FILED, Clerk of the Appellate Division, September 13, 2023, **A-002847-22**

Superior Court of New Jersey

KEVIN KELLY	*	APPELLATE DIVISION
	*	DOCKET NO. A-2847-22 T1
Plaintiff- Appellant,	*	
	*	DOCKET NO. BELOW: SSX-L-256-22
	*	
	*	ON APPEAL FROM:
	*	SUPERIOR COURT OF NEW JERSEY—
v.	*	LAW DIVISION, SUSSEX COUNTY
	*	
COUNTY OF SUSSEX AND	*	SAT BELOW:
COMMISSIONERS CARNEY,	*	Hon. , Louis S. Sceusi, JSC
FANTASIA AND YARDLEY,	*	
	*	
Defendant-Respondents.	*	
	*	

PLAINTIFF-APPELLANT'S
APPEAL BRIEF

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PROCEDURAL HISTORY

On June 24, 2022, Plaintiff filed a CEPA action pursuant to N.J.S.A. 34:19-1, et seq (Conscientious Employee Protection Act) (Pa-1). Defendants filed no Answer; instead, a R. 4:6-2 Motion was filed (Pa-17) which was treated by the Court below as a summary judgment motion and granted on December 30, 2022 (Pa-19). Plaintiff filed a Motion for Reconsideration on January 3, 2023 (Pa-31) which was denied on May 22, 2023 (Pa-32). This Notice of Appeal followed (Pa-39).

STATEMENT OF FACTS

In 2018, the County of Sussex went from a full-time county counsel to a part-time county counsel. The Plaintiff, Kevin Kelly, was chosen in 2018 to fill that position. He faithfully served for three years combining both the requirements of the position and the Rules of Professional Conduct as they apply to every attorney. Balancing both the requirements of the then-Sussex County Freeholders (now-Commissioners) and the Rules of Professional Conduct, he refused to put forth a ballot question which violated the law for local ballot questions. In addition, he objected to and refused to sanction personal counsel fees for the Sussex County Sheriff. In 2021, Plaintiff's contract expired and was not renewed. He was succeeded by the Sheriff's personal attorney whose legal fees he would not approve.

LEGAL ARGUMENT

POINT I
Kevin Kelly and George D'Annunzio were Both "Employees" (Pa-32)

The Supreme Court decided D'Annunzio v. Prudential Ins. Co., et al., 192 N.J. 110 (2007) which totally changed the perspective in connection with determining the independent contractor/employee status as it applies to CEPA. For the first time, the Supreme Court sanctioned what the Appellate Division determined in the same case at 383 N.J. Super. 270 and that is, that CEPA is remedial legislation and must be liberally construed. Prior cases limited their decisions to just employee/independent contractor and never asserted the "remedial legislation and liberal interpretation" to that relationship. The Motion filed by the Defendants herein ignored both the Appellate Division and the Supreme Court's reliance on these important social legislation policies.

The Supreme Court mandated a different approach to independent contractor-employee:

> Also, using the Pukowsky test as the paradigm for its analysis, the panel (Appellate Division) held that whether a professional person is an employee under CEPA's definition must hinge more on the degree of control and direction exercised by the employer over the professional worker under the circumstances and less on the lack of financial arrangements indicative of a traditional employee; Id. at 118-119.
>
> An employer cannot be expected to exert control over the provision of specialized services that are beyond the

employer's ability yet, the work may be an essential aspect of the employer's regular business; Id. at 123.

Has the worker become one of the 'cogs' in the employer's enterprise? Is the work continuous and directly required for the employer's business to be carried out, as opposed to intermittent and peripheral? Is the professional routinely or regularly at the disposal of the employer to perform a portion of the employer's work as opposed to being available to the public for professional services on his or her own terms? Do the 'professional' services include a duty to perform routine or administrative activities? If so, an employer-employee relationship more likely has been established; Id. at 124.

Finally, the test includes consideration of the worker's economic dependence on the employer's work but does not insist on the same financial indicia one might expect to be present in the case of a traditional employee, such as the payment of wages, income tax deductions, or provision of benefits and leave time; Id. at 124.

Workers who perform their duties independently may nevertheless require CEPA's protection against retaliatory action when they speak against or refuse to participate in illegal or otherwise wrongful actions by their employer. Such individuals should benefit from CEPA's remedies; Id. at 124.

The public at large benefits from a less-restricted approach to who may sue under CEPA as an employee of a business enterprise. It is unlikely to us that the legislature meant to sanction a restricted approach to CEPA's reach; Id. at 119.

CEPA defines 'employee' as 'any individual who performs services for and under the control and direction of an employer;' Id. at 120.

In ascertaining the legislative intent, we conclude that CEPA's definition of 'employee' does not necessarily

exclude workers who might be classified at common law as independent contractors and that CEPA's definition does not incorporate all the factors that define the term ‘employee,’ in other contexts; App Div.

Instead, in outlining the parameters of the definition contained in CEPA, we hold that the primary focus is on the ‘employer’s control and direction’ of the worker’s performance of services for the employer and not on (1) the terms of compensation; (2) the extent to which the employer provides benefits to the worker; or (3) whether the worker provides services for a full week or any part of a week; App. Div.

A single guiding principle has instructed our interpretation of CEPA in the decade since its enactment, as broad, remedial legislation, the statute must be construed liberally; D’Annunzio, *supra* at 119.

CEPA defines an employee as an individual who performs services for and under the control and direction of an employer for wages or other remuneration; Id. at 119.

As the Appellate Division noted, the definition does not exclude, explicitly, persons who are designated as independent contractors performing services for an employer for remuneration. It is beyond cavil that it includes more than the narrow band of traditional employees. Courts should ‘look to the goals underlying CEPA’ and focus not on labels but on the reality of Plaintiff’s relationship with the party against whom the CEPA claim is advanced; Id. at 119.

When CEPA or other social legislation must be applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor, we must look beyond the label attached to the relationship; Id. at 120.

> An employer cannot be expected to exert control over the provision of specialized services that are beyond the employer's ability, yet the work may be an essential aspect of the employer's regular business; Id. at 121.
>
> Therefore, the test further allows for examination of the extent to which there has been a functional integration of the employer's business with that of the person doing the work; Id. at 121.
>
> The question is who is included in that definition. As the Appellate Division noted the definition does not exclude, explicitly, persons who are designated as independent contractors performing services for an employer for renumeration. Id. at 121
>
> Taken out of context, labels can be illusory as opposed to illuminating when CEPA or other social legislation must be applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor, we must look beyond the label attached to the relationship; Id. at 122
>
> An employer cannot be expected to exert control over the provision of specialized services that are beyond the employer's ability yet, the work may be an essential aspect of the employer's regular business.

Perhaps the most important questions are, "has the worker become one of the 'cogs' in the employer's enterprise; is the work continuous and directly required for the employer's business to be carried out; is the professional routinely and regularly at the disposal of the employer to perform a portion of the employer's work as opposed to being available to the public; do the professional services include a duty to perform routine or administrative activities?" The Court tells us that if the

relationship is as described above, then an employer-employee relationship has been established. Clearly, in Kevin Kelly's Certification (Pa-46), all of the above questions are answered in the affirmative.

The single most important consideration is, "Therefore, in order that CEPA's scope fulfills its remedial promise the test for an 'employee' under CEPA's coverage must adjust to the specialized and non-traditional worker who is nonetheless integral to the business interests of the employer;" Id.at 124-25.

The Court below failed to recognize the limitations placed upon county counsel because of the R.P.C.'s and the influence that the CEPA standards have over the concept of independent contractor/employee. Thus, we turn to Judge Conford's dissent referred to below and recognized by the Supreme Court which states:

> There are various situations in which the control test does not emerge as the dispositive factor.

As pointed out by the Supreme Court, "has the worker become one of the 'cogs' in the employer's enterprise," and "is the work continuous and directly required for the employer's business to be carried out?"

The Rules of Professional Conduct require an attorney to object to the control of an employer which is illegal or in conflict. Therefore, the control factor may in some regards, be diminished because of the requirements of the R.P.C.s.

In that regard, see Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451 (1989). While the distinction between employee and independent contractor was not the subject, the Court did determine that:

> The Conscientious Employee Protection Act is not inconsistent with the Code of Professional Ethics adopted by the Supreme Court to the extent that this discharged attorney seeks money damages for refusing to join a scheme to cheat a competitor.

There, Parker was an in-house counsel. Parker sought money damages and not reinstatement. In short, the Court in Parker found that CEPA and the Code of Professional Conduct are consistent. The Supreme Court, on p. 120 of D'Annunzio, *supra,* sets forth the dissent of Judge Conford in the matter of Marcus v. Eastern Agricultural Ass'n, Inc., 58 N.J. Super. 584, 597 (App. Div. 1959) which dissent led to the reversal by the Supreme Court at 32 N.J. 460, 461 (1960). Judge Conford's dissent captures the facts of this case and the relationship between CEPA and the Code of Professional Conduct. Specifically, he stated:

> There are various situations in which the control test does not emerge as the dispositive factor; Id. at 120.
>
> Patently, where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent; Id. at 120.
>
> Where it is not in the nature of the work or the manner of its performance to be within the hiring party's direct

> control, the factor of control can obviously not be the critical one in the resolution of the case but takes its place as only one of the various potential indicia of the relationship which must be balanced and weighed in determining what, under the totality of the circumstances, the character of that relationship really is; Id. at 120.

In citing Judge Conford's dissent, the Court recognized that some work requires little supervision over details and finally, the Judge stated:

> Normally consistent with an independent contractor status might be equally consistent with an employment relationship. In such a situation, the factor of control becomes inconclusive and reorientation toward a correct legal conclusion must be sought by resort to more realistic significant criteria.

Here, the Plaintiff maintained regular office hours in a specific office at the Administration Building where there was an assistant counsel and a paralegal. The three were known as the Legal Department (Kelly Certification, ¶ 4; Pa-46). The control of an attorney is limited by the Code of Professional Conduct.

The trial Court failed to understand the important social ramifications of CEPA, and the relationship of CEPA to the Code of Professional Ethics. As to "the seminal case" of D'Annunzio v. Prudential Ins. Co. of America, *supra,* the Court below failed to recognize the central theme of that case. The Court paid lip service to D'Annunzio but failed to understand its importance. For example, at p. 9, it points out:

> The Court further adopted a 12-factor test originally established in Pukowsky v. Caruso, 312 N.J. Super. 171,

> 182-183 (App. Div. 1998), to determine whether an independent contractor may qualify as an employee for purposes of CEPA.

Here, we are not dealing with Chiropractor D'Annunzio, but Attorney Kevin Kelly. Yet, the provisions of D'Annunzio apply to Kelly's relationship to Sussex County, but the control factor is regulated by the RPCs. And actually, that's what this case is about; Kevin Kelly refused to provide a ballot question because it was illegal and he refused to authorize the payment of the Sheriff's attorneys' fees because they were personal and therefore, not the obligation of the taxpayers.

A reading of the Certification of Kevin Kelly (Pa-46) is dispositive of this appeal. There, the Plaintiff states that prior to his appointment, county counsel was a full-time position, but was changed to a "competitive, contracting process" which provided for "part-time county counsel with in-house assistance of an attorney and paralegal/secretary." Outside counsel are assigned and compensated pursuant to the R.F.P. process and S.C.F./S.C.C. approved counsel list (Kelly Certification, ¶2; Pa-46). There was an approved list for outside counsel, all of whom were selected from that list by the Plaintiff. There was an assistant counsel, Karen S. Tracy (Kelly Certification, ¶3; Pa-46). Ms. Tracy was employed by the County during the term of the full-time county counsel and remained during the term of the Plaintiff (Kelly Certification, ¶4; Pa-46). Also provided to the Plaintiff, Lydia Palmer was employed by the County as a paralegal/secretary to county counsel and remained during

Plaintiff's employment (Kelly Certification, ¶4; Pa-46). Outstanding law firms were recognized as approved outside counsel which provided significant representation for County government in matters which were considered as beyond that of County counsel (Kelly Certification, ¶5; Pa-46). Plaintiff was "required by the county to be physically present with established office hours in the Administration Building on a daily basis and on-call 24/7 to deal with emergent matters" (Kelly Certification, ¶ 8; Pa-46). He was required to provide legal services to the Board, Administrator, constitutional officers, department heads, independent agencies and employees on an ongoing basis and if necessary, to respond to these needs on a daily basis (Kelly Certification, ¶ 9). The technical specifications for the position as county counsel provided for the selection of an "individual" and required that individual to "personally perform services as county counsel" (Kelly Certification, ¶ 12).

The concept of control of an attorney who is regulated by the Code of Professional Conduct is best set forth in ¶16 of the Plaintiff's Certification where he indicates that, "On one occasion, board members objected to my representation of the developer of a multi-family complex in the Borough of Franklin. Although I had represented developers of this project for decades, I was forced to withdraw." Control is also indicated when the Plaintiff could not become involved in legal matters that conflicted with his work as county counsel. That was control because of the position as county counsel prohibited him from any type of work that conflicted with the

employer – the Freeholders/Commissioners. At ¶ 17, the Plaintiff sets forth responsibilities that included administration.

Clearly, the Plaintiff qualified under CEPA, as did George D'Annunzio as an "employee." In that regard, the Supreme Court dealt specifically with an R.F.P. which stated that D'Annunzio, as was the Plaintiff in this case, specifically designated as an independent contractor. The Supreme Court found that to be informative, but not dispositive of the matter because the designation was stated by the parties <u>to be for a purpose unrelated to CEPA's interests</u>; <u>Id.</u> at 123. There is the distinction that the Court missed in determining both Motions. Likewise, was the manner of payment as opposed to salary with income tax deductions of little consequence. Plaintiff, on a regular basis, held office hours at the Administration Building in Newton. Likewise, "D'Annunzio's time spent at Prudential's operation was continuous, week to week, and daily for a substantial period of time during business hours. Prudential exacted a not inconsequential amount of time from him, on its premises, which caused D'Annunzio to be away from attending to his private practice;" <u>Id.</u> at 126. The impact on D'Annunzio cannot be said to be minor. Moreover, his duties included numerous administrative tasks, all to be performed in accordance with protocols devised by Prudential to meet their business plan…In fact, all of the detailed requirements expected of D'Annunzio, were in furtherance of Prudential's operation; <u>Id.</u> at 123. The activities of D'Annunzio are similar to the activities of the Plaintiff on behalf of

the County of Sussex with the further requirement that the Rules of Professional Conduct applied to the Plaintiff.

Further, D'Annunzio pointed to many facts that support the creation of an employment relationship for CEPA purposes, notwithstanding that his agreement described him as an independent contractor; Id. at 127. The Court below failed to recognize CEPA's social ramifications on the distinction between independent contractor and this Plaintiff.

The Court below was hung up on the fact that the Plaintiff was part of a partnership and that payments were made to the partnership. That statement is contradicted by ¶ 4 of Plaintiff's Certification indicating that Karen. S. Tracy, Esq. was assistant county counsel and Lydia Palmer was employed by the County as a paralegal/secretary to county counsel in an office designated as his. They constituted the county's legal department. And ¶ 8 which indicates, "During my term as county counsel, I was required by the County to be physically present with established office hours in the Administration Building on a daily basis and on call 24/7 to deal with emergent matters. My practice was to spend mornings at K and W, afternoons at the county and return to K & W after 5 p.m.

Point II
The Court Below Failed, in Any Way, to Recognize the Influence of CEPA on the Traditional Concepts of Independent Contract/Employee (Pa-19).

The Court below failed to recognize that failure to renew a contract is a CEPA retaliatory action. However, the matter of Abbamont v. Piscataway Township Board of Education, 269 N.J. Super. 11 (1993) stands for that conclusion. There, a teacher in the Piscataway Township school system objected to health problems within his shop, which problems were inadequate ventilation. The Court concluded that the Board of Education did not renew his contract because of his complaints. In other words, Abbamont was a CEPA case where the Plaintiff's contract was not renewed. Consistent with the Abbamont opinion, *supra*, the Appellate Division in the unpublished opinion, Dukin v. Mt. Olive Township Board of Education, 2014 WL 273645, found that to be a retaliatory action under CEPA:

> Although the failure to renew Dukin's contract may have been due in part or in whole to budgetary constraints or poor job performance, certainly this negative job action could also have been in retaliation for Dukin's whistleblowing activities.

It is clear that the law of this State is that a failure to renew a contract can constitute retaliation.

The Motion for Reconsideration

Plaintiff filed a timely Notice of Motion for Reconsideration. The Court below failed to reconsider what was obvious in the comparison of D'Annunzio to Kelly and denied the Motion (Pa-32).

Conclusion

For the reasons expressed above, the Court's Order granting the R. 4:6-2 Motion and the Court's Order denying reconsideration should be reversed.

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KEVIN KELLY, Plaintiff-Appellant, vs. COUNTY OF SUSSEX AND COMMISSIONERS CARNEY, FANTASIA AND YARDLEY, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2847-22 T1 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SUSSEX COUNTY DOCKET NO.: SSX-L-256-22 SAT BELOW: Hon. Louis S. Sceusi, J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS COUNTY OF SUSSEX AND COMMISSIONERS CARNEY, FANTASIA AND YARDLEY

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PRELIMINARY STATEMENT

This case involves the trial court's well-reasoned dismissal of a whistleblower action brought by a disgruntled former county counsel following the expiration of his three-year statutory term in office.

After his term expired, plaintiff filed a complaint under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"). The trial court correctly granted Defendants' motion to dismiss the complaint for failure to state a claim, finding that Plaintiff was neither an employee nor did he suffer a retaliatory action under CEPA. The trial court also correctly denied Plaintiff's motion for reconsideration on the employee/independent contractor issue.

On appeal, Plaintiff argues that he was an employee as a matter of law. Contrary to his claims, the trial court correctly applied the applicable factor test and found Plaintiff to be an independent contractor. This was based upon numerous considerations, including that Plaintiff: 1) was an attorney not subject to the control of his employer, 2) was hired under an RFP for part-time legal services that allowed him to maintain a private legal practice, 3) was paid through his law firm, 4) did not receive employee benefits, and 5) was hired pursuant to an RFP which specifically provided that Plaintiff "will not be hired as an employee, or receive a salary or benefits." On appeal, Plaintiff raises nuanced arguments concerning the Rules of Professional Conduct, the purported

employer control of in-house attorneys, factual claims about his status through an improper self-serving certification, and his passing up of legal work due to County conflicts. This brief will outline how each of these arguments are unavailing.

Plaintiff also incorrectly claims that his non-renewal constituted the "discharge," "suspension," "demotion," or "terminat[ion]" required to be a retaliatory action under CEPA. The trial court correctly concluded that the lapse of Plaintiff's statutory term was not an adverse employment action or hostile work environment. Plaintiff promotes a case involving a non-tenured school teacher, claiming it stands for the proposition that non-renewals can be justiciable under CEPA. However, that case does not even make that holding, and the more analogous case involved our Supreme Court's dismissal of a CEPA claim brought by a county prosecutor, who is similarly a statutory officer with a term in office.

For these reasons, Plaintiff has failed to state a valid CEPA claim, and the Law Division should be affirmed.

PROCEDURAL HISTORY

On June 24, 2022, Plaintiff Kevin Kelly (hereinafter "Plaintiff") filed a complaint against Defendants County of Sussex, and Commissioners Carney, Fantasia, and Yardley (hereinafter "Sussex County") in the Superior Court of New Jersey, Sussex County Vicinage. The complaint asserted two counts pursuant to CEPA. (Pa3).

On August 15, 2022, Sussex County filed a Motion to Dismiss Plaintiff's complaint with prejudice pursuant to Rule 4:6-2(e). (Pa17) After oral argument before the Honorable Louis S. Sceusi, J.S.C. on December 9, 2022, the judge dismissed Plaintiff's complaint with prejudice on December 28, 2022 (Pa19), finding that Plaintiff was not an "employee" for CEPA purposes, and did not suffer "retaliatory action."

Thereafter, on January 3, 2023, Plaintiff filed a motion for reconsideration pursuant to Rule 4:49-2. (Pa31). Sussex County opposed Plaintiff's Motion for Reconsideration. (Pa35). This motion raised issues concerning the Court's determination regarding Plaintiff's independent contractor status, and not the other factors comprising a prima facie case under CEPA. (Pa37). Once again, after oral argument before the Honorable Louis S. Sceusi on May 22, 2023, the trial court entered an order denying Plaintiff's motion for reconsideration. In relevant part, the judge wrote:

> …[t]his Court's decision was not based on an incorrect or irrational basis. Critically, this Court: (1) correctly applied the Pukowsky factors (which under D'Annunzio are applicable to a CEPA claim) to the facts surrounding Plaintiff's independent contractor relationship with the County; and (2) considered all probative, competent evidence in the public record, most notably the 2018 RFP which clearly stated that Plaintiff would not be hired as an employee.
>
> [(Pa37)].

On May 23, 2023, Plaintiff filed notice of appeal.

STATEMENT OF FACTS

Plaintiff brought the instant CEPA claim after his term lapsed serving in the "statutory position of [Sussex County] Counsel pursuant to N.J.S.A. 40A:9-43 . . . for a 3-year term beginning on July 1, 2018." (Pa12).

The public record establishes that in 2018, the Sussex County Board of County Commissioners ("Board") sought a new part-time County Counsel to provide legal services to Sussex County as specified in Section 2.10 of the Sussex County Administrative Code. (Pa12). The County Counsel is a statutory position with a term of three years. N.J.S.A. 40A:9-43 ("In every county the board of chosen freeholders shall appoint a county counsel . . . . The term of office of the county counsel shall be 3 years . . . ."). Notably, the Administrative Code expressly provides that the County Counsel "shall be permitted to conduct private law practices," demonstrating a part-time intent for the role. (Da4).

To facilitate the appointment of a part-time County Counsel, the Board issued a Request for Proposal ("RFP"), which was published in the New Jersey (Sunday) Herald on May 1, 2018. (Da34). The RFP was issued pursuant to the competitive contracting provisions of the Local Public Contracts Law, N.J.S.A. 40A:11-4.5. (Da40). The RFP set forth "Technical Specifications" for the position of part-time County Counsel, which in relevant part stated:

> The County of Sussex is soliciting proposals from attorneys licensed to practice in the State of New Jersey to serve as County Counsel on a part-time basis. The individual selected will be paid at an hourly rate established by the Sussex County Board of Chosen Freeholders, *and will not be hired as an employee*, or receive a salary or benefits. The individual selected will be expected to personally perform the *contractual services* as County Counsel.
>
> [(Da60)].

The RFP set forth certain responsibilities of the part-time County Counsel, including maintaining office hours and attending meetings of the Board. (Da63). The RFP provided that the County Counsel would be paid on an hourly basis for work performed at the rate of $150.00 per hour. (Da63).

Several law firms submitted bids in response to the RFP for the position of part-time County Counsel, including Plaintiff's law firm, Kelly & Ward, LLC. ("Kelly & Ward") (Da81). Kelly & Ward's RFP response highlighted Plaintiff's substantial experience practicing law in Sussex County. (Da82). In a

cover letter contained on Kelly & Ward's letterhead, Plaintiff described his qualifications and stated that he was "familiar with the decades-long part time operations of County Counsel." (Da83).

Following the bidding process, at its June 27, 2018 meeting, the Board adopted a resolution appointing Plaintiff to serve as part-time County Counsel through Kelly & Ward. (Da115). Plaintiff's term as part-time County Counsel was to begin on July 1, 2018 and expire on June 30, 2021 at the stated hourly rate of $150.00 per hour for services performed as needed. (Da115).

In a July 5, 2018 press release announcing Plaintiff's appointment as part-time County Counsel, Plaintiff himself acknowledged that the County Counsel position had previously been occupied on a full-time basis, and that under his appointment it was returning to a part-time basis: "In returning the Office of the County Counsel to part-time attorneys, the Freeholders[1] have created the opportunity for us to utilize the special skills and services of multiple local counsels on an as needed basis." (Da120-Da121).

During Plaintiff's tenure as part-time County Counsel, he was compensated by payments made from Sussex County to Kelly & Ward. To this end, Plaintiff signed purchase orders that were made payable to Kelly & Ward,

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[1] On January 1, 2021, the Sussex County Board of Chosen Freeholders became the Sussex County Board of County Commissioners pursuant to P.L. 2020, c. 67.

not him personally. (Da220-Da376). In turn, Sussex County's payments for Plaintiff's services as part-time County Counsel were made in checks payable to Kelly & Ward, LLC. (Da167-Da220).

Prior to the June 30, 2021 expiration of Plaintiff's three-year term, on June 23, 2021, the Board considered the appointment of a part-time County Counsel for a term that would commence on July 1, 2021 and end on June 30, 2024. (Da124). As indicated in the transcript of the June 23, 2021 meeting (Da145), the Board decided to follow past practice and seek bids for part-time County Counsel. (Da152). This time, Sussex County expressed a desire to procure a law firm with a wider breadth of experience, in order to avoid hiring special County Counsels for specific matters, which it had been doing during Plaintiff's term as County Counsel. Specifically, the Director of the Board stated that:

> [w]e were specifically looking for a large firm with a very, very wide and deep bench in order for us to access professionals to be able to service the County. We wanted to make sure that we always had counsel available to us in any case of crisis. COVID really opened our eyes for need for solid counsel. So, again, we were specifically seeking a large – larger firm with a deep bench.
>
> [(Da145-Da146)].

This contrasted with the approach set forth in Plaintiff's initial proposal by Kelly & Ward, in which he himself had referenced the possibility of using multiple local counsels on an as needed basis. (Da121). At the meeting, the

Board voted to appoint another law firm and individual employed by that law firm to serve as part-time County Counsel, (Da132 and Da143), and thanked Plaintiff for his service:

> I want to specifically thank Mr. Kelly because although the structure that we had in place and the size of Mr. Kelly's firm was not what we were looking for, we do appreciate his hard work on behalf of the County. We hope to maintain a strong relationship with him.
>
> [(Da145)].

The Board took no action with respect to Plaintiff at the June 23, 2021 meeting. (Da132). As a result, pursuant to statute, Plaintiff's term as part-time County Counsel expired on June 30, 2021.

LEGAL ARGUMENT

I. PLAINTIFF'S APPEAL PRESENTS SEVERAL PROCEDURAL ISSUES THAT MUST BE ADDRESSED.

A. Plaintiff's appeal fails even under the applicable deferential standard of review.

In approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the Court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 776 (1989). The Court must search the complaint "in depth and with liberality to ascertain whether the

fundament of a cause of action may be gleaned even from an obscure statement of claim…." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact… [and the examination] should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id. at 165. Dismissal of the plaintiff's complaint can be appropriate after the complaint has been "accorded…[a] meticulous and indulgent examination…." Printing Mart-Morristown, 116 N.J. at 772. Even when affording the applicable *de novo* standard of review, Stop and Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017), there is no basis to reverse the trial court's decision to dismiss Plaintiff's complaint with prejudice.

Plaintiff also did not present any basis to the trial court to obtain the judicial relief of reconsideration in the order under review. In D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990), the Chancery Division stated:

> [a] litigant should not seek consideration merely because of dissatisfaction with a decision of the Court….Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an

> arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process....[T]he Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

The appropriate appellate standard of review of a denial of a motion for reconsideration is abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). "Although our reported decisions do not clearly articulate the standard of review where there is a denial of a motion for reconsideration, the standard in the Federal courts is 'abuse of discretion.' We now adopt that standard as the appropriate norm for appellate review of a denial of a motion for reconsideration." Id. at 389. An abuse of discretion occurs "when the court's decision is made without rational explanation, inexplicably departs from established policies, or rests upon an impermissible basis. Matter of T.I.C.-C., 470 N.J. Super 596, 606 (App. Div. 2022) (citing Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "If the judge misconceives or misapplies the law, his discretion lacks a foundation and becomes an arbitrary act. When that occurs, the reviewing court should adjudicate the matter in light of the applicable law to avoid a manifest denial of justice." In re Presentment of Bergen County Grand Jury, 193 N.J. Super. 2, 9 (App. Div. 1984).

Plaintiff fails to demonstrate how or why the trial court's well-reasoned decision denying Plaintiff's motion for reconsideration was an instance of an

abuse of discretion. Indeed, the trial court's decision denying Plaintiff's motion for reconsideration provided ample explanation as to why Plaintiff failed to state a claim under CEPA, with the trial court stating:

> In this Court's December 2022 Order, the Court determined that under the seminal case of D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110, 122 (2007), Plaintiff was an independent contractor, not an employee, and thus not entitled to the protections of the New Jersey Conscientious Protection Act....This Court also recognized that D'Annunzio adopted the twelve-factor test in Pukowsky v. Caruso, 312 N.J. Super. 171, 182-183 (App. Div. 1998) for the purpose of determining whether an independent contractor may qualify as an employee for the purpose of CEPA. This Court's application of the factors was well-reasoned and thorough in finding that all of the Pukowsky factors weighed against the Plaintiff.
>
> To the contrary, Plaintiff has not put forth any new information or evidence in the instant motion to demonstrate that the court's decision was incorrect. Nor has Plaintiff demonstrated or established that the Court acted in an arbitrary, capricious, or unreasonable manner....
>
> Moreover, Plaintiff asserts that the Court 'changed a R. 4:6-2 [m]otion into a [s]ummary [j]udgment [m]otion without notifying the parties that it did in fact do that.'...Contrary to Plaintiff's assertions, this Court found that the four corners of Plaintiff's Complaint were insufficient to state a claim as a matter of law. To reach this determination, the Court properly evaluated certain matters of public record that the Defendants provided as part of their motion. The Court's reliance on these *public records*-which are distinct from self-serving certifications that Plaintiff attempted to rely

> upon-did not convert the County Defendants' motion to one for summary judgment as Plaintiff contends.
>
> [(Pa37-Pa38)].

As such, there is no basis for this court to reverse the trial court.

B. The trial court properly considered matters of the public record in deciding the motion to dismiss, and Plaintiff's self-serving certification cannot be considered on appeal.

The trial court properly granted Sussex County's motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e). The opinion was validly based upon certain public records that Sussex County submitted into the motion record, such as the RFP pursuant to which Plaintiff bid and obtained the subject legal work.

Plaintiff incorrectly claimed below that the Court "changed a R. 4:6-2 [m]otion into a [s]ummary [j]udgment [m]otion without notifying the parties that it did in fact do that." Contrary to Plaintiff's assertions, the trial court properly found that the four corners of Plaintiff's complaint were insufficient to state a claim as a matter of law. To reach this determination, the trial court properly evaluated certain matters of public record that Sussex County provided as part of their motion practice.

In Banco Popular N. Am., 184 N.J. at 183, our Supreme Court established that "[i]n evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and

documents that form the basis of a claim.'" Thus, the trial court was permitted to and properly considered documents such as the RFP that Plaintiff's appointment was based upon, and which stated that he was being appointed as an independent contractor. The trial court's reliance on *public records* did not convert Sussex County's motion to one for summary judgment as Plaintiff contends.

In contrast, and directly relevant to this appellate practice, Plaintiff attempted to submit a self-serving certification to the trial court, which sought to add new facts to the record in arguing he was an employee. While it does not appear that Plaintiff's certification was considered by the trial court, it must not be considered by this Court. Sussex County's motion to dismiss must be judged by the four corners of Plaintiff's complaint, as well as any potential *public records*. There is no provision for a party filing a deficient complaint and then later buttressing it with a self-serving certification to survive a motion to dismiss. Further, Sussex County's motion to dismiss was never converted to a motion for summary judgment as Plaintiff has argued.

As such, this Court should consider the public records that were submitted by Sussex County and filed below, but Plaintiff's self-serving certification contained in his appendix must be disregarded by this Court on appeal.

II. THE LAW DIVISION CORRECTLY HELD THAT PLAINTIFF WAS NOT AN "EMPLOYEE" UNDER CEPA BECAUSE HIS

LAW FIRM WAS RETAINED BY SUSSEX COUNTY TO PERFORM LEGAL WORK ON AN AS-NEEDED, INDEPENDENT CONTRACTOR BASIS.

The Law Division correctly held that Plaintiff's part-time role as an external County Counsel rendered him an independent contractor and not an employee for purposes of CEPA.

For an individual to have a valid claim against an employer under CEPA, he or she must be an "aggrieved employee or former employee" of the entity against which such a claim is asserted. N.J.S.A. 34:19-5. Under CEPA, an "employee" is defined as "[a]ny individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. 34:19-2(b). The statutory term "employee[]" is distinguishable from an individual serving as an "independent contractor," see, e.g. Pfenninger v. Hunterdon Cent. Reg'l High Sch., 167 N.J. 230, 252 (2007) ("an independent contractor, in contrast to the average employee, contracts to do certain work according to his own methods, without being subject to the control of his employer except as to the product or result of his work" (quotation omitted)), as independent contractors are not entitled to protections under CEPA. Perlowski v. Elson T. Killam Assocs., 384 N.J. Super. 467, 473 (Law Div. 2005).

In the seminal case of D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110, 122 (2007), our Supreme Court established a three-factor test to

analyze whether "a professional person or an individual otherwise providing specialized services allegedly as an independent contractor" can be construed as an "employee" for purposes of CEPA: "(1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue." Id. at 122.

With respect to the latter factor, the D'Annunzio Court provided guidelines to determine whether there has been a functional integration:

> [h]as the worker become one of the "cogs" in the employer's enterprise? Is the work continuous and directly required for the employer's business to be carried out, as opposed to intermittent and peripheral? Is the professional routinely or regularly at the disposal of the employer to perform a portion of the employer's work, as opposed to being available to the public for professional services on his or her own terms? Do the "professional" services include a duty to perform routine or administrative activities? If so, an employer-employee relationship more likely has been established.
>
> [Id. at 123-124].

The Court further adopted a twelve-factor test originally established in Pukowsky v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998) to determine whether an "independent contractor" may qualify as an "employee" for purposes of CEPA:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation--supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the 'employer;' (10) whether the worker accrues retirement benefits; (11) whether the 'employer' pays social security taxes; and (12) the intention of the parties.
>
> [Id. at 182-183 (quoting Pukowsky, 312 N.J. Super. at 182-83).]

The analyzing court "must balance those factors supporting employee status with those supporting independent contractor status," and "absolute unanimity" among the factors is not required for a claim to be dismissed as a matter of law. Perlowski, 384 N.J. Super. at 476.

In this case, the trial court correctly applied the Pukowsky factors to find that Plaintiff was not an employee for CEPA purposes. The trial court conducted an extensive application of the facts to the various Pukowsky factors:

> As to the first, second, and third Pukowsky factors, 'the employer's right to control the means and manner of the worker's performance,' 'the kind of occupation—supervised or unsupervised," and 'skill,' the Court finds that Plaintiff indeed performed work that was unsupervised in nature and that required the use of his independent professional judgment, skill, and compliance with relevant professional standards for attorneys, namely the New Jersey Rules of Professional Conduct. Given his role as an attorney serving as a part-

time County Counsel, Defendants did not have the right to control the means and manner of Plaintiff's performance. Thus, factors one, two, and three weigh against Plaintiff.

As to the fifth and twelfth factors, 'the length of time in which the individual has worked,' and 'the manner of termination of the work relationship,' the Court finds that Plaintiff's role as County Counsel was meant to be a part-time position, under the clear terms of the agreement and the RFP, such to provide services to the Board of County Commissioners on an as-needed basis. Further, it is worthy of mentioning that the County Counsel is expressly authorized to maintain a private law practice. Lastly, Plaintiff's role is a statutory one with a term of office of three years. <u>See</u> N.J.S.A. 40A:9-43. Based on these findings, factors five and seven weigh against Plaintiff.

With respect to the fourth factor, 'who furnishes the equipment and workplace,' the record is quite clear that Plaintiff itemized billing entries submitted on letterhead provided by Kelly & Ward, not by the County. As such, Plaintiff utilized the resources of his law firm to perform his County Counsel duties. To the extent Plaintiff was required to attend meeting[s] or maintain a presence at Sussex County facilities, the Court finds this to be negligible in comparison to the facts outlined above. Thus, factor four weighs against Plaintiff.

As to factor six, 'the method of payment,' the Court finds that because the checks the County issued as payment for Plaintiff's services were made out to Plaintiff's law firm and not him personally, and because the invoices Plaintiff sent to the County for his services came from his law firm and not him personally, that the County never paid Plaintiff directly, as it would an employee. As such, factor six weighs against Plaintiff.

> As to the eight, tenth, and eleventh factors, 'whether there is annual leave,' 'whether the worker accrues retirement benefits,' and 'whether the 'employer' pays social security taxes,' it is clear that Plaintiff did not receive any employment benefits through his role as part-time County Counsel. Plaintiff also did not receive annual leave, did not accrue retirement benefits, and Sussex County did not pay social security or payroll taxes on Plaintiff's behalf. Clearly then, these factors weight against Plaintiff.
>
> Regarding factor nine, 'whether the work is an integral part of the business of the employer',' Plaintiff's role as County Counsel cannot be described as an integral part of the business of the employer, which is a governmental entity. His role as part-time County Counsel was that of an independent legal advisor appointed for a statutory term of three years (with no automatic right to be reappointed) to fulfill the specific, limited role of providing legal services as and when needed by the County as described in Section 2.10 of the Sussex County Administrative Code. This factor weighs against Plaintiff.
>
> Lastly, as to the twelfth factor, 'the intention of the parties,' it is unequivocal that the County's RFP's Technical Specifications sought the services of a 'part-time' County Counsel for which '[t]he individual selected will be paid at an hourly rate established by the Sussex County Board of Chosen Freeholders, <u>and will not be hired as an employee, or receive a salary or benefits.</u>'
>
> [Pa26-Pa27 (emphasis in original)].

The Law Division judge dutifully applied the factor test and concluded that Plaintiff failed to establish that he was an "aggrieved employee or former

employee" as required to assert a CEPA claim. (Pa28). The trial court judge's analysis represents a correct and thorough application of the applicable law.

On appeal, Plaintiff raises several different nuanced arguments concerning the employee/independent contractor issue, each of which must be rejected.

First, Plaintiff first argues the trial court "failed to consider the central theme" of D'Annunzio." Contrary to this claim, the trial court did consider the central theme of D'Annunzio, and in fact conducted a thorough analysis of all the factors contained in same. Plaintiff seeks an interpretation that CEPA's status as remedial legislation that is liberally construed leads to his complaint being automatically valid. But that is not the law. Our courts have reiterated that independent contractors are not subject to CEPA. This analysis necessarily results in a finding that Plaintiff cannot bring a whistleblower claim, as the trial court found.

Second, Plaintiff incorrectly argues that the "control factor" is regulated by the New Jersey Rules of Professional Conduct governing attorneys, warranting a finding that he was an employee for purposes of CEPA. A closer review demonstrates that Plaintiff's attorney status militates in favor of finding him to be an independent contractor. "[E]mployer control" is analyzed under CEPA pursuant to the twelve-factor Pukowsky test – which is a hybrid approach

adopted by our courts incorporating both the common law right-to-control test and the relative nature of the work test. Estate of Kotsovska v. Liebman, 221 N.J. 568, 592-94 (2015) (citing Pukowski v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998)). Plaintiff has not cited any authority that ties the "control factor" to the RPCs as he claims. The only relevant case that he cites is Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451, 458, 463 (1989), which stands for the unremarkable proposition that full time in-house attorneys may assert claims under CEPA without a constitutional violation "imping[ing] on the Supreme Court's plenary and exclusive power to regulate the conduct of attorneys."

To the extent Plaintiff claims he was "controlled" for purposes of CEPA, leading to him taking various whistleblower actions outlined in his complaint, his actions are also inconsistent with his professional obligations under the very RPCs that he raises. If Plaintiff actually believed that he was forced to commit an illegal act, he was obligated to withdraw from representation. RPC 1.16(a)(1) states that "[a] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if, (1) the representation will result in violation of the Rules of Professional Conduct or other law." Plaintiff did not comply with this ethical obligation and instead remained in his statutory position of County Counsel and served out his term,

reaping the financial benefits of same. The RPCs do not provide any basis for Plaintiff to claim that he was controlled by Sussex County to establish him as an employee under CEPA, and if anything, the RPCs obligated Plaintiff to withdraw from representation and he failed to do so.

Contrary to Plaintiff's contention that the RPCs rendered him "control[led]" as an employee for CEPA purposes, the RPCs also afforded Plaintiff a unique insulation from termination or removal because he possessed a statutory term – during which the Sussex County lacked any ability to "control" him by removal.

To this end, in Coyle v. Bd. of Chosen Freeholders, 170 N.J. 260 (2002), our Supreme Court recognized that RPC 1.16(a)(3), which requires a lawyer to withdraw from representation if he or she is discharged, is inapplicable to government lawyers with a statutory term of office, such as County Counsel: "RPC 1.16(a)(3) was never intended to apply to public counsel with statutory terms, and we so hold." Id. at 268.

As such, the only way for the Board to change its representation, barring removal of Plaintiff for cause, would have been for the Board to wait until the expiration of Plaintiff's statutory term of office and then appoint another individual to the position. That is exactly what happened here. The Board

followed the law and decided that at the end of Plaintiff's term, it wanted to hire a firm with a deeper bench of attorneys and chose not to reappoint Plaintiff.

Plaintiff's instant lawsuit is simply an attempt to shoehorn a baseless CEPA claim into a valid and lawful exercise of a public entity's right to choose its legal representation, particularly where the public entity cannot avail itself of the typical right of a client to terminate its legal representation during the statutory term of its County Counsel. *See* RPC 1.16(a)(3). It is illogical for Plaintiff to claim that the RPC's subjected him to Sussex County's "control" when he possessed a unique statutory term that allowed him to remain in his position without his client having any ability to remove him – unlike any other legal representation in New Jersey.

Third, Plaintiff recites various facts from his self-serving certification to support a finding that he was an employee. But this self-serving certification cannot be considered as it is outside the motion for reconsideration on appeal (and underlying motion to dismiss), as further outlined in Point Heading I(C), *supra*.

Even if the self-serving certification is evaluated, it raises various factual claims that still do not support a conclusion that Plaintiff was an employee under CEPA. For instance, Plaintiff notes that he held regular office hours at a specific office in the County Administration building, claims he was on call 24/7 to deal

with emergent matters, and contends he was tasked with responding to the County officials on a daily basis. (Pf. Br. at 10). These facts are unremarkable and are consistent with the obligations of any other outside municipal or county attorney throughout the State of New Jersey. Outside counsels regularly provide representation on a 24/7 basis, especially in our technology age, and may also interact with their public bodies on a daily basis. They may also be required to meet at the public body's offices on a recurring basis. But those aspects do not render the attorney an employee for CEPA purposes, especially when considering all the other factors, including that Plaintiff's retainer was established pursuant to an RFP seeking an attorney as an independent contractor, paid through his private law firm.

Fourth, Plaintiff's argument that his decision to forego certain private legal work due to a potential conflict with the County rendered him an employee must be rejected. In making this claim, Plaintiff conflates the Board objecting to his outside work representing private clients or inability to represent certain clients in private practice with the Board controlling his work as County Counsel.

Under RPC 1.7, an attorney "shall not represent a client if the representation involves a concurrent conflict of interest." This occurs when a representation of one client "will be directly adverse to the other client," or if

"there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." RPC 1.7(a)(1)-(2). Notably, unlike private clients, a public entity such as Sussex County may not consent to or waive a concurrent conflict of interest. RPC 1.7(b)(1).

In D'Annunzio, the Court noted that the Appellate Division, in emphasizing the control factor under Pukowsky, "focused on factors that examine the nature of the employer's right to control the work of a licensed professional . . . not the right to control the outcome, but rather to manage how that work is performed for the purposes of the employer's business operations. . . . [W]e agree with the emphasis in the Appellate Division's analysis. . . ." Id. at 125. Thus, when evaluating the "control" factor of the Pukowsky test, a court must look to the extent that the employer had control over the individual's work as it relates to the employer's business operations.

In this case, Plaintiff had a legal obligation to refrain from any outside representations that may constitute a concurrent conflict of interest with Sussex County. Sussex County did not possess the legal ability to waive any such conflict. If an attorney represents a public entity, such as a county, it is possible that numerous conflicts arise, for instance a potential inability to represent any clients with land use applications that may be before the county planning board.

However, the existence of these potential conflicts in no way establishes "control" by Sussex County over Plaintiff for purposes of CEPA. The "control" under the statute is based upon how work is performed for the employer's own business operations.

While Plaintiff may have wished he had the ability to pursue certain private representations during his time as County Counsel that he had to forego due to legal conflicts, that does not support him having a right of action as an employee under CEPA after his statutory term expired. The control analysis is limited to Plaintiff's work for Sussex County, not the outside work that he passed upon due to conflicts of interest. The conflict provisions of the RPCs, which are designed to protect the interests of attorneys' clients, cannot be construed as determining whether attorney is an employee under CEPA, which is a wholly different inquiry.

For these reasons, the trial court correctly held that Plaintiff was an independent contractor for purposes of CEPA.

III: THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF'S NON-RENEWAL DID NOT CONSTITUTE A RETALIATORY ACTION AS A MATTER OF LAW.

The trial court correctly held that the lapse in Plaintiff's term was not a CEPA retaliatory action as a matter of law. The third and fourth CEPA factors require Plaintiff to demonstrate that "an adverse employment action was taken

against him" and "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003) (emphasis added). Plaintiff's position that he meets this standard is incorrect. The term "adverse employment action" is encompassed within CEPA's statutory definition of "retaliatory action" as: "[t]he discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). In Keelan v. Bell Communications Research, 289 N.J. Super. 531, 539 (App. Div. 1996), the Appellate Division elaborated that "[t]he definition of retaliatory action speaks in terms of completed action. Discharge, suspension or demotion are final acts. 'Retaliatory action' does not encompass action taken to effectuate the 'discharge, suspension or demotion'".

Retaliatory actions may be premised upon a single discrete action, or a hostile work environment, which is defined as "many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003).

> In determining whether an actionable hostile work environment claim exists, [our courts] look to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere

> offensive utterance; and whether it unreasonably interferes with an employee's work performance."
>
> [Id. at 447 (quotation omitted)].

Plaintiff cannot establish as a matter of law that he suffered a "discharge, suspension, or demotion" or was "terminated." Plaintiff's complaint concedes that he was appointed to serve as part-time County Counsel pursuant to N.J.S.A. 40A:9-43. This appointment was approved by resolution of the Board and was effective from July 1, 2018 to June 30, 2021. The Board did not take any further action to re-appoint Plaintiff to a new three-year term.

Plaintiff's position that he was "terminated" – as he states in his Complaint – is inconsistent with N.J.S.A. 40A:9-43 and would require a finding that he had a continued right to remain in the position of part-time County Counsel past June 30, 2021. This would be an *ultra vires* reading of the statute governing county counsels. Plaintiff's argument is also inconsistent with the Board's action, which acknowledged and thanked Plaintiff for his services, while choosing to appoint a new individual to serve as County Counsel for a new three-year term. (Da143). The public record demonstrates that Board publicly parted ways with Plaintiff amicably, with the Director stating:

> I want to specifically thank Mr. Kelly because although the structure that we had in place and the size of Mr. Kelly's firm was not what we were looking for, we do appreciate his hard work on behalf of the County. We hope to maintain a strong relationship with him.

[(Da145)].

Plaintiff's complaint fails to establish any factual basis to conclude that he was discharged, suspended, demoted, or terminated. Rather, he served a three-year term, after which the Board did not choose to renew his services. The trial court correctly agreed and adopted this reasoning in its rider granting the Sussex County' motion to dismiss. (Pa28).

On appeal, Plaintiff argues that Sussex County's decision to not reappoint him to a statutory term constituted the required retaliatory action. Plaintiff relies upon a case, Abbamont v. Piscataway Tp. Bd. Of Educ., 269 N.J. Super. 11 (App. Div. 1993), which a involves public school teacher and does not stand for the purported proposition. In that case, the Appellate Division heard an appeal from a jury verdict that was awarded in a CEPA case. Ibid. It involved a teacher that was not re-hired or recommended for tenure, after which he commenced a CEPA action. Id. at 20. The appeal did not address or determine whether the non-renewal and denial of tenure to a teacher constituted a retaliatory action under CEPA. It also did not involve a statutory appointment to a term in office. Thus, the case does not stand for Plaintiff's proffered proposition that the non-renewal of his statutory term is actionable under CEPA as a matter of law.

Unlike the position of a school teacher, as County Counsel, Plaintiff had a statute term in an office that he was required to vacate it after its expiration.

"Absent a statutory holdover position, [statutory employees] who have not been reappointed and confirmed by the last day of their first full term must vacate the office." Casamasino v. City of Jersey City, 158 N.J. 333, 353 (1999). A statutory term of office, barring a holdover provision, definitively ends at the expiration of the term unless the person serving in that office is reappointed. Kaman v. Montague Tp. Committee, 306 N.J. Super. 291, 300 (App. Div. 1997), *aff'd*, 158 N.J. 371 (1999). The applicable County Counsel statute, N.J.S.A. 40A:9-43, does not contain a holdover provision. Thus, Plaintiff had no right to remain in office after his term expired and he was not entitled to a reappointment.

The Court addressed the interplay of a statutory appointment with CEPA in Yurick v. State, 184 N.J. 70 (2005), where it affirmed the dismissal of a CEPA claim brought by a county prosecutor that had a statutory term. Id. at 75-76. In that case, the county prosecutor was nominated and confirmed by the State Senate in accordance with the State Constitution and state statute. Id. at 74. County prosecutors receive a five-year term, and unlike a county counsel, they are allowed to serve in holdover until a successor qualifies. Id. at 74. After the prosecutor's five-year term expired, the Attorney General entered a "supersedure" order that took over all the prosecutor's duties. Id. at 74. Under this order, the prosecutor continued to hold his office in holdover, but no longer had any "power of control over the day-to-day operations of the prosecutor's

office." Id. at 82. Our Supreme Court held that the "[s]upersession" did not constitute "retaliatory action" under CEPA as a matter of law. Id. at 83. It held that the removal of duties under "[s]upersession" is "not the equivalent of removal from office." Ibid. Notably, the Court wrote that: "Plaintiff may have hoped to remain as a holdover officer in charge of the operation of his office at the conclusion of his five-year term, but he had no reasonable expectation that he would be permitted to do so." Ibid.

The Yurick case demonstrates that a statutory appointee to a term in office cannot have any reasonable expectation of a renewed term in office, and that a decision to not renew a term or remove powers is not a "retaliatory action" under CEPA. If a holdover statutory appointee was stripped of all his powers in office, and the Court did not find that to be actionable under CEPA, it follows that a county counsel cannot state a CEPA claim as a matter of law premised upon his or her nonrenewal without any right to holdover. A contrary interpretation would render CEPA as granting statutory employees with an implied tenure right and bind governing bodies to renew the terms of statutory appointees under certain circumstances, which cannot possibly be the law.

For these reasons, the trial court correctly concluded that Plaintiff did not suffer a retaliatory action as a matter of law.

CONCLUSION

For the foregoing reasons, the Law Division correctly dismissed Plaintiff's complaint for failure to state a claim and denied reconsideration, and these final orders should be affirmed.

Respectfully submitted,

/S/ MICHAEL L. COLLINS

MICHAEL L. COLLINS, ESQ.

KRISHNA R. JHAVERI, ESQ.

FILED, Clerk of the Appellate Division, November 28, 2023, **A-002847-22**

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November 28, 2023

Via eCourts Appellate

Honorable Judges of the Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0970

Re: Kelly v. County of Sussex, et al.
A.D. Docket No.: A-2847-22

Honorable Judges:

Please accept this Letter Brief in lieu of a more formal brief in reply to Defendants' recently-filed Brief and Appendix.

First of all, both Orders were appealed. On p. 4 of the Notice of Appeal, it specifically states that additional trial Court information: Disposition Date: 12/28/22, which was the original Motion in connection with this matter.

On p. 1 of 5, the Appellant states 5/22/23 with an asterisk after that date and, as indicated on p. 4, is the original hearing date.

Now, to Defendants' Brief.

1. Question presented: Is Kevin Kelly, Esq. a part-time Sussex County Counsel another George D'Annunzio, (192 N.J. 110 (2007))?

Appellant will be filing a direct appeal to the Supreme Court.

Respectfully submitted,
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FILED, Clerk of the Appellate Division, December 07, 2023, **A-002847-22**

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December 7, 2023

Via eCourts Appellate

Honorable Judges of the Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0970

Re: Kelly v. County of Sussex, et al.
A.D. Docket No.: A-2847-22

Honorable Judges:

Please accept this Letter Brief in lieu of a more formal brief in reply to Defendants' Brief and Appendix.

Defendants' Brief fails to recognize a number of factors set forth in Plaintiff's Certification. First of all, the Plaintiff did not "perform legal work" on an as-needed basis. Clearly, the Plaintiff had regular office hours, had an assistant and a secretary. In other words, the work of the County was done by County employees in the Administration Building. The legal work of the County was done for the County in the County's building.

How the RPCs Influenced the Plaintiff's Work

The Defendants argue that the Plaintiff should have resigned rather than be placed in a situation where the RPCs come into play. What the Defendants failed to recognize is that in connection with the ballot issue, and the payment of the Sheriff's personal legal expenses, were objected to by the Plaintiff and they are the CEPA predicates. When a lawyer-Plaintiff agrees to carry out the wrongful conduct, then there is a problem. In this case, the Plaintiff objected.

The Non-Renewal of a Contract Can in Fact be a Retaliatory Act

At the end of the contract, there was no dissatisfaction with the Plaintiff. The Commissioners gave as a reason the fact that Steinhardt has more employees. The Court must recognize that it was Steinhardt who handled the ballot question and Steinhardt who was the Sheriff's lawyer and whose legal fees the Plaintiff refused to permit. Not only was the Plaintiff's contract not renewed, but his successor was the one who wanted the RPCs to be violated i.e. pay my legal fees for the Sheriff's personal matters. The best way to look at the non-renewal of a contract is to realize that the action can be taken for a reason, for no reason, but it can't be taken for the wrong reason. The wrong reason in this case is the Plaintiff's refusal to carry out wrongful requirements i.e. the ballot question and the Sheriff's legal fees. If the Plaintiff's contract was not renewed because of those two issues, then the contract

was not renewed for "the wrong reason," and, therefore, this is a CEPA case brought on behalf of a part-time County Counsel whose contract was not renewed.

Plaintiff claims it was for the wrong reasons, whether it was or it wasn't is a jury question. Whether the Plaintiff is an employee pursuant to CEPA, is a legal question. Unfortunately, the Court below missed the point and actually set CEPA back because the Court did not recognize that CEPA is remedial legislation which must be liberally construed.

Respectfully submitted,
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