and are deprived of an opportunity to fully evaluate the effect of the Orders. The closest the Trial Court came to actual findings was its holding that the claim became frivolous "at some point." That obviously does not cut it and reversal is necessary.

C. The Trial Court Erred by Awarding Sanctions Against Plaintiffs Without a Specific Finding of "Bad Faith"

As discussed above, upon reconsideration, the Trial Court did not alter the amount of the sanction or the basis therefor, but determined that the sanction should be directed at Plaintiffs only, and not at their attorneys. (3T 22:15-23:17). Although the Trial Court never spelled it out, because the Frivolous Litigation Statute is directed to parties, and Rule 1:4-8 is directed only to attorneys, the sanctions award must have been made pursuant to the Frivolous Litigation Statute.

An award pursuant to the Frivolous Litigation Statute "require[s] proof of bad faith" because "clients generally rely on their attorneys to evaluate the basis

in law or equity of a claim or defense[].” Bove, 460 N.J. Super. at 151 (emphasis added) (quoting Ferolito v. Park Hill Ass’n, Inc., 408 N.J. Super. 401, 408 (App. Div. 2009)). Thus, where the award of sanctions “is based on an assertion that the non-prevailing party’s claim lacked ‘a reasonable basis in law or equity’” (as is the case here) “‘an award cannot be sustained if the [non-prevailing party] did not act in bad faith in asserting or pursuing the claim.’” Id. (alteration in original; quoting Ferolito, 408 N.J. Super. at 408); see also Borough of Englewood Cliffs, v. Trautner, No. A-2765-21, slip op. at 27-28, 2024 WL 1708605, at *9 (N.J. App. Div. Apr. 22, 2024) (approved for publication) (citation omitted) (stating that award of sanctions cannot be sustained without proof of bad faith “when the non-prevailing party is represented by an attorney”). The recognized presumption is that the client was relying on the attorney, not the other way around.

However, here, the Trial Court got the requirements and analysis backwards:

> The law presumes that the lawyer is acting on behalf of the client and with the client’s instructions and acquiescence . . . . [I]t’s the client’s responsibility to . . . retain the lawyer to pursue the litigation and it’s the lawyer’s responsibility to determine the strategy with I’m sure the consultation with the client and that has always been the case and as Mr. Latzer [NJ Retina’s counsel] says there was a 1:4-8 letter. I have no doubt that Mr. Berutti [Plaintiffs’ former counsel] relayed that 1:4-8 letter to plaintiff.

> I have no doubt that they discussed what that meant. I imagine that Mr. Berutti also discussed my comments as to whether NJ Retina should be in the case or not and despite all of that it went forward.
>
> But the responsibility is on the client, not the lawyer and so the award of fees is as to the plaintiff, not to the plaintiff's counsel.

(3T 22:20-23:12) (emphasis added). Not only does the Trial Court apply this presumption backwards, but in laying out its findings, it explicitly specifies that its findings are *based entirely on assumptions and imagination*. All of this is simply speculation about what Plaintiffs knew and what their counsel told them, and is obviously not proof of bad faith.

In fact, nothing even vaguely referenced by the Trial Court or NJ Retina (who has the burden of establishing bad faith, see Ferolito, 408 N.J. Super. at 408) amounts to a showing of "bad faith." There is no suggestion whatsoever that Plaintiffs were motivated by anything other than a desire to press their case on an issue of importance to them, or that they did anything other than rely on the advice of their counsel. See Ferolito, 408 N.J. Super. at 411 (finding client "motivated by a goal of great importance to him" and not by "any hostility or ill-will" did not act in bad faith). All that NJ Retina has been able to show is that Plaintiffs ***might*** not succeed on their claim (if granted proper discovery). That is not sufficient. See Tagayun v. AmeriChoice of New Jersey, Inc., 446 N.J. Super. 570, 579–80 (App. Div. 2016) (citation omitted) ("The statute should not be allowed to be a counterbalance to the general rule that each litigant bears

his or her own litigation costs, even when there is litigation of 'marginal merit.'"). Likewise, in the absence of any factual findings from the Trial Court, all that can be determined from its Reconsideration Order is that it agrees with NJ Retina: Plaintiffs might not succeed on their claim. That is likewise insufficient. Id. at 580 (citing Ferolito, 408 N.J. Super. at 408). Thus, the award of sanctions pursuant to the Frivolous Litigation Statute was clear error and should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Summary Judgment Order and Sanctions Order and remand to the lower court for further adjudication.

WEINER LAW GROUP LLP
Attorneys for Plaintiffs/ Appellants, Innovation Optics, Inc. and Alan Greenberg

Dated: April 25, 2024

By:_____
Paul S. Grossman, Esq.

SUPERIOR COURT OF NEW JERSEY

INNOVATION OPTICS, INC. and ALAN GREENBERG,

Plaintiffs-Appellants,

v.

ASSOCIATED RETINAL CONSULTANTS LLC d/b/a NJ RETINA,

Defendant-Respondent,

and

COREY M. NOTIS, M.D., P.A. d/b/a ASSOCIATES IN EYE CARE, COREY M. NOTIS, M.D., RIVER CITY EYE ASSOCIATES LLC, ASSOCIATES IN EYECARE OPTICAL, CHRISTOPHER SANCHEZ, ABC COMPANIES 1-20, said names being fictious, and JOHN DOES 1-50, said names being fictitious,

Defendants.

APPELLATE DIVISION
DOCKET NO. A-001468-23

Civil Action

On Appeal From the Superior Court of New Jersey, Law Division, Union County

Docket No. UNN-L-3354-19

Sat Below:

Hon. Thomas J. Walsh, J.S.C.

DEFENDANT-RESPONDENT ASSOCIATED RETINAL CONSULTANTS LLC D/B/A NJ RETINA'S BRIEF AND APPENDIX IN OPPOSITION TO PLAINTIFFS-APPELLANTS' APPEAL

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Associated Retinal Consultants LLC d/b/a NJ Retina ("NJ Retina") respectfully submits this brief in opposition to the appeal of Innovation Optics, Inc. and Alan Greenberg (together, "Plaintiffs").

INTRODUCTION

Plaintiffs employed a quintessential "file-first-and-ask-questions-later" approach to litigation, which caused NJ Retina to unnecessarily incur more than $150,000 in attorneys' fees defending against claims that Plaintiffs never had *any* legal or factual basis to pursue. The trial court correctly granted summary judgment in NJ Retina's favor and appropriately exercised its discretion in sanctioning Plaintiffs for their continued pursuit of frivolous claims. The trial court's decisions should be affirmed in all respects.

Plaintiffs' claims against NJ Retina were wholly predicated on a single innocuous allegation in their Complaint – namely, that plaintiff Alan Greenberg ("Greenberg") "was approached by Brill, an employee of defendant Associates in Eyecare, and was advised that defendant Dr. [Corey M.] Notis was going to sell his practices and real estate for $10,000,000 . . . to defendant NJ Retina[.]" Based *solely* on this allegation, Plaintiffs accused NJ Retina of wrongfully interfering with their alleged "de facto" partnership/joint venture relationship with Dr. Notis and his related entities (the "Notis Defendants"). Apparently

Plaintiffs theorized that *if* Dr. Notis did, in fact, complete a sale to NJ Retina, then such a sale could be the predicate for claims against NJ Retina.

But of course at the time they filed their Complaint, Plaintiffs admittedly had *no idea* if a sale had occurred and had *no idea* whether NJ Retina somehow had knowledge of Plaintiffs' alleged "de facto" partnership/joint venture relationship with Dr. Notis. To be sure, the Complaint does not include either of these allegations. Nor did Plaintiffs have any basis, whatsoever, to conclude that NJ Retina had done something wrong *even if a sale had occurred*. Indeed, Plaintiffs had no idea, when they filed their Complaint, whether NJ Retina and Dr. Notis had even *spoken* about Plaintiffs, let alone wrongfully interfered with their alleged "de facto" partnership/joint venture relationship.

From the outset of the case and thereafter NJ Retina presented Plaintiffs with irrefutable evidence -- from sworn certifications to contemporaneous communications between NJ Retina and the Notis Defendants -- which confirmed that NJ Retina did not enter into a transaction with Dr. Notis and had done nothing wrong. In fact, Dr. Notis did not even sign a letter of intent. Plaintiffs, however, refused to dismiss their Complaint. All the while, Plaintiffs repeatedly acknowledged, including in emails and court filings, what was apparent from the Complaint: Plaintiffs did not have *any* basis for suing NJ Retina in the first place. In fact, even on this appeal, Plaintiffs concede that they

filed tortious interference claims against NJ Retina even though NJ Retina's "knowledge" and "intention" were "*missing element[s]*" of Plaintiffs' claims.

Despite all of this, Plaintiffs go so far as to ask this Court to reverse the trial court's rulings to afford them an opportunity to *continue* pursuing frivolous claims against NJ Retina. Plaintiffs' appeal rests largely on a fundamental mischaracterization of the trial court's ruling: the trial did *not* rule that a tortious interference claim is unsustainable, as a matter of law, in the absence of a "subsequent transaction" between the alleged tortious interferer and its co-defendant. Rather, the trial court found that the absence of a transaction between NJ Retina and Dr. Notis meant that -- *in this case* -- Plaintiffs had no basis, whatsoever, to pursue claims against NJ Retina.

The frivolousness of Plaintiffs' claims, in the absence of a transaction, is self-evident. Indeed, Plaintiffs' entire case, in the absence of a transaction, boils down to this: NJ Retina considered the purchase of assets of Dr. Notis' practice but no letter of intent was even signed. Yet, Plaintiffs brought claims against NJ Retina despite not knowing whether a transaction occurred and, worse, they dragged NJ Retina through years of litigation *after* learning that a transaction did *not* occur. In short, Plaintiffs never had a good-faith legal or factual basis to pursue claims against NJ Retina. This Court, therefore, should affirm the trial court's rulings in all respects.

COUNTERSTATEMENT OF FACTS & PROCEDURAL HISTORY

I. PLAINTIFFS FILE A COMPLAINT WHICH IS PREDICATED ALMOST EXCLUSIVELY ON A DISPUTE BETWEEN THEM AND THE NOTIS DEFENDANTS.

Plaintiffs filed their Complaint in September 2019. The Complaint was based almost exclusively on allegations arising out of the alleged "de facto" joint venture/partnership between Greenberg and Dr. Notis. (Pa50a-Pa79a).[1]

Specifically, Plaintiffs alleged various "informal arrangements" beginning in or around 2002, in which Greenberg, the owner of several optical companies, would refer his patients in need of ophthalmologic surgeries to Dr. Notis while Dr. Notis worked in Innovation Optics' Roselle Park office approximately one day per week rent free. (Pa51a-Pa52a ¶¶ 9-11). Plaintiffs further alleged that these arrangements became "more formal" once Greenberg introduced Dr. Notis to two doctors, both of whom practiced adjacent to Greenberg's office but no longer intended to perform ophthalmology surgeries. (Pa52a ¶ 12). Dr. Notis purportedly benefitted from this introduction by performing all surgeries for one of the doctor's patients. (Pa53a ¶ 15).

[1] "Pa" refers to Plaintiffs' appendix; "Pb" refers to Plaintiffs' brief; "Da" refers to NJ Retina's appendix; 1T refers to the August 6, 2021; 2T refers to the November 19, 2021 transcript; and 3T refers to the February 4, 2022 transcript.

In or around 2004, Dr. Notis allegedly convinced Greenberg to move his office from Roselle Park to a building Dr. Notis had purchased at 900 Stuyvesant Avenue, Union, New Jersey. (Pa53a ¶¶ 16-17). Prior to the relocation, Dr. Notis allegedly promised Greenberg that he would "not abandon [Greenberg] for any reason once the move was made," on account of Dr. Notis' alleged receipt of Greenberg's customer list. (Pa53a ¶¶ 20-21). According to Plaintiffs, Dr. Notis and Greenberg discussed combining their practices within the building in a manner resembling the relationship Greenberg had had with Drs. Friedman and Shoenfeld. (Pa53a ¶ 18). Plaintiffs alleged that once Greenberg moved his office to 900 Stuyvesant Avenue, Dr. Notis required Innovation Optics to pay rent at "far greater than market [value]" to Defendant River City, a company allegedly owned by Dr. Notis. (Pa54a-Pa55a ¶¶ 24, 26). The practices of Innovation Optics and Associates in Eyecare ultimately became "combined for many purposes" as a result of the purported informal arrangement between Dr. Notis and Greenberg. (Pa54a ¶ 22).

In or around 2014, Associates in Eyecare allegedly opened a second practice in Springfield, New Jersey. (Pa55a ¶ 27). Prior to the opening, Dr. Notis allegedly promised Greenberg "that he would be able to run the Springfield store, would be able to hire opticians, would earn the profits at that store, and would pay rent to the landlord . . . ." (Pa59a ¶ 51). "After Mr.

Greenberg had taken affirmative steps to [begin] the process of opening such new store[,]" however, Dr. Notis allegedly told Greenberg that "'they are going in a different direction' and, thus, cut Mr. Greenberg out of the very profitable and valuable Springfield optical practice . . . ." (Pa60a ¶ 52).

Plaintiffs also alleged that Dr. Notis falsely held himself out to Vision Services Plan, a large insurer of optometric services in the United States, as owning at least 51% of the Innovation Optics business so as to satisfy Vision Services Plan's requirements that an ophthalmologist and/or ophthalmology practice own at least 51% of any optical practice which was vending to insureds of Vision Services Plan. (Pa56a, Pa57a, Pa58a ¶¶ 34, 38, and 42).

II. PLAINTIFF'S BARE BONES ALLEGATIONS AGAINST NJ RETINA

NJ Retina was not referenced for the first time substantively until paragraphs 44 and 45 of the Complaint, wherein Plaintiffs alleged that Greenberg was approached by an individual named "Brill," a purported employee of Associates in Eyecare, who allegedly advised Greenberg that Dr. Notis planned to sell his practice and real estate for $10,000,000.00 to NJ Retina, "or a related entity, ABC Companies 1-20." (Pa58a ¶¶ 44-45). Plaintiffs further alleged that NJ Retina, "and/or John Does 1-50, and/or ABC Companies 1-20, intend to own the optician practice at Stuyvesant Avenue should they complete the purchase of defendant Dr. Notis' assets, such that the ongoing relationship

with Innovation Optics as the building's ophthalmology practice necessarily would have to be terminated." (Pa60a ¶ 53). Finally, Plaintiffs alleged in conclusory fashion -- "[u]pon information and belief" and without providing a shred of factual support -- that NJ Retina (and other defendants) "maliciously and without reasonable justification actively and/or passively encouraged, approved of, aided and abetted, and/or directed the actions of [the Notis Defendants] as related to the plaintiffs, since the parties commenced and/or completed negotiations to purchase defendant Dr. Notis's assets, which has interfered with the plaintiffs' business and has caused foreseeable harm to the plaintiffs." (Pa62a ¶ 60).

Based on these barebone allegations, Plaintiffs somehow asserted claims against NJ Retina for tortious interference with contractual relations (Counts One through Three), tortious interference with prospective economic relations (Count Five), unjust enrichment (Count Eleven), conspiracy (Count Thirteen), and declaratory judgment (Count Fifteen). (Pa62a-Pa64a; Pa65a; Pa72a; Pa74a; Pa75a).

III. NJ RETINA'S INITIAL RULE 1:4-8 LETTER AND DEMANDS FOR DISMISSAL

In response to the Complaint, NJ Retina's counsel sent Plaintiffs' counsel a letter dated October 23, 2019 (the "Initial 1:4-8 Letter") notifying him that Plaintiffs' claims against NJ Retina were frivolous within the meaning of Rule

1:4-8 and N.J.S.A. 2A:15-59.1 and demanding that they be withdrawn with prejudice. (Pa443a-Pa446a). Specifically, the Initial 1:4-8 Letter explained that NJ Retina did nothing more than engage in preliminary discussions with Dr. Notis regarding the possibility of acquiring his practice. (Pa444a). While NJ Retina sent Dr. Notis a letter of intent in March 2019 (the "Draft LOI") (approximately six months before Plaintiffs' Complaint was filed) Dr. Notis did not sign the letter, and NJ Retina had never consummated a transaction with Dr. Notis. (Pa444a).

Plaintiffs rejected NJ Retina's demand for dismissal by correspondence dated November 6, 2019. (Pa448a-Pa450a). Plaintiffs' counsel claimed that he could not dismiss NJ Retina because "no backup documentation has been provided to support your fact assertions and, obviously, no discovery has yet been conducted." (Pa448a). In response, NJ Retina provided him with a certification from its representative, Rick Turk, who confirmed under oath that NJ Retina did not enter into a transaction with Dr. Notis and had nothing to do with the dispute between Plaintiffs and the Notis Defendants. (Pa260a-Pa262a). Plaintiffs refused to dismiss the complaint despite Mr. Turk's sworn certification. (Pa452a-Pa455a).

Thereafter, on November 20, 2019, NJ Retina filed a motion to dismiss or, alternatively, for summary judgment. (Pa260a-Pa262a). NJ Retina's motion

included the same certification previously provided to Plaintiffs' counsel. (Ibid.). On January 2, 2020, the trial court entered an order denying NJ Retina's motion without prejudice. (Pa263a). The court's order did not include any explanation of why NJ Retina was not entitled to dismissal. (Pa264a). Instead, the Court set forth boilerplate law governing motions to dismiss and then stated as follows: "From the Complaint as pleaded, in accordance with the Printing Mart standard, the court finds the cause of action can be gleaned and that further discovery is warranted before a Motion To Dismiss or Motion For Summary Judgment can be granted." (Ibid.). Following the trial court's ruling, in July 2020, Plaintiffs filed an Amended Complaint which included the same allegations and claims against NJ Retina as they set forth in their initial Complaint. (Pa96-Pa129a). The Amended Complaint, however, included new allegations concerning the Notis Defendants, specifically that they had engaged in wrongdoing while the litigation was pending, (Pa110 ¶¶ 73, 75).

IV. DISCOVERY AND THE COURT'S URGING OF PLAINTIFFS' COUNSEL TO DISMISS NJ RETINA FROM THE CASE

During discovery, Plaintiffs failed to produce a single document supporting their claims against NJ Retina, and their responses to interrogatories failed to identify any facts to support their claims against NJ Retina. (Pa428a; Pa385a-Pa398a). Specifically, when asked to identify facts to support their

allegations that NJ Retina "maliciously" and "without justification" interfered with the relationship between Dr. Notis and Greenberg, Plaintiffs asserted the following boilerplate response: "Since the specifics of the negotiations, discussions, communications, and transactions between the defendants is presently unknown to the plaintiffs, the allegations described are stated on information and belief, in keeping with applicable legal principles." (Pa392a-Pa394a, Responses to Interrogatories 14-21, 23-24). Plaintiffs never amended this interrogatory response.

In October 2020, the trial court heard argument on the Notis' Defendants' motion for a protective order. (Pa429a ¶ 14). Despite the subject of the motion -- Plaintiffs' ability to obtain documents concerning Dr. Notis' finances -- the court questioned Plaintiffs' counsel on why NJ Retina was a party to the case.[2] (Ibid.). The court told him that he "must concede" that Plaintiffs have no claim against NJ Retina if Dr. Notis did not execute a letter of intent with NJ Retina. (Ibid.). The court later commented, when issuing its decision on the motion, that it was "not sure where the case is going" against NJ Retina. (Ibid.).

On November 23, 2020, NJ Retina served Plaintiffs with its written responses to document demands and interrogatories along with a production of

[2] By this time, a new judge had replaced the judge who decided NJ Retina's motion to dismiss.

documents. (Pa430a ¶ 16). Included in the document production were: (i) a copy of the Draft LOI that Dr. Notis never signed; and (ii) contemporaneous emails exchanged between Dr. Notis (or his representatives) and NJ Retina regarding their potential transaction. (Ibid.). NJ Retina also provided Plaintiffs, as part of its interrogatory responses, with sworn statements confirming once again that NJ Retina did not enter into a transaction with Dr. Notis and had nothing to do with Plaintiffs' dispute with him. (Ibid.). Several weeks after producing discovery responses, NJ Retina again demanded that Plaintiffs dismiss it from the case. (Pa430a ¶ 17). Plaintiffs, however, refused. (Ibid.).

V. NJ RETINA'S SECOND RULE 1:4-8 LETTER AND ADDITIONAL DEMANDS FOR DISMISSAL

Plaintiffs' continued refusal to dismiss NJ Retina prompted it to send a second Rule 1:4-8 correspondence to Plaintiffs' counsel on January 8, 2021 (the "Second 1:4-8 Letter"). (Pa465a-Pa467a). In the Second 1:4-8 Letter, NJ Retina demonstrated -- once again -- that Plaintiffs' claims were frivolous. (Ibid.). Once again, Plaintiffs rejected NJ Retina's demand for dismissal. (Pa469a).

VI. NJ RETINA SEEKS SUMMARY JUDGMENT BASED ON UNDISPUTED EVIDENCE SHOWING IT DID NOT ENTER INTO A TRANSACTION WITH DR. NOTIS AND HAS NOTHING TO DO WITH PLAINTIFFS' DISPUTE WITH HIM.

On June 4, 2021, Plaintiffs filed a motion seeking leave to amend their complaint (with the proposed amended complaint still containing bare-bones

allegations against NJ Retina). (Pa271). In response to the motion, on June 29, 2021, NJ Retina filed opposition and a cross-motion for summary judgment. (Pa275a).

NJ Retina's summary judgment motion included a certification from its representative, Rick Turk, which was substantially similar to the certification that Mr. Turk provided at the outset of the case when Plaintiffs' counsel requested "backup" for NJ Retina's assertion that it did not enter into a transaction with Dr. Notis and had nothing to do with Plaintiffs' dispute with Dr. Notis. Specifically, through his certification, Mr. Turk presented the following undisputed facts: NJ Retina employs medical doctors who diagnose and treat a full range of retinal disorders of the eye. (Pa282a ¶ 2). NJ Retina is affiliated with NJEye LLC ("NJEye"), which is an administrative services organization that provides support services including payer contracting, administrative, financial, legal, human resource and other non-clinical support services to affiliated eye care medical practices including NJ Retina. (Ibid.). NJEye, in coordination with NJ Retina, has been acquiring the assets of ophthalmology and retina medical practices in New Jersey and other states along the east coast. (Pa283a ¶ 4).

In early 2019, NJ Retina and NJEye engaged in preliminary discussions with Dr. Notis regarding the possible purchase of the assets of his practice,

Corey M. Notis MD PA, and its two office locations: 900 Stuyvesant Avenue in Union, New Jersey and 155 Morris Avenue in Springfield Township, New Jersey. (Pa283a ¶ 3). In March 2019, NJ Retina and NJEye sent Dr. Notis the Draft LOI with regard to the potential purchase of the assets of his medical practice. (Pa283a ¶ 4). Discussions with Dr. Notis, however, went nowhere, and Dr. Notis did not sign the Draft LOI. (Pa283a ¶ 5).

In light of Dr. Notis' rejection of NJ Retina's and NJEye's expression of interest, NJ Retina and NJEye's preliminary interest in the potential acquisition of the assets of Dr. Notis' practice never advanced beyond the preliminary interest phase in regard to the potential purchase of Dr. Notis' practice. (Pa283a ¶ 6). Indeed, NJ Retina and NJEye never consummated a letter of intent to purchase Dr. Notis' practice; NJ Retina and NJEye did not perform the typical due diligence associated with acquiring the assets of a medical practice; and NJ Retina and NJEye did not commence negotiations of nor draft any definitive purchase agreements. (Pa283a ¶ 7).

Importantly, neither NJ Retina nor NJEye had any involvement in Plaintiffs' allegedly long-standing relationship with Dr. Notis and Associates in Eyecare. (Pa284a ¶ 9). In fact, NJ Retina and NJEye had no familiarity with Innovation Optics or Greenberg or their alleged relationship with Dr. Notis until they reviewed the allegations in the Complaint. (Pa284a ¶ 10). At no time did

NJ Retina or NJEye have any communications with the Notis Defendants regarding Innovation Optics or Greenberg. (Pa284a ¶ 11). In short, NJ Retina and NJEye had nothing to do with the dispute between Plaintiffs and the Notis Defendants. (Pa284a ¶ 12).

VII. THE TRIAL COURT GRANTS NJ RETINA'S MOTION FOR SUMMARY JUDGMENT AND DISMISSES IT FROM THE CASE

Following oral argument on August 6, 2021, the trial court granted NJ Retina's cross-motion for summary judgment,[3] dismissed the complaint against NJ Retina with prejudice, and denied leave to amend as to NJ Retina.[4] (1T; Pa149).

The trial court concluded that the predicate for Plaintiffs' pursuit of claims against NJ Retina -- that NJ Retina entered into a transaction with Dr. Notis -- indisputably did *not* occur. (1T21:5-25:19). Rather, the evidence showed that NJ Retina simply "came in" and "did a little bit of an investigation" regarding purchasing the assets of Dr. Notis' practice. (1T21:16-21). NJ Retina

[3] Plaintiffs argue in passing that NJ Retina's cross-motion for summary judgment "was not a proper cross-motion." (Pb5). Rule 4:46-1, however, permits the filing of a cross-motion for summary judgment. Further, due to adjournments, Plaintiffs had more time to oppose NJ Retina's cross-motion -- in excess of 30 days -- than they would have if NJ Retina had filed a standalone motion rather than a cross-motion.

[4] Plaintiffs have not appealed the trial court's denial of their motion to amend.

"issued a notice of intent to [] purchase" the assets but the transaction "never went forward." (1T21:20-23). In fact, Plaintiffs' counsel conceded, on the record, that Dr. Notis never signed the "notice of intent." (1T11:8-9).

The trial court further determined that Plaintiffs had not alleged, let alone identified any evidence, that NJ Retina committed a wrongful or "unlawful" act. (1T26:2-6). All NJ Retina did, the trial court found, was "try[] and buy [] another business." (1T4-6). As the court further explained: "From day one it's been clear that NJ Retina came in. They made an offer for the business. This lawsuit came about. They -- they shied away and that was the end of it."[5] (1T26:18-21). In the absence of a transaction between Dr. Notis and NJ Retina, and in the absence of any allegation (let alone evidence) of wrongdoing by NJ Retina, the trial court determined that Plaintiffs' claims for tortious interference and civil conspiracy failed as a matter of law. (1T21:11-26:6).

Dismissal of Plaintiffs' unjust enrichment claim was also warranted, the trial court found, as Plaintiffs introduced "no facts whatsoever to support" their claim that they "expected remuneration from [NJ Retina] at the time [they] performed or conferred a benefit on [NJ Retina] and the failure of remuneration enriched [NJ Retina] beyond its contractual rights." (1T27:5-11).

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[5] The trial court also pointed out that NJ Retina, having never entered into a transaction with Dr. Notis, "certainly never profited" from one. (1T26:22-24).

The trial court acknowledged that discovery was not complete at the time of its ruling -- but found that further discovery was not warranted as Plaintiffs failed to demonstrate how further discovery "would effect [sic] the disposition of a claim." (1T26:17-24 ("I don't find that that standard [for further discovery] can be met at this point.")).

VIII. THE TRIAL COURT AWARDS NJ RETINA A PORTION OF THE FEES IT INCURRED IN DEFENDING AGAINST PLAINTIFFS' FRIVOLOUS CLAIMS

After prevailing on summary judgment, on August 25, 2021, NJ Retina filed a motion seeking sanctions against Plaintiffs and their counsel. (Pa423a). The trial court heard oral argument on November 19, 2021, after which it set out, in detail, the law governing a sanctions motion. (2T14:20-17-11). Applying that law to the record before it, the court found that Plaintiffs' claims against NJ Retina became frivolous once they became aware that NJ Retina had not entered into a transaction with Dr. Notis. (2T18:6-14). No "conceivable cause of action for" tortious interference (or any other claim Plaintiffs asserted) existed once Plaintiffs knew that NJ Retina and Dr. Notis never entered into a transaction. (2T18:10-15).

The court observed that it had questioned Plaintiffs' counsel, at an October 2020 conference, why NJ Retina was a party to the case in the absence of a transaction with Dr. Notis. (2T17:15-22). Nevertheless, "it took two years

of litigation and [a] summary judgment motion" before NJ Retina was ultimately out of the case. (2T18-2-3). The court found that NJ Retina was entitled to an award of 50% of the fees incurred "in defending what I do find was a frivolous cause of action against them." (2T18-22-24). Accordingly, the court granted NJ Retina's motion and awarded it $72,984.95 in fees and costs. (Pa18a).

On Plaintiffs' motion for reconsideration of the fee award, the trial court affirmed its order, except it determined the award should have been entered only against Plaintiffs, not their counsel. (Pa35a). In issuing its decision, the court reiterated the reasons why Plaintiffs' continued pursuit of claims against NJ Retina was frivolous, (3T19:22-22:14). Specifically, the court found that "from day one" (after taking over the matter from another judge) it had questioned why NJ Retina was a defendant in the case. (3T21:8-16). "[D]espite that conversation, and despite [NJ Retina's] 1:4-8 letters, [NJ Retina was] continued in [the case] for another two years until I let them out on summary judgment . . . ." (3T22:3-6). Plaintiffs pursued claims against NJ Retina, the trial court found, even though "there was never a cognizable cause of action" against NJ Retina. (3T22:7).

Although it affirmed the fee award, the court determined the award should have been entered only against Plaintiffs, not their counsel. In this regard, the court found that "[t]he law presumes that the lawyer is acting on behalf of the

client and with the client's instructions and acquiescence and strategy." (3T22:20-22). The court had "no doubt" that Plaintiffs' counsel made his clients award of NJ Retina's Rule 1:4-8 letters and of the court's comments during the October 2020 conference. (3T23:4-9). "[D]espite all of that [the case] went forward[,]" the court found, and the responsibility was on the Plaintiffs to stop it. (3T23:9-12). Plaintiffs, however, failed to do so. (3T23:9-12).

IX. PLAINTIFFS COMMENCE THIS APPEAL AFTER CONCLUDING THEIR LITIGATION WITH THE NOTIS DEFENDANTS.

After NJ Retina was dismissed from the case, Plaintiffs continued litigating the matter with the Notis Defendants. On January 15, 2024, however, Plaintiffs and the Notis Defendants entered into a Stipulation of Dismissal with Prejudice, pursuant to which Plaintiffs agreed to dismiss all of their claims against the Notis Defendants. (Pa675a). Plaintiffs then commenced this appeal of the trial court's rulings granting summary judgment in NJ Retina's favor and awarding it sanctions. (Pa238a).

LEGAL ARGUMENT

I. STANDARDS OF REVIEW

This appeal implicates two standards of review. First, this Court's review of the trial court's grant of summary judgment "is de novo, using the same legal standard as the trial court." Avis Budget Group, Inc. v. City of Newark, 427 N.J. Super. 326, 327 (App. Div. 2012), certif. denied, 213 N.J. 531 (2013).

Second, this Court reviews the trial court's fee award under an abuse of discretion standard. See Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) ("The legislature intended that judicial discretion should be used in determining an award for fees pursuant to N.J.S.A. 2A:15–59.1.").

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN NJ RETINA'S FAVOR BASED ON THE ABSENCE OF A TRANSACTION WITH DR. NOTIS AND PLAINTIFFS' FAILURE TO SET FORTH ALLEGATIONS, LET ALONE INTRODUCE EVIDENCE, THAT NJ RETINA DID ANYTHING WRONG.

Plaintiffs' entire case against NJ Retina rested on a single substantive allegation in their Complaint -- namely that Dr. Notis "was going to sell" his practice(s) and real estate to NJ Retina. (Pa58a ¶¶ 44-45). Based on this allegation alone, Plaintiffs somehow brought claims against NJ Retina for tortious interference (Counts One through Three and Five), unjust enrichment (Count Eleven), conspiracy (Count Thirteen), and a declaratory judgment (Count Fifteen).

The trial court concluded, however, that NJ Retina *never* consummated a transaction with Dr. Notis. (Pa283a; 1T11:8-9). This fact was undisputed. Instead, NJ Retina did nothing more than engage in preliminary discussions with Dr. Notis regarding the purchase of his practice. (Pa283). Accordingly, Plaintiffs' claims against NJ Retina failed as a matter of law. The trial court's

ruling makes sense from both a legal and common-sense perspective. Simply put, the conveyance of an expression of interest in a medical practice, which went nowhere (not even proceeding to an executed letter of intent) cannot be the basis of a lawsuit.

Plaintiffs' appeal focuses almost exclusively on the trial court's dismissal of their tortious interference claims. (Pb15-Pb27). That is, Plaintiffs' unjust enrichment and declaratory judgment claims were so legally unsustainable that Plaintiffs do not attempt to explain how the trial court erred in dismissing them. And, Plaintiffs pay short shrift to their conspiracy claim, arguing only that the claim should not have been dismissed because (Plaintiffs incorrectly argue) their tortious interference claim should not have been dismissed. (Pb23 ("[B]ecause the tortious interference claim should have survived summary judgment, so, too, should have the conspiracy claim[.]")).

The trial court's dismissal of Plaintiffs' tortious interference claims, however, was correct in all respects. "The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) malice—that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages." DiMaria Constr., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001), aff'd, 172 N.J. 182 (2002).

In applying these elements, the trial court homed in the absence of a transaction between NJ Retina and Dr. Notis -- and rightfully so: again, the *only* substantive allegation in the Complaint concerning NJ Retina was that Dr. Notis "was going to sell" his practice(s) and real estate to NJ Retina. (Pa58a ¶¶ 44-45). Because NJ Retina and Dr. Notis indisputably did *not* consummate a transaction, the trial court found, Plaintiffs could not establish that NJ Retina "intentional[ly] interfere[d]" with any "protected interest" that Plaintiffs may have had, nor could they show that NJ Retina caused Plaintiffs any damages.

To be clear, even assuming, *arguendo*, Plaintiffs could demonstrate that NJ Retina and Dr. Notis consummated a transaction (which of course Plaintiffs cannot), such a transaction would not amount to NJ Retina having engaged in "intentional interference without justification" of Plaintiffs' alleged "de facto" partnership with Dr. Notis. Indeed, Plaintiffs' Complaint did not allege that NJ Retina, while engaged in preliminary discussions with Dr. Notis, was even aware of Plaintiffs' alleged "de facto" partnership with Dr. Notis (because it was not). (Pa50a-Pa78a). It is axiomatic that a party cannot "intentionally interfere" with a relationship of which it is not even aware. See Major League Baseball Promotion Corp. v. Colour-Tex, Inc., 729 F. Supp. 1035, 1051 (D.N.J. 1990) ("It is a simple proposition that a person cannot intentionally interfere with a contract [or relationship] that he knows nothing about."). Nor did Plaintiffs

allege how NJ Retina's "purchase" (or Dr. Notis' alleged plan to sell to NJ Retina) caused Plaintiffs harm or damages for which NJ Retina could be liable.

The simple reality is that Plaintiffs' claims should not have survived NJ Retina's *motion to dismiss*, let alone its motion for summary judgment. Aside from their allegation about a transaction which did not happen, the Complaint contained nothing more than bald legal conclusions regarding NJ Retina. The Complaint alleged that NJ Retina "without justification, maliciously, purposely, knowingly, recklessly, and/or negligently" interfered with Plaintiffs' "de facto" partnership and/or contracts with Dr. Notis. (Pa62a-Pa64a (Counts One-Three)). It further alleged that NJ Retina "maliciously and without reasonable justification actively and/or passively encouraged, approved of, aided and abetted, and/or directed the actions of defendants Associates in Eyecare and Dr. Notis as related to the plaintiffs, since the parties commenced and/or completed negotiations to purchase Dr. Notis' assets." (Pa62a ¶ 60). Nowhere, however, did the Complaint assert any *factual* allegations to support these conclusions. It is well settled that mere labels and conclusions, without any supporting factual allegations, are insufficient to withstand a motion to dismiss. See Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998) ("[I]t is improper to assert a claim without any factual basis for that claim[.]").

In light of Plaintiffs' failure to plead factual allegations to support a tortious interference claim, it comes as no surprise that Plaintiffs failed to introduce a single piece of evidence which even remotely supported a tortious interference claim. The record contains no evidence showing, for example, that NJ Retina "intentional[ly] interfere[d]" with any "protected interest" that Plaintiffs may have had or that NJ Retina caused Plaintiffs any damages. To the contrary, the record evidence shows that NJ Retina had no involvement, whatsoever, in Plaintiffs' alleged dispute with Dr. Notis. (Pa284a ¶ 9). In fact, NJ Retina had "no familiarity" with Plaintiffs *until it was served with the Complaint*, and never at any time had communications with Dr. Notis regarding Plaintiffs. (Pa284a ¶¶ 10-11).

Despite their bare bones and legally deficient Complaint, and the absence of any record evidence supporting their claims, Plaintiffs urge this Court to overturn the trial court's summary judgment ruling based on three arguments: (i) the trial court "erred" by finding that a transaction between NJ Retina and Dr. Notis was a "required element" of a tortious interference claim; (ii) there were "disputed issues of material fact" concerning their tortious interference claim; and (iii) "necessary discovery" was outstanding at the time the trial court granted summary judgment. As explained below, none of these arguments has merit.

A. Plaintiffs Have Mischaracterized The Trial Court's Ruling Concerning The Absence of A Transaction Between NJ Retina And Dr. Notis.

Plaintiffs first contend the trial court erred by determining that a transaction between NJ Retina and Dr. Notis was a "required element" of their tortious interference claim. (Pb16-Pb20). Plaintiffs have completely mischaracterized the trial court's ruling. The trial court never determined that a plaintiff cannot, as a matter of law, pursue a tortious interference claim unless the alleged tortious interferer consummates a transaction with the party with whom the plaintiff allegedly had a relationship. Rather, the court found, based on the circumstances of this case, that the absence of a transaction between Dr. Notis and NJ Retina foreclosed Plaintiffs from pursuing claims against NJ Retina.

Indeed, in the absence of a transaction, Plaintiffs could not establish the basic elements of a tortious interference claim, including that: (i) NJ Retina "malic[iously]" and "intentional[ly] interfere[d] without justification" with the "de facto" partnership between Plaintiffs and Dr. Notis, and (ii) such intentional and unjustified interference caused Plaintiffs damages. DiMaria Constr., Inc., 351 N.J. Super. at 567. Even if NJ Retina had knowledge of Plaintiffs' "de facto" partnership with Dr. Notis at the time they made their offer to purchase

the assets of Dr. Notis' practice -- which they unquestionably did not[6] -- NJ Retina's unaccepted offer hardly constitutes malicious and intentional interference, nor did its offer cause Plaintiffs any damages. And even if NJ Retina completed a transaction with Dr. Notis, with knowledge that he was in a "de facto" partnership with Plaintiffs, Plaintiffs *still* would not have a viable tortious interference claim against NJ Retina.

Plaintiffs' contention that courts do not require a "subsequent transaction" is a complete red herring. (Pb18 ("[N]o court has ever held that the existence of a subsequent transaction, or even a financial benefit to the interferer, is a required element of a claim for tortious interference.")). What matters is that New Jersey law *does* require the party alleging tortious interference to establish both malicious interference and damages. But again, the absence of a transaction between Dr. Notis and NJ Retina demonstrates that NJ Retina did not maliciously interfere with Dr. Notis and Plaintiffs' alleged "de facto" partnership, nor did it cause Plaintiffs any damages.

The cases on which Plaintiffs rely simply reiterate a party's obligation to establish malicious interference and damages. (Pb18-Pb19). In Van Horn v.

[6] As detailed above, Plaintiffs never even alleged in their Complaint, let alone established through evidence, that NJ Retina had knowledge of Plaintiffs' existence at the time they made an offer to purchase the assets of Dr. Notis' practice.

Van Horn, for example, the court found tortious interference where "the defendants conspired to injure [the plaintiff] Emma . . . by false and malicious statements concerning the personal and business character of Emma, [through which] they induced and persuaded [a third party] to remove the stock of goods he had supplied her with, and to refuse to deliver what he had expected to let her have, leaving her without any stock to sell or customers to sell to." 56 N.J.L. 318, 319 (E&A 1894). Similarly, in Strollo v. Jersey Central Power & Light Co., the court affirmed the denial of a motion to dismiss a tortious interference claim where the defendants "wrongfully caused [the plaintiff] to lose his employment by the slanderous and untrue statements they made concerning the plaintiff to his employer." 20 N.J. Misc. 217, 220 (Sup. Ct. 1942). And, in Lightening Lube, Inc. v. Witco Corp, the Third Circuit found that franchisees were liable for tortious interference because they committed a host of wrongful conduct, including improper threats, defamatory statements, and false accusations of fraud. 4 F.3d 1153, 1167-69 (3d Cir. 1993).

Far from showing how the trial court erred, these cases (and the others to which Plaintiffs cite) underscore why the trial court was *correct* in dismissing Plaintiffs' tortious interference claims.[7] Indeed, unlike in Van Horn, Strollo,

[7] Plaintiffs' own explanatory parentheticals demonstrate that the cases on which they rely support the trial court's decision. (Pb18-Pb19).

Lightening Lube, and the other cases, Plaintiffs never alleged -- let alone introduced evidence -- showing that NJ Retina committed any wrongdoing (*e.g.*, by making false and malicious statements, improper threats, or false accusations of fraud) or that any wrongdoing caused Plaintiffs any damages. Plaintiffs' argument, therefore, has no merit.

B. Plaintiffs' "Disputed Facts" Are Not Material And The Inferences They Draw Are Not Reasonable.

Plaintiffs next argue dismissal was inappropriate because there were "questions of disputed material fact and reasonable inferences supporting" their tortious interference claim. (Pb20-Pb23). Plaintiffs are wrong in both respects. The *only* material factual allegation underlying Plaintiffs' claims against NJ Retina -- a potential transaction between NJ Retina and Dr. Notis -- was indisputably *false*. As demonstrated above, in the absence of a transaction, Plaintiffs could not establish that NJ Retina maliciously interfered with Dr. Notis and Plaintiffs' alleged de facto partnership, and that such interference caused Plaintiffs to suffer damages. Thus, the "factual disputes" identified in Plaintiffs' brief are not material.

To be sure, even if the so-called "factual disputes" identified in Plaintiffs' brief are resolved in their favor, Plaintiffs *still* would not be able to demonstrate that NJ Retina maliciously interfered with Dr. Notis and Plaintiffs' alleged de

facto partnership, or that such interference caused Plaintiffs to suffer damages. The "factual disputes" appear to concern NJ Retina's knowledge, at the time of its preliminary discussions with Dr. Notis, of Plaintiffs' optical shop. (Pb22 (suggesting that NJ Retina's offer "contemplated a new optical shop to replace Plaintiffs'"; ibid. (suggesting that Plaintiffs were aware "that there was an independently owed optical shop in the building")). First, Plaintiffs' Complaint failed to allege that NJ Retina, at the time of the discussions, had any knowledge of Plaintiffs, let alone their operation of an optical shop. (Pa50a-Pa79a). Thus, Plaintiffs are attempting to establish factual disputes relating to allegations that they never pleaded. Second, the inferences that Plaintiffs draw from the evidence regarding NJ Retina's "knowledge" are hardly reasonable. Plaintiffs take a huge leap by suggesting that because the Draft LOI makes passing reference (on one page) to the "Union NJ Optical Start Up," (Pa755a), NJ Retina must have known about Plaintiffs' optical shop and their alleged de facto partnership with Dr. Notis.[8] Neither the Draft LOI, nor any other document in the record, remotely supports such a conclusion. All of the evidence is to the

[8] Plaintiffs also seem to suggest that NJ Retina had knowledge of Plaintiffs' optical shop because it "engaged in preliminary discussions with [Dr. Notis] . . . at his two office locations . . . ." (Pb22). The documents to which Plaintiffs cite, however, do not state that the discussions occurred at the office locations, but rather that the discussions concerned the purchase of the *assets located at his two office locations*. (Pa283a).

contrary. (*See* Pa282a-Pa284a; Pa757a-Pa779a). This is not to mention the fact that Plaintiffs alleged a so-called "de facto" partnership with Dr. Notis. Plaintiffs offer no explanation for how a third party could conceivably have had knowledge of such a relationship. Third, even if NJ Retina made an offer to purchase the assets of Dr. Notis' practice at a time when it had knowledge of Plaintiffs' optical shop and of their alleged "de facto" partnership with Dr. Notis (which it did not), such an offer hardly amounts to malicious interference and did not cause Plaintiffs to suffer damages in any event. Tortious interference must be based on *wrongful* interference; mere knowledge does not suffice.

Finally, Plaintiffs suggest there is a "factual dispute" regarding whether NJ Retina, *after* sending Dr. Notis the Draft LOI, became "aware of Plaintiffs and the claims they asserted [in this lawsuit]." (Pb23). Once again, however, the documents to which Plaintiffs cite do not remotely support such a conclusion. (Pa757a; Pa759a; Pa762a; Pa764a; Pa766a; Pa768a). The documents (specifically, communications between NJ Retina and Dr. Notis) make no reference, whatsoever, to Plaintiffs or this lawsuit and, in fact, many of the documents predate the lawsuit. That aside, even if the evidence did support Plaintiffs' position (which it does not), Plaintiffs do not even attempt to explain how NJ Retina could be liable for tortious interference by virtue of communicating with Dr. Notis while it had knowledge of Plaintiffs and their

claims. Communicating with a party who is engaged in a lawsuit is not, of course, a basis for a cause of action.

C. No Amount of Additional Discovery Would Have Resulted in Plaintiffs Having A Viable Tortious Interference Claim Against NJ Retina.

Plaintiffs' final argument is that summary judgment was improper because discovery was not complete. (Pb24-Pb27). It is well settled, however, that summary judgment is appropriate before the completion of discovery where no amount of additional discovery will change the outcome of a case. See Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div.) ("While we are aware that ordinarily decision on a summary judgment should be withheld until completion of discovery, nevertheless, discovery need not be undertaken or completed if it will patently not change the outcome." (citing cases)), certif. denied, 180 N.J. 354 (2004); Apfel v. Budd Larner Gross Rosenbaum Greenberg & Sade, 324 N.J. Super. 133, 144 (App. Div.) (rejecting argument that "case was not ripe for summary judgment" because additional discovery "would not change the conclusion reached by the trial court"), certif. denied, 162 N.J. 485 (1999). Here, no amount of additional discovery would have changed the fact that NJ Retina did not consummate a transaction with Dr. Notis. Nor would additional discovery change the fact that even if NJ Retina *had* consummated a transaction with Dr. Notis, such a transaction would not amount to tortious interference.

To be clear, Plaintiffs should have never had an opportunity to conduct *any* discovery because their claims should not have survived NJ Retina's pre-answer motion to dismiss. That Plaintiffs were afforded an opportunity to conduct discovery and *still* could not -- and to this day still cannot -- identify a single piece of evidence supporting their claims only underscores why this Court should affirm the trial court's grant of summary judgment.

Plaintiffs argue they should have had an opportunity to depose "NJ Retina witnesses" to "address[] NJ Retina's knowledge of Innovation Optics' optical shop at the time it offered a LOI that explicitly included an expense for the 'Union NJ Optical Start Up.'" (Pb27). Putting aside that the Draft LOI does not actually evidence "NJ Retina's knowledge" (as explained above), Plaintiffs defensively insist that "depositions of NJ Retina witnesses would not have been a fishing expedition or merely an attempt to salvage Plaintiffs' claims either." (Pb27). But that is precisely what the depositions would have entailed. Plaintiffs wanted to take depositions to find evidence of NJ Retina's "knowledge[,]" (Pb27) -- the "element" of Plaintiffs' tortious interference claim that was "*missing*" at the time they filed their Complaint, (Pb30 (emphasis added)). Plaintiffs' reliance on discovery to find support for the "missing" element of their claim contravenes well-settled New Jersey law. See Glass, 317 N.J. Super. at 582 ("It has long been established that pleadings reciting mere

conclusions without facts and reliance on subsequent discovery do not justify a lawsuit.").

In the end, additional discovery would have only enabled Plaintiffs to continue their fishing expedition to bolster the conclusory allegations in the Complaint. The best Plaintiffs would be able to do is create an ***un***genuine issue as to an ***im***material fact -- neither of which preclude the entry of summary judgment. See Manhattan Trailer Park Homeowners Ass'n, Inc. v. Manhattan Trailer Court & Trailer Sales, Inc., 438 N.J. Super. 185, 193 (App. Div. 2014) ("Factual disputes that are merely immaterial or of an insubstantial nature do not preclude the entry of summary judgment." (quotation marks and citation omitted)). For example, even if Plaintiffs could demonstrate that NJ Retina had "knowledge" of Plaintiffs' optical shop at the time it sent the Draft LOI (which, again, it did not), Plaintiffs' tortious interference claim would *still* fail, as a matter of law. The trial court, therefore, correctly granted summary judgment in NJ Retina's favor and dismissed the Complaint.

III. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN SANCTIONING PLAINTIFFS FOR THEIR BAD FAITH PURSUIT OF CLAIMS WITHOUT ANY LEGAL OR FACTUAL BASIS.

After granting NJ Retina's motion for summary judgment, the trial court sanctioned Plaintiffs for their bad faith pursuit of claims against NJ Retina that

they should have never brought in the first instance. This Court should affirm its decision in all respects.

The trial court awarded sanctions pursuant to the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1. The Frivolous Litigation Statute authorizes an award of attorneys' fees and costs where the plaintiff's complaint is frivolous. N.J.S.A. 2A:15-59.1(a)(1) ("A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous."). Under the Frivolous Litigation Statute, to conclude that litigation is frivolous, the court must find that either:

> (1) The complaint . . . was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> [N.J.S.A. 2A:15-59.1(b).]

The Frivolous Litigation Statute serves a dual purpose: first, "a punitive purpose in seeking to deter frivolous litigation," and second, "to compensate a

party that has been victimized by another party bringing frivolous litigation." Toll Bros., Inc. v. Twp. of West Windsor, 190 N.J. 61, 67 (2007).

The trial court applied the foregoing principles and correctly determined that Plaintiffs' claims against NJ Retina were frivolous and, therefore, Plaintiffs were required to pay a portion of the fees and costs that NJ Retina incurred in defending against the claims. (2T13:21-19:1). Specifically, the trial court found that in the absence of a transaction between NJ Retina and Dr. Notis, Plaintiffs had "no conceivable cause of action" against NJ Retina, (2T17:12-25), and that Plaintiffs' pursuit of litigation once they became aware there was no transaction was "frivolous[,]" (2T18:8-14). The court emphasized that the first time it met with the parties it questioned why NJ Retina was in the case in the absence of a transaction, but that it nevertheless "took two years of litigation and [a] summary judgment motion" before NJ Retina was dismissed. (2T17:16-18:3).

The record amply supports the trial court's ruling and by no means can it be said that the court's decision was "'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Borough of Englewood Cliffs v. Trautner, --- A.3d ---, 2024 WL

1708605, at *3 (App. Div. 2024) (approved for publication)[9] (Pa717a) (citation omitted) (identifying when an abuse of discretion arises); Masone, 382 N.J. Super. at 193 ("[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.").

To begin, Plaintiffs' own Complaint demonstrates the frivolous nature of their lawsuit. As detailed above, the Complaint contained a *single* substantive allegation concerning NJ Retina -- namely, that Dr. Notis "was going to sell" his practice(s) and real estate to NJ Retina. (Pa58a ¶ 44).[10] Of course this allegation, even if it were true, did not provide a basis for a cause of action against NJ Retina. The frivolous nature of the Complaint, however, is perhaps most apparent from what the Complaint did *not* allege. It did *not* allege that a sale with Dr. Notis actually took place. It did *not* allege that NJ Retina had any knowledge of Plaintiffs' existence, let alone Plaintiffs' alleged "de facto"

[9] Trautner is included in NJ Retina's appendix containing unpublished cases even though it has been approved for publication. We are not aware of any unpublished opinions that are contrary to the cases included in the appendix.

[10] Aside from the allegation concerning the alleged potential "sale" to NJ Retina, the Complaint included only conclusory allegations concerning NJ Retina. (See Pa62a ¶ 60; Pa62a, First Count ¶ 2; Pa72a, Eleventh Count ¶ 2; Pa74a, Thirteenth Count ¶ 2).

partnership with Dr. Notis, while discussing a sale with Dr. Notis. Nor did it allege how NJ Retina could have conceivably had knowledge of such a "de facto" partnership. And, it did *not* allege that NJ Retina committed any wrongdoing while engaged in discussions with Dr. Notis. In short, the Complaint did not allege *any* facts that remotely supported a cause of action against NJ Retina.

Ironically, Plaintiffs did not shy away from the fact that they did not have a good-faith basis for suing NJ Retina. Plaintiffs' counsel first admitted, in emails exchanged at the outset of the case, that *Plaintiffs needed discovery to learn "what occurred during negotiations" between Dr. Notis and NJ Retina, "how [Plaintiffs] rights may have been affected, or what [NJ Retina's] role may have been*." (Pa454a (emphasis added)). When later responding to NJ Retina's discovery demands, Plaintiffs conceded that "*the specifics of the negotiations, discussions, communications, and transactions between the defendants is presently unknown to the plaintiffs . . . .*" (Pa392a-Pa394a, Responses to Interrogatories 14-21, 23-24). (emphasis added)). Then, in responding to the Second 1:4-8 Letter, Plaintiffs wrote: "Once again, it is necessary for us to conduct discovery since *we have no way of knowing the complete interactions between your client and Associates in Eyecare, or whether there are remaining interactions that may be actionable*." (Pa469a (emphasis added)). It is simply

beyond cavil that a plaintiff cannot pursue claims not known to exist and/or phantom damages, hoping they somehow will develop.

Even on *this appeal*, Plaintiffs effectively acknowledge that they did not have a good-faith basis for pursuing claims against NJ Retina. Plaintiffs concede that they filed claims based on a single piece of innocuous information: "Greenberg was told that [Plaintiffs'] relationship [with Dr. Notis] ended because of a potential sale to NJ Retina[.]" (Pb30). Plaintiffs further concede that NJ Retina's "knowledge" and "intention" were "*missing element[s]*" of their claim, (Pb30).

Plaintiffs' Complaint and their admissions make it abundantly clear that they commenced this litigation in bad faith and with no factual or legal basis to do so. But even assuming, *arguendo*, that the Complaint was not frivolous at the time it was filed (which it was), it *most certainly* became frivolous once NJ Retina advised Plaintiffs that a transaction with Dr. Notis was never consummated. See Bove v. AkPharma Inc., 460 N.J. Super. 123, 152 (App. Div.) ("[L]itigation may become frivolous, and therefore sanctionable, by continued litigation over a merit-less claim, even if the initial pleading was not frivolous or brought in bad faith."), certif. denied, 240 N.J. 7 (2019). NJ Retina alerted Plaintiffs that there was no completed transaction at the very outset of this case, as part of the Initial 1:4-8 Letter. (Pa442a). After Plaintiffs insisted

they could not take NJ Retina's counsel at his word, NJ Retina provided Plaintiffs with a sworn certification in which its representative explained that: (i) NJ Retina did nothing more than engage in preliminary discussions with Dr. Notis regarding the possibility of acquiring his practice; (ii) NJ Retina sent Dr. Notis the Draft LOI, which Dr. Notis did not sign; (iii) there were no negotiations of any definitive agreements between NJ Retina and Dr. Notis; and (iv) NJ Retina never consummated a transaction with Dr. Notis. (Pa260a-Pa262a). In light of these facts, NJ Retina demanded dismissal of the Complaint. But Plaintiffs inexplicably refused.

Plaintiffs' insistence on keeping NJ Retina in the case -- despite the absence of a completed transaction -- became so egregious that the trial court urged them to dismiss NJ Retina from the case during a hearing in October 2020. (Pa429a ¶ 14). The court's comments initially seemed to resonate with Plaintiffs' counsel, who said he would be "inclined" to dismiss NJ Retina from the case upon receipt of additional discovery. (Ibid.). But once NJ Retina provided that additional discovery -- including the Draft LOI that Dr. Notis never signed -- Plaintiffs *still* refused to dismiss NJ Retina from the case. (Pa430a ¶ 17). Plaintiffs then doubled down on their frivolous Complaint by seeking leave to file a second amended complaint which included some new allegations concerning NJ Retina that Plaintiffs manufactured out of whole cloth

and which did not provide a basis for a cause of action in any event. (Pa431a ¶ 21).[11] Ultimately, Plaintiffs' tactics compelled NJ Retina to oppose Plaintiffs' motion to amend and file a cross-motion seeking dismissal of the case. (Ibid.). In granting NJ Retina's cross-motion for summary judgment, the trial court recognized the obvious -- that from "day one" of this case Plaintiffs did not have a basis to pursue claims against NJ Retina. (1T26:17-23).

The trial court's sanctions award is consistent with this Court's recent decision in Trautner (to which Plaintiffs cite, (Pb39)). Trautner, 2024 WL 1708605 at *1. In Trautner, this Court affirmed an award of sanctions against the Borough of Englewood Cliffs (the "Borough") in connection with its pursuit of claims against its former attorneys and a developer that had previously obtained a judgment against the Borough. Sanctions were warranted, this Court found, because the Borough "knew or should have known, when it filed suit . . . that its claims were contrary to the clear evidence[.]" Trautner, 2024 WL 1708605 at *10. "[T]he Borough proffered no facts and articulated no law to substantiate its allegations. There was no honest, creative advocacy in the Borough's claims." Ibid.

[11] As noted above, Plaintiffs do not appeal from the trial court's denial of their motion seeking leave to file the second amended complaint.

This Court likewise affirmed an award of attorneys' fees in Sarfo ex rel. Sarfo v. Quivers, No. A–1043–01T5, 2002 WL 31432737, at *3 (App. Div. Aug. 30, 2002). In that case, the Court emphasized that "when the plaintiff began this litigation, she had no reason to believe that defendant Quivers was liable in law or fact." Ibid. The plaintiff had taken a "shot in the dark" by filing a "bare bones" complaint with no "sufficient good-faith basis to commence litigation." Ibid.

Similarly here, Plaintiffs commenced and continued this lawsuit against NJ Retina despite "clear evidence" -- that no sale occurred -- which was contrary to their claim. Trautner, 2024 WL 1708605 at *10. Plaintiffs "proffered no facts" to support their claims, ibid., and had "no information of" NJ Retina's participation in the alleged wrongdoing, Quivers, 2002 WL 31432737 at *3. Nevertheless, they took a "shot in the dark" by filing a "bare bones" complaint against NJ Retina. Ibid. Plaintiffs "may have anticipated prevailing against" NJ Retina "depending on what discovery disclosed," but "there was no reasonable basis in fact or law for this reliance." Ibid. Nor was there any "honest, creative advocacy in" support of Plaintiffs' claims. Trautner, 2024 WL 1708605 at *10. Under these circumstances, as in Trautner and Quivers, the trial court appropriately sanctioned Plaintiffs for pursuing frivolous claims.

* * * *

Plaintiffs raise a series of objections concerning the trial court's sanctions award. (Pb29-Pb41). As explained below, Plaintiffs' objections have no merit.

A. Plaintiffs' Argument That The Trial Court "Inappropriate[ly]" Focused on The Absence of A Transaction Between NJ Retina And Dr. Notis Is Nonsensical.

Plaintiffs contend the trial court made a "clear error in judgment" by focusing on the absence of a transaction between Dr. Notis and NJ Retina. (Pb29-Pb33). Once again, Plaintiffs have misconstrued both the law and the trial court's ruling. As explained above, the trial court never determined that a plaintiff cannot, as a matter of law, pursue a tortious interference claim unless the alleged tortious interferer consummates a transaction with the party with whom the plaintiff allegedly had a relationship. Rather, the court found that, based on the circumstances of this case, the absence of a transaction between Dr. Notis and NJ Retina foreclosed Plaintiffs from pursuing claims against NJ Retina.

Plaintiffs' insistence that this case "appeared to be (and still appears to be) a classic case of tortious interference" -- *despite the absence of a transaction* -- strains credulity. (Pb29). Plaintiffs identify "facts" which they claim they became aware of in discovery (e.g., that "NJ Retina conducted due diligence which must have alerted it to Plaintiffs' presence" and that NJ Retina supposedly offered a "'credit' for a new optical in Plaintiffs' place") and argue "the[] facts

have never been disproven, nor would learning that a transaction never occurred invalidate these facts." (Pb30). Plaintiffs have it all wrong. Even if every single one of Plaintiffs' "facts" were true (which they are not), Plaintiffs would *still* be unable to show that NJ Retina maliciously and intentionally interfered with Plaintiffs' alleged de facto relationship and that such interference caused Plaintiffs damages.[12]

B. The Trial Court's Ruling Was Sufficiently Detailed And Supported By Adequate Findings.

Plaintiffs next argue the trial court failed to make adequate findings in support of its sanctions award. (Pb33-Pb35). Not so. First, Plaintiffs' characterization of the trial court's ruling as "merely" consisting of a handful of remarks, (Pb34-Pb35), is simply wrong. A review of the transcript demonstrates that the court's decision was far more detailed than Plaintiffs suggest. (See 2T13:20-19:1). Second, the nature of the trial court's ruling reflects the simple reality that Plaintiffs brought claims based on *one* single substantive allegation that was *indisputably false*. No extensive analysis was required in this regard -- indeed Plaintiffs *conceded* that a transaction between Dr. Notis and NJ Retina

[12] Plaintiffs attempt to recast their tortious interference claim by arguing that NJ Retina's offer to Dr. Notis "caused the rupture of [Plaintiffs and Dr. Notis'] 20-year 'mutually beneficial' relationship, thereby damaging plaintiffs." (Pb18). Plaintiffs never alleged this in their Complaint, nor did they introduce any evidence (their appeal brief cites to none) which supports this theory.

never occurred. In the absence of a transaction, the frivolousness of Plaintiffs' claims was self-evident. Third and finally, the trial court's ruling must be read in conjunction with its summary judgment and reconsideration rulings, in which the court further explained why Plaintiffs' claims were frivolous, (1T21:5-27:14; 3T19:22-23:17). See Trautner, --- A.3d ----, 2024 WL 1708605 at *10 ("Support for the court's findings of frivolous litigation was grounded in its decision dismissing the Borough's complaint for failure to state a claim.").

C. The Trial Court Correctly Determined That Plaintiffs' Claims Became Frivolous Once They Were Aware That Dr. Notis And NJ Retina Did Not Consummate A Transaction.

Plaintiffs also argue the trial court "never stated at what point" Plaintiffs' tortious interference claim "suddenly became frivolous, or what information became available to Plaintiffs to render it so." (Pb35). But in fact, the trial court specifically held that "once the plaintiff[s] knew that there was no deal" between Dr. Notis and NJ Retina, "I don't find there was any conceivable cause of action for . . . intentionally interfering with a prospective economic opportunity and I do find that further pursuing the litigation was frivolous." (2T18:7-14). Plaintiffs play coy about when they "supposedly" became aware that Dr. Notis and NJ Retina did not consummate a transaction. (Pb35). Plaintiffs, however, have conceded that they knew, *from the moment they filed their Complaint*, that Dr. Notis and NJ Retina did not consummate a transaction. Indeed, as Plaintiffs

have acknowledged, their Complaint never alleged that a deal was consummated between NJ Retina and the Notis Defendants. (Pa50a-Pa78a). Thus, Plaintiffs have *themselves* identified when their case became frivolous: at the very outset.

Plaintiffs suggest their case could not have become frivolous at the outset because the trial court denied NJ Retina's motion to dismiss. (Pb35). The trial court's mistaken denial of NJ Retina's motion to dismiss,[13] however, does not change the time at which Plaintiffs became aware that no transaction occurred, nor did the trial court's motion to dismiss ruling afford Plaintiffs a license to continue pursuing frivolous claims. Plaintiffs also suggest their case did not become frivolous once NJ Retina produced discovery which further evidenced that no transaction occurred. (Pb36). The discovery that NJ Retina produced, however, was not open to interpretation -- it simply confirmed what Plaintiffs already knew, which is that no transaction occurred.

D. Plaintiffs Have Waived Any Argument Regarding The Reasonableness Of The Fees Awarded And The Trial Court's Award Of Fees Was Proper In Any Event.

Plaintiffs additionally argue that the trial court failed to make sufficient findings to support the amount of fees it awarded. (Pb36). As an initial matter,

[13] A new judge took over the matter after NJ Retina's motion to dismiss was decided. (3T:21:9-11).

Plaintiffs *never challenged* before the trial court the amount in fees that NJ Retina sought. Plaintiffs never claimed that the fees NJ Retina sought were unreasonable or excessive. (See 2T). They said nothing in this regard. Plaintiffs, therefore, have waived any challenge to the amount of fees awarded. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (noting the "well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court").

This Court in M. Spiegel & Sons Oil Corp. v. Amiel found waiver under precisely the same circumstances as those currently before the Court. No. A-1900-16T2, 2018 WL 1734035, at *6 (App. Div. Mar. 12, 2018). The plaintiff in Amiel "submitted certifications from counsel in support of its attorney's fee request and, in response, defendants did nothing. Defendants opted not to contest the reasonableness of the requested attorney's fees before the trial court, and instead chose to challenge the requested fees for the first time on appeal." Ibid. This Court "decline[d] to consider claimant's argument because it was not raised before the trial court and does not involve jurisdictional or public interest concerns." Ibid. A finding of waiver is warranted here as well.

Plaintiffs' challenge to the fee award fails in any event. Contrary to Plaintiffs' argument, the trial court did issue sufficient findings in support of its fee award. The court first acknowledged its authority to award a sanction equal

"to a sum sufficient to deter repetition of" frivolous conduct. (2T15:23-25). "The sanction[,]" according to the court, "may consist of an order to pay a penalty into court or an order directing payment to the mo[vant] of some or all of the reasonable attorneys fees and other expenses incurred . . . ." (2T15:25-16:5). The court then stated that it had reviewed NJ Retina's counsel's certification which described in great detail the services provided and fees incurred. (2T18:15; Da8-15). The court found that "the hours are reasonable for the type of attorneys that are working in the case in this area in this expertise" and that NJ Retina was "entitled to at least 50 percent of the fees that they suffered in defending against at what I do find was a frivolous cause of action against them." (2T18:19-24).

By awarding NJ Retina half of the fees it incurred ($72,984.95), the trial court actually afforded Plaintiffs a substantial *discount* of the fees they caused NJ Retina to incur given that they admittedly knew from the very outset that NJ Retina had not entered into a transaction with Dr. Notis. To be clear, however, the court's award of fees was proper even assuming, *arguendo*, that Plaintiffs did not become aware of the absence of a transaction until *November 2020*, when NJ Retina produced discovery. Specifically, at that time, NJ Retina provided Plaintiffs with: (i) a copy of the Draft LOI that Dr. Notis never signed; (ii) contemporaneous emails exchanged between Dr. Notis (or his representatives)

and NJ Retina regarding their potential transaction; and (iii) additional sworn statements confirming once again that NJ Retina did not enter into a transaction with Dr. Notis and had nothing to do with Plaintiffs' dispute with him. (Pa430a ¶ 16). Still, Plaintiffs still refused to dismiss NJ Retina from the case. From the time period after NJ Retina produced discovery through the trial court's decision on NJ Retina's fee motion, NJ Retina incurred approximately $74,000 in attorneys' fees -- *an amount more than the court awarded*. Thus, under all circumstances, the court's award of fees was proper and, in fact, it afforded Plaintiffs a substantial discount to which they were not entitled.

E. The Record Is Replete With Evidence Of Plaintiffs' Bad Faith.

Finally, Plaintiffs argue the trial court's ruling was not supported by a finding that Plaintiffs pursued claims in bad faith. (Pb38-Pb41). In fact, the opposite is true. As detailed above, the record before the trial court painted a disturbing picture. Plaintiffs abused the judicial system by filing a Complaint against NJ Retina despite having no good-faith reason to believe NJ Retina was liable in law or fact. NJ Retina did precisely what it was supposed to do -- afford Plaintiffs an opportunity to dismiss their Complaint against it. But when pressed to dismiss the Complaint, Plaintiffs refused. When provided with evidence undercutting the only substantive fact in the Complaint -- an alleged sale by Dr. Notis to NJ Retina -- Plaintiffs still refused to dismiss the Complaint. When

urged by the trial court to dismiss the Complaint and when provided with additional evidence demonstrating the absence of a sale, Plaintiffs once again refused to dismiss the Complaint. These circumstances plainly evidence Plaintiffs' bad faith and their intent to keep NJ Retina in the case, cause it to incur attorneys' fees, and pressure it into paying money to them. Plaintiffs were warned repeatedly, chose to proceed at their own risk, and the trial court appropriately made them suffer the consequences for pursuing claims in bad faith and for the purpose of harassing and injuring NJ Retina.

This Court's decision in Trautner illustrates why the trial court's bad faith finding was correct. Just as in Trautner, *Plaintiffs' "bad faith was demonstrated by the fact that it knew or should have known, when it filed suit . . . that its claims were contrary to the clear evidence . . . .*" Trautner, 2024 WL 1708605 at *10 (emphasis added). Plaintiffs' bad faith was further evidenced by the absence of facts and law to substantiate their claims, and any "honest, creative advocacy[.]" Trautner, 2024 WL 1708605 at *10 (finding bad faith where "the Borough proffered no facts and articulated no law to substantiate its allegations" and where "[t]here was no honest, creative advocacy in the Borough's claims"); see also Tagayun v. AmeriChoice of New Jersey, Inc., 446 N.J. Super. 570, 581 (App. Div. 2016) (finding that plaintiffs acted in bad faith where they pursued

claims after they "had been advised by the court that their claims had to be arbitrated").

Plaintiffs contend they were not acting in bad faith because they were "rely[ing] on the advice of their counsel" and "press[ing] their case on an issue of importance to them[.]"[14] (Pb40). This argument fails for multiple reasons. First, absent from the record is a single piece of evidence supporting Plaintiffs' contentions. See, e.g., McKeon-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 563 (1993) (finding no bad faith by a plaintiff whose attorney submitted an affidavit stating that "plaintiff at all times acted on my advice, and would not have filed this complaint had I not advised her that she had a valid cause of action based on the facts as she understood them"). Second, and in any event, "reliance on the advice of counsel does *not* constitute a defense where" -- as in this case -- "a party has acted in bad faith." Deutch & Shu, P.C. v. Roth, 284 N.J. Super. 133, 138 (Law Div. 1995) (citing McKeon, 132 N.J. at 563) (emphasis added). Third, this is not a case in which Plaintiffs can claim they

[14] Plaintiffs argue the trial court, in finding bad faith, "got the requirements and analysis backwards" and "speculate[d] about what Plaintiffs knew and what their counsel told them[.]" (Pb39-Pb40). Plaintiffs have mischaracterized the trial court's ruling. The court was simply reiterating the well-settled principle that Plaintiffs' counsel was acting on Plaintiffs' behalf and with their authority. See Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005) ("[I]t is the clear policy of our courts to recognize acts by the attorneys of the court as valid and presumptively authorized[.]").

relied on counsel to determine whether their claims lacked "a reasonable basis in law or equity[.]" N.J.S.A. 2A:15-59.1. Rather, this case is about the absence of any *factual* basis to pursue claims against NJ Retina. The absence of any factual basis to join NJ Retina in this lawsuit evidences Plaintiffs' bad faith. And Plaintiffs' decision to continue pursuing claims against NJ Retina -- despite NJ Retina repeatedly reminding them that no factual basis existed -- only further evidences and makes crystal clear that Plaintiffs acted in bad faith.

* * * *

In sum, this Court should reject Plaintiffs' objections and affirm the trial court's sanctions award. In the event, however, that the Court finds the trial court's sanctions award deficient in any respect, it should order a remand.

CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court's summary judgment ruling and its award of sanctions against Plaintiffs.

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