SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JANET YIJUAN FOU, Plaintiff-Respondent, v. KEVIN KERVENG TUNG, P.C. and KEVIN TUNG, ESQ., Defendants-Appellants.	DOCKET NO.: A-003377-22T4 CIVIL ACTION ON APPEAL FROM AMENDED FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO. BELOW: NID-L-6259-12 SAT BELOW: HON. J. RANDALL CORMAN, J.S.C.

BRIEF FOR DEFENDANTS-APPELLANTS KEVIN KERVENG TUNG, P.C. AND KEVIN TUNG, ESQ.

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PRELIMINARY STATEMENT

In the history of American Jurisprudence, this case is likely the first instance where an outrageous, astronomic, and excessive attorney fee award of over $1.547 Million Dollars was first awarded to Plaintiff's attorneys for legal fees, which consisted of attorney fees compounded with attorney fees in a legal malpractice case where the elements of causation and actual damage were never established. In the case at hand, the Court ruled that the Plaintiff sustained no actual damages other than incurring legal fees to re-open the case for a different amended judgment of divorce because of the alleged Defendants' breach of duties during the representation, thereby Defendants are liable for the legal fees incurred by the Plaintiff. This ruling is the result of misapplying the law and introducing "new law" into our jurisprudence that may well come back to haunt the citizen of the State of New Jersey.

This ruling is unsupported by existing case law in the State of New Jersey or perhaps across the entire nation and the result is also fundamentally unfair. In the meantime, this case establishes a dangerous precedent that plaintiff can create damages in any legal malpractice case just by commencing action to incur legal fees so long as there are some evidence that the defendant has breached the duty in providing legal services to the plaintiff. The two cases relied on by the Appellate Division in the decision to support the ruling are either not applicable or in fact in support of Defendants' argument that Plaintiff needs to prove causation and damages

in addition to breach of duty before being awarded legal fees, because incurring legal fees per se is not the element of damage in the tort claim. Plaintiff must prove actual damages sustained in the underlying matrimonial case before being awarded legal fees in the malpractice case pursuant to "trial within a trial" doctrine in legal malpractice case.

In the instant case, at the end of the trial, a direct verdict should have been rendered for the Defendants in a professional malpractice case when Plaintiff failed to prove actual damages by an expert in the underlying matrimonial case. The trial court judge, however, denied Defendants' motion to dismiss the malpractice complaint for failure to prove damages. Instead, the trial court judge referred the case to the jury to infer causation and damage from circumstantial evidence in the professional malpractice case, regardless only the expert is permitted to opine causation and damages in the professional malpractice case. The jury is not permitted to infer causation and damages from circumstantial evidence.

On appeal, the Appellate Division corrected the trial court's mistake and vacated the unsubstantiated jury award of $500,000 for Plaintiff's failure to prove actual damages, but substituted the jury award of $500,000 with a new award for $449,798.50 to Plaintiff's attorneys for legal fees despite the fact that Defendants were not afforded an opportunity to challenge this new award and the trial records are devoid of any analysis regarding the legal fees claimed by Plaintiff; especially,

the Appellate Division was aware that the amount of the award for attorney fees was substantially different from the legal fees awarded by the Family Court at the conclusion of the contested divorce case between the Fous. The Appellate Division then affirmed in part, vacated in part, and remanded for further proceedings of the Final Judgment of the Superior Court of New Jersey.

On remand, the Plaintiff requested for the award of $1,311,832.94 legal fees in the proposed Final Judgment for the trial court judge to sign. The trial court granted Plaintiff's application and denied Defendants' opposition and cross-motion to vacate the Final Judgment without analyzing the law and facts.

By permitting fee-shifting in a legal malpractice case where causation and damage were never established in the underlying matrimonial case, more and more unscrupulous attorneys will be encouraged to abuse the legal process for their own personal gain and greed. In the instant matter, the attorneys for the Plaintiff fabricated a non-existing malpractice case simply for their personal financial gains by repeatedly misrepresenting facts to various courts. Plaintiff's attorney finally admitted during the investigation before an Attorney Ethics investigator after the completion of the malpractice trial. Now, the Court seeks to reward astronomical and excessive attorney fees to Plaintiff's attorneys who have abused the legal process and committed fraud upon the court and who have not successfully proved actual damages sustained by the Plaintiff. Where does the justice lie to award attorney fees

of $1,311,832.94 to attorneys who had openly admitted to commit fraud upon the court at the expense of the innocent victim!

PROCEDURAL HISTORY

On January 11, 2019, following a jury trial and verdict, Judge Phillip L. Paley of the Superior Court of New Jersey entered a Final Judgment against Defendants Kevin Kerveng Tung, P.C. and Kevin Tung, Esq., imposing joint and several liability for $1,547,063.31 in damages ($500,000), attorney's fees ($702,000), prejudgment on the jury's damages award ($65,250), and prejudgment interest on the award for attorney's fees and costs ($279,813.31). (Da25)[1] Defendants appealed the Final Judgment. On August 25, 2021, the Appellate Division of the Superior Court of New Jersey rendered an opinion, affirming in part, vacating in part, and remanding for further proceedings of the Final Judgment of the Superior Court of New Jersey. (Da25-40) On June 23, 2023, Judge J. Randall Corman of the Superior Court of New Jersey entered an Order denying Defendants' motion to vacate the Final Judgment dated January 11, 2019. (Da13) On July 10, 2023, Judge J. Randall Corman of the Superior Court of New Jersey entered an Order, amending January 11, 2019 Final Judgment pursuant to August 25, 2021 Appellate Court Decision. (Da15-17)

STATEMENT OF FACTS

[1] Hereinafter, "Da" refers to Defendants' Appendix for Appeal.

In a legal malpractice action instituted by the Plaintiff Janet Yijuan Fou ("Respondent") against her attorney Kevin Tung and the law firm, Kevin Kerveng Tung, P.C., ("Appellants") for their representation in an uncontested divorce matter involving a $1,000 legal fee, the Plaintiff-Respondent failed to prove causation and actual damages sustained by the Plaintiff at the end of the malpractice trial. (Da109-111) During the trial, the expert for the Plaintiff only proffered a net opinion stating that the Defendants shall be responsible for legal fees to obtain the amended judgment and to enforce the judgment in a malpractice action. (Da113) The record shows that the Plaintiff's expert failed to conduct any analysis into the facts of this case and additionally failed to apply any law to the facts which would have allowed Plaintiff's expert to appropriately draw the conclusion as to whether the amount of the legal fees incurred by Plaintiff were proximately caused by the Defendants' negligence. The record is also devoid of any indication that the Plaintiff's expert rendered an opinion regarding what portion of the $449,798.50 was incurred to make the so-called corrections to the alleged errors made by the Defendants during their representation of the Plaintiff in the uncontested divorce proceeding. (Da114) The record also shows that the jury was never instructed to determine if the legal fees incurred by the Plaintiff in the Family Court proceeding to set aside the PSA and judgment of divorce was due to the negligence of the Defendants, which was a substantial factor in bringing about the ultimate harm sustained by the Plaintiff.

On the appeal, the Appellate Division of the Superior Court of New Jersey substituted an unsubstantiated jury award of $500,000 with a new award for $449,798.50 to Plaintiff for attorney fees.

On remand, the Plaintiff requested for the award of $1,311,832.94 legal fees in the proposed Final Judgment with no affidavit in support of the calculation of the legal fees sought by the plaintiff. (Da41) The trial court granted plaintiff's application and denied defendants' opposition and cross-motion to vacate the Final Judgment without stating a reasoning. (Da13-17) This appeal to the Superior Court of New Jersey follows.

ARGUMENT

I. Defendants' Due Process Rights Were Violated When the Appellate Division Substituted An Unsubstantiated Jury Award of $500,000 to A New Award of $449,798.50 For Legal Fees (Raised Below: Da45)

On the appeal, the Appellate Division substituted an unsubstantiated jury award of $500,000, which was vacated by Appellate Division for Plaintiff's failure to prove actual damages, with a new award for $449,798.50 to Plaintiff for attorney fees despite the fact that Defendants were not afforded an opportunity to challenge this new award and the trial records are devoid of any analysis regarding the legal fees claimed by Plaintiff. The Appellate Division was aware that the amount of the award for attorney fees was problematic. (*See* Da40 n. 7) By substituting the award of $49,798.50 as legal fees to Plaintiff's attorneys, the Appellate Division assumed

a fact not in the record that Jury was awarding the Plaintiff's attorneys $500,000 for legal fees. Defendants' Fourteenth Amendment due process right was violated when their right to a fair trial and their right to present a defense was deprived.[2] The new award legal fees of $449,798.50 was not fully litigated. Defendants are prejudiced as a result of the substitution of the jury award without giving an opportunity to defend themselves. This is why so many issues related to this new award of legal fees of $449,798.50 are outstanding. Defendants should be given an opportunity to challenge it.[3]

This case is not a normal one. Justice is not served! This is the fight against the award of excessive legal fees in a tort case where the Plaintiff suffered no actual damage other than alleged legal fees incurred. The Plaintiff did not recover any damage, the law firm shall end up with a windfall of legal fees over $1.311 million dollars! Something is very wrong! This Court is obligated to review the records and request the Plaintiff to provide certification of attorney fees record to

[2] *See Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (Depriving Defendant's right to present a defense was a violation of his due process and this right is a fundamental element of due process of law); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (The right to present a defense, the right to present the defendant's version of the facts is a fundamental element of due process of law); *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (Judgment rendered without affording due process of law was unenforceable).

[3] Because the record was void of any analysis as to what portion of the legal fees shall be attributable to the legal fees incurred to set aside the original judgment, the attorneys for the Plaintiff shall still have a duty of candor to the court to provide the supporting evidence necessary to establish the entitlement of the legal fees for setting aside the original divorce judgment. The attorneys for the Plaintiff cannot just take it for granted for all the legal fees incurred by the Plaintiff unrelated to the proceeding to make corrections to the original divorce judgment and PSA.

substantiate Plaintiff's request for the award of $1,311,832.94 legal fees sought in the proposed Final Judgment.[4]

II. Rule 4:50-1(a) and (f) Permits Relief from Judgment Because of Mistake (Raised Below: Da45-66, Da168-178)

A. Both the Alleged Defendants' Specific Negligence for Failure to Incorporate Terms In Chinese Agreements to English PSA or Defendants' "Many Other Deviations" from Standard Practice During Representation Had Caused No Actual Damages to Plaintiff

The Court below denied Defendants' motion to vacate the Final Judgment without analyzing the facts and the application of the law other than stating that the relief requested is inconsistent with the decision of the Appellate Division decided on August 25, 2021 (Da25-40) in this matter. (Da-14)[5]

"Rule 4:50-1 provides in relevant part that on motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably

[4] In the history of American Jurisprudence, this case is likely the first instance where an astronomic attorney fee award over $1.547 million dollars was compounded with attorney fees in a legal malpractice case where the elements of causation and actual damage were never established in the matrimonial case. The general principle in American Jurisprudence is that the parties shall bear their own legal fees. The tort law should not be re-written just for the purpose to award a power law firm with astronomic and excessive attorney fees at the expense of the innocent people.

[5] The trial court below erred in denying Defendants' motion without reviewing the records and facts in the instant matter, because the trial court was empowered by Rule 4:50-1(a) and (f) to vacate the judgment should the trial court determines there were mistakes made when the Final Judgment was first rendered. Especially, Rule 4:50-1 "is a carefully crafted vehicle intended to underscore the need for repose while achieving a just result. It thus denominates with specificity the narrow band of triggering events that will warrant relief from judgment if justice is to be served." *DEG, LLC. v. Township of Fairfield*, 198 N.J. 242, 261, 966 A.2d 1036 (2009).

alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; . . . (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order." *DEG, LLC. v. Township of Fairfield*, 198 N.J. 242, 260, 966 A.2d 1036 (2009).[6]

Applying Rule 4:50-1(a) and (f) to the facts in the instant case, the Court below should have vacated the Amended Final Judgment. The original Final Judgment was not a consent judgment of the parties as in *DEG, LLC. v. Township of Fairfield.* Nor was the motion to vacate the original Final Judgment by the Defendants a pathway to reopen litigation because Defendants rethink the effectiveness of their original legal strategy. Rather the original or the Amended

[6] "Rule 4:50-1(a) provides relief when a judgment has been entered as a result of 'mistake, inadvertence, surprise, or excusable neglect.' The four identified categories in subsection (a), when read together, as they must be, reveal an intent by the drafters to encompass situations in which a party, through no fault of its own, has engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation." *DEG, LLC. v. Township of Fairfield*, 198 N.J. 242, 262, 966 A.2d 1036 (2009). "Rule 4:50-1(a) … is intended to provide relief from litigation errors 'that a party could not have protected against.' *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) (citing *Thompson v. Kerr-McGee Ref. Corp.*, 660 F.2d 1380, 1384-85 (10th Cir. 1981)." *DEG, LLC. v. Township of Fairfield*, 198 N.J. 242, 263, 966 A.2d 1036 (2009).

"Rule 4:50-1(f), the so-called catch-all, provides relief for 'any other reason. . . . No categorization can be made of the situations which would warrant redress under subsection (f). . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice.'" *DEG, LLC. v. Township of Fairfield*, 198 N.J. 242, 269-270, 966 A.2d 1036 (2009) (quoting *Court Inv. Co. v. Perillo,* 48 N.J. 334, 341, 225 **A**.2d 352 (1966)).

Final Judgement here are the result of the Appellate Division of the Superior Court of New Jersey had corrected the trial court's mistake and vacated the unsubstantiated jury award of $500,000 for Plaintiff's failure to prove actual damages, but had substituted an unsubstantiated jury award of $500,000 with a new award for $449,798.50 to Plaintiff's attorneys for legal fees despite the fact that Defendants had not been afforded an opportunity to challenge this new award and the trial records were devoid of any analysis regarding the legal fees claimed by Plaintiff.

The decision of the Appellate Division dated August 25, 2021 (Da25-40) is contradictory to itself. The Defendants would like to point out to the Court that in the decision the Appellate Division found that Plaintiff suffered $449,798.59 in damages as a direct and proximate result of defendants' negligence, because plaintiff incurred $449,798.59 in attorney's fees and costs to remedy the errors in the PSA and original judgment of divorce resulting from defendants' negligence. (Specific Negligence on the Part of the Defendants) But in the meantime, the Court also found that the balance of the jury's $500,000 damages award in the amount of $50,201.41 was without any competent evidence that plaintiff suffered any actual damages—beyond the fees incurred to vacate the PSA and original judgment of divorce and obtain the AFJD-as a direct and proximate result of defendants' negligence (Da34), because the record showed that there was no evidence of any disposition of assets between 2009 when the divorce judgment was granted and when the divorce

judgment was set aside in 2011. (See, Da115) This reasoning raises a question whether the negligence on the part of the Defendants had proximately caused any actual damage to the Plaintiff, Plaintiff's legal fees cannot be a "mere potion of the damages" suffered by the Plaintiff as a result of Defendants' negligence when Plaintiff sustained no actual damages.

However, the Court later rejected the argument raised by the Defendants that the original Chinese agreements were declared invalid by the Family Part; therefore, Defendants' failure to incorporate provisions from the Original Chinese agreements into PSA could not be the proximate cause to the damages sustained by Plaintiff, because the failure to incorporate provisions in the tossed out Chinese agreement is not the "but for" causation for the errors in the PSA or the original divorce judgment. (Da38) There was nothing to remedy the errors of the PSA, because the original Chinese agreement was also declared invalid. In order to avoid the logic fallacy, the Court thus reasoned that the Plaintiff's negligence claim is not based on the validity of the Chinese agreements or on an alleged inability to enforce them following entry into the PSA, but is based on the Defendants' negligence that includes "many other deviations" from the standard practice as Plaintiff's expert testified. Because the Court has determined that Plaintiff suffered no actual damage other than the legal fees spent to vacate the PSA and judgment of divorce; therefore, Defendants' "many other deviations" from the standard practice during the representation, even if they

were true, still caused no actual damage to Plaintiff. *See Lovett v. Estate of Lovett*, 250 N.J.Super. 79, 593 A.2d 382 (CDAC 1991) (Even if attorney was negligent and breached his duty in his representation, plaintiffs must demonstrate that they suffer a loss proximately caused by attorney's negligence)[7] This is the same situation here. Plaintiff incurring $449,798.59 in attorney fees and costs was for the purpose to obtain an entirely new judgment of divorce, which is unrelated to the original judgment. (*See* Da180-193) This new judgment was not an amended PSA or an amended judgment to fix the errors that were allegedly caused by Defendants' negligence. Defendants' error in the underlying matrimonial case, if any, was harmless to the Plaintiff.

In addition, the purpose of a legal malpractice claim is to put the plaintiff in as good a position as he or she would have been had the attorney kept his or her contract.[8] The principle that Plaintiff must prove causation and damage before being considered for awarding legal fees incurred is also reflected in the "trial within a

[7] *Lovett* is on point and it is one of the two cases relied on by the Appellate Division to render its opinion that Defendants are responsible for Plaintiff's legal fees to vacate the PSA and judgment of divorce. In *Lovett v. Estate of Lovett,* plaintiffs' only remaining claim against the attorney was for the legal fees they incurred to bring the lawsuit against the attorney for a variety of negligence that the plaintiffs claimed the defendant attorney had committed after plaintiffs' main negligence claims against the defendant attorney were all abandoned or disposed. This is a similar situation here. The Court in *Lovett* denied the recovery of legal fees against the attorney even if he breached the duty to wrongfully act as both broker and lawyer, because plaintiff failed to prove a causal link between the breach and any reasonably attributable damages.

[8] *See Saffer v. Willoughby*, 143 N.J.256, 271, 670 A.2d 527 (1996); *Lieberman v. Employers Ins., of Wausau*, 84 N.J. 325, 341, 419 A.2d 417 (1980) (Plaintiff was only entitled to recover for losses which were proximately caused by the attorney's negligence.)

"[T]he measure of damages is ordinarily the amount of that the client would have received (or would not have had to pay) but for his attorney's negligence." *Gautam v. DeLuca*, 215 N.J.Super. 388, 397, 521 A.2d 1343 (App. Div.), *certify. denied*, 109 N.J. 39, 532 A.2d 1107 (1987).

trial" doctrine in legal malpractice actions.[9] In the case at hand, this Court in its decision had rendered a proposition which had no direct support from any precedent in the State of New Jersey and across the nation. Rather, this case establishes a dangerous precedent that plaintiff can create damages in any legal malpractice case just by commencing action to incur legal fees so long as there are some evidences that the defendant has breached the duty in providing legal services to the plaintiff.[10]

[9] "The most common way to prove the harm inflicted by [legal] malpractice is to proceed by way of a 'suit within a suit' in which a plaintiff presents the evidence that would have been submitted at trial had no malpractice occurred." *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*, 179 N.J. 343, 358, 845 A.2d 602 (2004). At such a trial, the plaintiff, who typically was the plaintiff in the underlying case, must prove, by a preponderance of the evidence that: "(1) he [or she] would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectability of such judgment." *Id.*; *See also Mosley v. Friauf*, 2023 U.S.Dist.LEXIS 80018 n. 2 ("To prevail in a legal malpractice action, a plaintiff must prove that he would have obtained relief in the underlying lawsuit, but for the attorney's malpractice; consequently, the trial of a legal malpractice claim becomes, in effect, a trial within a trial"; *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005) (citation omitted). First, "the plaintiff must prove that [his] lawyer's conduct fell below the applicable standard of care." *Austin v. Sneed*, No. M2006-00083-COA-R3-CV, 2007 Tenn. App. LEXIS 688, 2007 WL 3375335, at *5 (Tenn. Ct. App. 2007) (quoting *Mihailovich v. Laatsch*, 359 F.3d 892, 904-05 (7th Cir. 2004)). Second, "the plaintiff must prove that [he] had a meritorious claim or remedy that [he] lost . . . due to [the] attorney's negligence." Id.) "In the legal malpractice context, there is only liability if, absent the legal negligence (e.g., missing the statute of limitations), the client would have prevailed on his or her lost cause of action." *Naffis v. Xerox Educ.Servs, LLC (In re Naffis)*, 2019 Bankr.LEXIS 323, *14, 2019 WL 470199. Those cases clearly illustrated the concept that Plaintiff must prove damage sustained in addition to breach of duty in the underlying case, even if the Defendant attorney missed the statute of limitation.

[10] A thorough legal research on all federal and all state precedents, Defendants have not found a case directly supporting this new "creative" ruling. Almost all courts reject the concept to award legal fees to plaintiffs for no actual damages sustained by plaintiffs. Almost all courts across the nation held that the argument that plaintiff would not have incurred attorneys' fees in cases and the related litigations but for defendants' breach of duty or contracts is unpersuaded, because plaintiff is attempting to recast his attorney's fees as consequential damages of the breach to be unavailing and nothing more than a pedestrian attempt to circumvent the American Rule that parties shall bear their own legal fees. One court had pointed out that "[i]t is the defendant's actions that caused the breach of contract that are compensated for, and not the plaintiff's action in seeking to enforce his or her rights." "Only by providing damages that seek to rectify the breaching party's actions may we make a prevailing litigant whole." *See Audi of Am. v. Bronsberg & Hughes Pontiac*, 2017 U.S.Dist. LEXIS 233248.

This ruling is against the current law that plaintiff must prove that she suffered actual damages as a result of Defendants' breach of duties before the Court can award legal fees incurred by Plaintiff to vindicate her rights, not the other way around!

In addition, in this case Plaintiff had spent typical litigation discovery cost through the two additional years of contested divorce proceedings after the re-opening of the Fou v. Fou matrimonial action by Mrs. Fou. Those costs were not part of the damages that Plaintiff Fou had to spend to bring or defend a separate action by a third party. Therefore, the alleged omission to conduct discovery by Mr. Tung was not the causation that had caused the Plaintiff to incur legal fees in her underlying matrimonial action. The court has denied typical litigation discovery cost incurred in a third-party exemption case to American Rule that parties shall bear their own legal fees, because this is not the costs that plaintiff was forced to spend to defend or to bring a separate lawsuit as a result of defendants' negligence or to incur investigation costs as a result of defendants' negligence. Plaintiff had to incur typical litigation discovery cost to defend a personal injury case regardless of defendants' negligence. *See Lederer v. Gursey Schneider LLP*, 22 Cal.App.5th 508, 527, 231 Cal.Rptr.3d 518 (2018). This is exactly what happened in the case at hand.

Plaintiff had to incur typical discovery cost in her contested divorce case regardless of Defendants' negligence.[11]

Furthermore, the Court's incorrect conclusion "but for" Defendants' failure to incorporate these terms in the Chinese Agreements in to the English PSA or "but for" Defendants' "many other deviations" from standard practice, Plaintiff would not have suffered damages by incurring the expense to vacate the PSA and original judgment of divorce and the AFJD.[12] This is contradicting to the earlier finding that

[11] In the instant case, after the English Property Settlement Agreement and all of the pre-existing Chinese agreements were set aside by Family Court Judge Weisberg, Plaintiff was permitted to conduct discovery. Mr. Fou provided thousands of pages of financial information. (*See* Da194-195: Trial Transcript 4T31-32) During the trial, in response to questions during cross-examination, Plaintiff's attorney Mr. Bracuti testified that he filed multiple motions to compel discovery, (*See* Da196: Trial Transcript 4T47) but Plaintiff still was unable to get really any real hard documentations from Mr. Fou. At the end of the proceeding, Family Court Judge Rafano issued an Amended Final Judgment of Divorce, which awarded Plaintiff Janet Fou $1.1 Million Dollars, plus attorney fees in the amount of $229,389.69 to compel discovery. (Da180-193) The award of $1.1 Million Dollars was based on Mr. Fou's admission that he had $2.2 Million Dollars in assets in a so-called Will in 2007. (Da197: Trial Transcript 4T81) Mrs. Fou testified that she knew the Will in existence in 2007, two years before the Fous met Defendant Tung, while Mr. Fou was in hospital and she intentionally withheld the critical fact from Mr. Tung and never told Mr. Tung about the existence of the Will and the $2.2 Million Dollars assets in 2009 when Mr. Tung was representing her. Judge Rafano essentially signed the proposed Amended Final Judgment of Divorce prepared by Mr. Bracuti except that Judge filled in the attorney fees awarded by him. (Da198-199: Trial Transcript 4T87 17-25 and 4T88 3-10) The $2.2 Million Dollars was typed in the proposed Amended Final Judgment of Divorce and was based on Mr. Fou's admission that he possessed $2.2 Million Dollars in the so-called Will. (Da199-200: Trial Transcript 4T88-89) The $2.2 Million Dollars number was contained in the document so called "Will". (Da206-208) (Da203: Trial Transcript 4T92 14-18 and 4T93 1-5) The $2.2 Million Dollars in the Amended Final Judgment of Divorce was not from any other financial documents, such as Vanguards accounts and other family financial documents that were submitted to Court after the English PSA and all Chinese agreements were set aside by Judge Weisberg. (Da205: Trial Transcript 4T94 8-15)

[12] The Amended Final Judgment of Divorce contain the same one-third share of Joe Fou's income as Janet Fou's alimony same as in the original Property Settlement Agreement drafted by Mr. Tung. (Da209-210: Trial Transcript 4T98 23-25 and 4T99 1-2) Mr. Bracuti did not know if there was any evidence showing that Mr. Fou had transferred any money out of the United States from February 2009 until September of 2012, when Judge Weisberg set aside English PSA and all Chinese agreements. (Da212: Trial Transcript 4T110 4-12) Mrs. Fou had provided to Court the contents of the computer files known as family savings, f-savings, to Gene. The contents of the previously encrypted files evidenced the exchange and transfer of substantial sums of money during the relevant time period preceding the parties' divorce in 2009, when Mr. Tung was hired by Mrs. Fou. (Da212-213: Trial Transcript 4T110 20-25 and 4T111 1-19) The Court had found that there is no evidence that Mr. Tung was ever advised about the encrypted file. (Da215-216: Trial

Plaintiff did not show that she suffered any actual damages due to Defendants' negligence. The Court did not resolve the dilemma that the Plaintiff did not suffer any damage as a result of either the Defendants' negligence to incorporate the missing terms in the invalid Chinese Agreements into the final English PSA or Defendants' "many other deviations" from the standard practice in the decision dated August 25, 2021. The Plaintiff's expert during the trial did not opine an opinion that the legal fees incurred by Plaintiff were proximately caused by the Defendants' negligence, because of lack of competent evidence to support such a legal conclusion. Plaintiff's expert opinion on the loss of negotiation leverage was the only damage sustained by Plaintiff, which was purely a speculation and a net opinion, not supported by facts. (*See* Da109)[13]

Therefore, it is a Rule 4:50-1(f) mistake to make the Defendants to pay the entire legal fees requested by the Plaintiff's attorney in the amount of $449,798.59,

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Transcript 11T12 8-9) After the divorce, Mr. Bracuti did not see any documents or any financial information showing a transfer of any company assets. (Da213-214: Trial Transcript 4T111 20-25 and 4T112 1-2) Mr. Bracuti agreed that if he had a clear tracing and evidence of a transfer of assets between February of 2009 and September of 2012, he would have submitted that evidence to the Court. (Da214: Trial Transcript 4T112 1-22) Therefore, Plaintiff again failed to establish the proximate causation in fact, which "requires proof that the result complained of probably would not have occurred 'but for' the negligent conduct of the defendant."

[13] New Jersey Rule of Evidence 703 requires that an expert opinion be based on "facts or data … perceived by or made known to the expert at or before the hearing." "The net opinion rule is a 'corollary of N.J.R.E. 703 … which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." *Townsend v. Pierre*, 221 N.J. 36, 53-54, 110 A.3d 52 (2015); *Buckelew v. Grossbard*, 87 N.J. 512, 524, 435 A.2d 1150 (1981) (The "net opinion" rule appears to be a mere restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence, are inadmissible). The rule requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion. *See Jimenez v. Gnoc. Corp.*, 286 N.J. Super. 533, 540, 670 A.2d 24 (App. Div.), *certify. denied*, 145 N.J. 374, 678 A.2d 714 (1996). Applying the law to facts in the instant case, plaintiff's expert's net opinion must be excluded.

which was the total legal fees that Plaintiff had incurred for her contested matrimonial action, including the legal fees incurred to conduct extensive discovery and to locate assets of Mr. Fou to enforce the post-divorce judgment, as the damage sustained by the Plaintiff. Defendants are now seeking the Court to make corrections in the original Final Judgment as well as the Amended Final Judgment. This kind of the mistake is a Rule 4:50-1(f) relief, the so-called catch-all, which provides relief for "any other reason." No categorization can be made of the situations which would warrant redress under subsection (f). The very essence of (f) is its capacity for relief in exceptional situations and in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice.

B. Legal Fees Shall Only Be Awarded to A Successful Claim for Malpractice and for Relevant Work Attributable to the Malpractice Claim

Defendants also pointed out to the Court below that the legal fees shall only be awarded to a successful claim for malpractice and for relevant work attributable to the malpractice claim. Defendants challenged that the Appellate Division vacated the jury award of $500,000 damage to the Plaintiff on the ground that Plaintiff Fou sustained no actual damages but permitted fee shifting by awarding $449,798.50 as damages for the legal fees incurred by the Plaintiff. In doing so, the Appellate Division assumed a fact that was not in the record that those fees shifted were based on the concrete analysis of the fact and applicable laws by an expert and the expert's

opinion on the fee-shifting issue was adopted by the jury. The record, however, shows that the Plaintiff's expert never analyzed any facts and drew a conclusion that the $449,798.50 in damages were proximately caused by the defendants' negligence.[14] *See Jerista v. Murray*, 185 N.J. 175, 190-91, 883 A.2d 350 (2005) (Proximate cause is an essential element of a legal malpractice claim). Again, in a professional malpractice case, jury is not permitted to infer causation and damages from circumstantial evidence. In a legal malpractice case, proximate causation must ordinarily be established by expert testimony.[15]

Since the burden is on the Plaintiff's expert to competently testify regarding the value of Plaintiff's damages and Plaintiff's expert has never officially done so on the record before the end of trial, the Plaintiff simply failed to establish the legal fees incurred by the Plaintiff were recoverable under the law and the award of

[14] In the instant case, the Plaintiff's expert offered a net opinion as to the legal fees incurred by the Plaintiff during the trial. (Da113-114, Trial Transcript 6T156-157 and 9T203-204) He never stated how he arrived at such an opinion for the damages in the amount of $449,798.50. When defendants' attorney objected to his net opinion, the trial court judge realized this fact and stated on the record: "Well, no. But he is not offering an opinion as to the value. He's just confirming what he said before. I overrule that objection." (Da114) Beyond this single instance where the trial judge confirmed that the Plaintiff's expert was not offering an opinion as to the value of damages, the trial record clearly shows that the amount of damage allegedly sustained by the Plaintiff were never proven, analyzed, or discussed further in any capacity.

[15] *See Froom v. Perel*, 377 N.J.Super. 298, 318, 872 A.2d 1067 (App. Div. 2005) (holding that expert testimony was required on the issue of proximate causation where the legal transaction involved "a complex real estate acquisition and development"); *2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J.Super. 478, 490, 640 A.2d 346 (App. Div. 1994) (holding that expert testimony was required to establish proximate causation in legal malpractice case involving complex commercial transaction); *Vort v. Hollander*, 257 N.J. Super 56, 61, 607 A.2d 1339 (App. Div. 1992) (holding that expert testimony was required to establish proximate causation in legal malpractice case).

damages in the amount of $449,798.50 was groundless.[16] Due to Plaintiff's expert's failure to render an opinion regarding the exact amount of legal fees that were incurred by Plaintiff to make corrections to the Defendants' so-called errors, the jury was in no position to determine the correct amount of fees to be shifted.[17] Even if one were to assume that the jury awarded damages to the Plaintiff because Plaintiff incurred legal fees to correct errors caused by Defendants' negligence, the jury was still in no position to determine the correct amount of fees to be shifted because Plaintiff's expert failed to render an opinion regarding the amount of legal fees that were incurred by Plaintiff to correct Defendants' "errors". As a result, the calculation of damages should not be $449,798.50.[18]

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[16] *See Lamb v. Barbour*, 188 N.J.Super. 6, 12, 455 A.2d 1122 (App. Div. 1982) (To establish the element of causation, a plaintiff in a legal malpractice claim must show that the claimed negligent conduct was a "substantial contributing factor" in causing the plaintiff's damages.)

[17] The record did not show that the jury was instructed to determine if the legal fees incurred by the Plaintiff in the Family Court proceeding to set aside the PSA and judgment of divorce was due to the negligence of the Defendants, which was a substantial factor in bringing about the ultimate harm sustained by the Plaintiff. *See Conklin v. Hannoch Weisman*, 145 N.J.395, 678 A.2d 1060 (1996) (Traditional jury charge on proximate cause as a continuous sequence is inapt for legal malpractice case in which there are concurrent independent causes of harm and that a jury in such case must be instructed to determine whether the negligence was a substantial factor in ringing about the ultimate harm.), *Froom v. Perel*, 377 N.J.Super. 298, 312, 872 A.2d 1067 (App.Div. 2005) (In legal malpractice case, a charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations.).

[18] The record shows that as of June 7, 2017, three years after the so-called corrected Amended Judgment of Divorce was issued, the outstanding balance of legal fees incurred by Plaintiff in procuring her matrimonial action against her husband was $396,198.59. The record also shows that Plaintiff only paid $53,600 before December 2016 (The difference between the total legal as damage awarded by the Court and the outstanding balance $449,798.59-396,198.59=53,600). The Plaintiff's attorney admitted that they only received about $52,000 legal fees from Plaintiff. The legal fees incurred between December 2016 and June 2017 were mostly for discovery of assets and appeals of the Amended Judgment of Divorce. Those legal fees were incurred by the Plaintiff after she had obtained the Amended Judgment of Divorce, which was issued on February 21, 2014. None of the fees incurred during that period were used to make corrections of any "errors" in the PSA nor were there any fees incurred to obtain a new judgment. How could the defendants be responsible for those legal fees?

Our Supreme Court has noted that "New Jersey has a strong policy against the shifting of counsel fees."[19] The only time, attorney fees can be recovered only if in a successfully prosecuting a legal malpractice action as consequential damages proximately related to the malpractice. In the instant case, Plaintiff's failure to prove to sustain actual damages as a result of the Defendants' negligence during representation, thereby no attorney fees should have been awarded to the Plaintiff.

Even if this Court still wanted to award legal fees to the Plaintiff, this Court shall apply a deferential standard.[20] These cases establish that the judge was obligated to differentiate between the work plaintiff's counsel did in connection with the legal malpractice claim from the other work performed in making any fee award. The record was devoid of any analysis by the Court and the expert for the Plaintiff during trial for the issue at hand. Therefore, to a minimum, the trial court shall request the attorneys for the Plaintiff to file an affidavit of attorney for the legal fees

[19] *See In re Niles*, 176 N.J. 282, 293, 823 A.2d 1 (2003). In most circumstances, New Jersey courts follow the "American Rule," which prohibits recovery of counsel fees by the prevailing party against the losing party, and which serves the threefold purposes of ensuring unrestricted access to the courts, "ensuring equity by not penalizing persons for exercising their right to litigate a dispute," and administrative convenience. *See Niles, supra.* 176 N.J. at 294.

[20] *See Grubbs v. Knoll*, 376 N.J.Super. 420, 430, 870 A.2d 713 (App. Div. 2005). In fixing counsel fees, a trial judge must ensure that the award does not cover effort expended on independent claims that happen to be joined with claims for which counsel is entitled to the attorney fees. *See Grubbs v. Knoll*, 376 N.J.Super. 420, 431; *Ricci v. Corporate Express of the Esat, Inc.*, 344 N.J.Super. 39, 48, 779 A.2d 1114 (App. Div. 2001) (noting that a party is entitled to attorney's fees for only some of the work performed, the relevant services should be identified or a reasonable explanation made for the failure to so) *certify. denied*, 171 N.J. 42, 791 A.2d 220 (2002); *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590, 614, 581 A.2d 91(App. Div. 1990) (holding that the court must take into account that plaintiff succeeded as to two claims that did not provide for attorneys' fees when awarding fees as to the one claim that did), *aff'd o. b.* 124 N.J. 520, 591 A.2d 943 (1991)

incurred in this matter for the service provided to determine if any legal fees shall be granted for the corrections made by the Plaintiff.

It is worth to note Judge Rafano awarded $229,389.69 counsel fees to Plaintiff Janet Fou in the Final Judgment of Divorce on October 22, 2014. (Da191) This $229,389.69 included the legal fees incurred by Plaintiff to set aside the original judgment of divorce and to make correction of the alleged error in PSA and the original judgment of divorce. The $229,389.69 legal fees award also included the legal fees after converting the uncontested divorce case to a heavily contested divorce action, of which the Defendants were not contacted to provide the legal service requested by the Plaintiff Fou. Defendants were only paid $1,000 legal fees for an uncontested divorce case. There is no way the legal fees incurred by the Plaintiff to make corrections to the original judgment of divorce, if shifting is permitted, can be more than $229,389.69, the total legal fees awarded by the Family Court to Plaintiff Janet Fou at the conclusion of granting a new Final Divorcer Judgment. Therefore, the fact that Appellate Division substituted its finding that Plaintiff had suffered $449,798.59 legal fees was a clear error, which was based on Plaintiff's attorney James Plaisted's misrepresentations to Court. This is why Mr. Plaisted refused to submit his certification to the Court below to support his request for attorneys in the proposed Amended Final Judgement. This Court must correct this error, because the Court is a court of justice and equity. The award of excessive

$1,311,832.94 legal fees to Plaintiff's attorney for failure to prove Plaintiff had suffered no actual damage as a result of negligence on the part of the Defendants or on the claim to make corrections in the PSA and judgment of divorce for a harmless error is clearly unconscionable.

III. Plaintiff's Motion to Reopen the Divorce Case Was Not for the Purpose to Remedy the Errors in the PSA or Judgment of Divorce But for the Purpose to Rescind the Agreements Between the Parties (Raised Below: Da45-66, Da168-178)

In the instant case, the jury was shown with the evidence that Plaintiff and Mr. Fou how they entered into their agreements regardless if Defendants would advise them otherwise. In addition, the jury was shown evidence that it was Plaintiff Fou who wanted to rescind the agreements she had with Mr. Fou after Plaintiff discovered that Mr. Fou married a new wife. (*See* Da343) Therefore, the jury was aware that the legal fees incurred by Plaintiff Fou to re-open the divorce case was not for the purpose to remedy the errors in the PSA.[21] The PSA was a sham PSA

[21] On December 5, 2009, seven months after the judgment of divorce was issued, Plaintiff wrote to Mr. Fou in the email. She not only discussed how and why she entered into the Chinese agreements with Mr. Fou before the divorce, but also she pointed out that "I guess the purpose of your trip is to find a new wife. Having a third people involved in, it will influence your new family when we discuss money issues. I may not be calm." (*See* Da 342-343) On January 10, 2020, Plaintiff wrote another email to Mr. Fou that "I let you go and agree with no-fault divorce, so that you can keep more money, and have freedom and ability to find the dog-like obedient woman." "I agree to buy out by one hundred thousand U.S. dollars, only lump sum after taxing. I know you get affordable, but pain of paying." (*See* Da346-347) On February 20, 2010, in another email, Plaintiff Fou wrote "[f]or steady, the company will not be apart temporarily, it's good for us, which is your request when we broke up. I agreed it by considering the overall situation. In fact, I know, it is risky for me. The risk is that you operate it by yourself, and you may transfer money to China, so the company could be shuttled down anytime. Due to anxiety about risk, I list several companies' balance of 2007 on supplemental agreement in particular." "All my interests after divorce are all built on your integrity…However, all things happened from signing divorce papers last year to your travel to Beijing this year make me uneasy, therefore, I take the measure of buyout." (*See* Da347-349) Those post-divorce judgment email communications between Plaintiff Fou and her ex-husband clearly demonstrated that the

between the parties. The new judgment was a result of a default judgment on the part of the husband resulting from an extensively litigated contested divorce. The Court cannot now inject a different contract between the Plaintiff and Defendant attorneys for an uncontested divorce to make defendants pay legal fees for Plaintiff's heavily contested divorce case. Thus, the fees should not be construed as a "mere portion of the damages" sustained by the Plaintiff. The jury returned an arbitrary award of $500,000 for damages in the underlying matrimonial case, because they were influenced by the introduction of the prior decisions in different court proceedings by Judge Paley during deliberation, implying that Defendants must have committed wrongs as the other courts have determined. Defendants were severally prejudiced.

IV. Plaintiff's Legal Fees Were Not Permitted Fee Shifting Under the Current Law (Raised Below: Da45-66, Da168-178)

The Appellate Division incorrectly relied on ruling from *In re Estate of Lash* 169 N.J. 20, 26 (2001) to award legal fees to Plaintiff in the instant case, because the legal fees incurred by Plaintiff to set aside the PSA and Judgment of Divorce were not permitted fee shifting under the law. In fact, none of the cases cited in *In re Estate of Lash* supports the ruling of the Appellate Division in the instant case.

A. Lawyer Is Not An Insurer for Every Mistake Occurring in the Practice

motion to re-open the original divorce matter was due to the fact that Plaintiff Fou wanted to change the terms in the their Chinese agreements after the discovery of the new wife of the ex-husband, not for the purpose to make corrections in the PSA or divorce judgment.

In *McCullough v. Sullivan*, 102 N.J.L. 381, 132 A.102 (1926), the Supreme Court of New Jersey held the following:

> "[a] lawyer, without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is employed to conduct, or that the instruments he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice….he is not to be held accountable for the consequences of every act which may be held to be an error by a court."

This principle was followed in subsequent cases.[22] In fact, there are only a few exceptions where the plaintiff may recover the legal fees. However, Plaintiff in the instant matter fails to qualify for any of these exceptions because she did not prove that the legal fees that she spent to correct the Defendants' "errors" were a "mere portion of the damages" that were recoverable.

B. Plaintiff Failed to Prove the Underlying Malpractice Case

The general rule is that an attorney is only responsible for a client's loss if the loss is proximately caused by the attorney's legal malpractice.[23] The test of proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss. The burden is on the client to show what injuries were suffered as a proximate consequence of the attorney's breach of duty. The measure

[22] *See 2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J.Super 478; *Frank H. Taylor & Son, Inc. v. Shepard*, 136 N.J.Super. 85, 344 A.2d 344, 1975 N.J.Super.LEXIS 600.

[23] In *2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J.Super 478, even though the court found that the attorney committed malpractice, the claims were dismissed because the plaintiff failed to prove that the attorney's malpractice was a proximate cause of the plaintiff's loss.

of damage is ordinarily the amount that a client would have received but for the attorney's negligence. In addition, a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in [successfully] prosecuting the legal malpractice action.[24] In the instant case, plaintiff did not prove the underlying malpractice case because the court found that she suffered no actual damages other than the legal fees she spent to set aside the PSA and to obtain a new judgment, which is not a "mere portion of the damages".

C. Plaintiff was Not Forced to Litigate with A Third Person to Protect Her Interest and the Legal Fees Incurred Were Not Foreseeable, Because Plaintiff Failed to Prove the Underlying Malpractice Claim Against the Alleged Tortfeasor

In the Decision, the Appellate Division cited *In re Estate of Lash*, 169 N.J. 20, 26 (2001) to support its finding that Defendants in the instant case are liable for Plaintiff's legal fees incurred to set aside the PSA and to obtain a new judgment of divorce. (Da100) This case is clearly distinguishable when compared to the instant matter at hand. The holding in *Estate of Lash* states that "[o]ne who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for attorney fees thereby suffered or incurred."[25] In *Estate of Lash*,

[24] *See Saffer v. Willoughby*, 143 N.J. 256, 272, 670 A.2d 527 (1996); *Hagen v. Gallerano*, 66 N.J.Super. 319, 332-33, 169 A.2d 186 (App.Div. 1961); *Feldmesser v. Lemberger*, 101 N.J.L. 184, 41 A.L.R. 1153 (E. & A. 1925).

[25] The Supreme Court cited several cases to illustrate the concept to "bringing or defending an action against a third person. In *Gerhardt v. Continental Ins. Cos*., 48 N.J. 291, 300, 225 A.2d 328 (1966),

the administrator tortiously breached his fiduciary duty and caused the estate to file suit against the administrator, the tortfeasor, and the surety on the bond. As a direct and proximate result of the administrator's breach of duty, the estate incurred attorneys' fees to litigate its claim against the administrator to recover damages, a third person, and against the surety in order to demonstrate that the surety was financially responsible for administrator's defalcation. Those fees were a foreseeable consequence of the administrator's action because all parties were aware of the bond,

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the Court ruled that the counsel fees and costs incurred by the Plaintiff insured in defending a workman's compensation claim in a third-party lawsuit against the insured satisfied the element of damages because the defendant insurer defaulted on its obligation to defend the insured, thereby causing the insured to incur legal fees in defending an action against the third party. However, the insured was not entitled to recover her fees for the current litigation because the plaintiff insured must first win the underlying contract breach case before those legal fees and costs could be considered for the element of damages.

By the same token, in *Enright v. Lubow*, 202 N.J.Super. 58, 84, 493 A.2d 1288 (App.Div. 1985), the Appellate Division reversed a judgment to award legal fees to the plaintiff against a title company. This determination was reached in accordance with N.J. Court Rules, Comment R.4:42-9(a)(6). The Appellate Division's determined that the intention of N.J. Court Rules, Comment R.4:42-9(a)(6) was to permit an award of counsel fees only where an insurer refused to indemnify or defend its insured's third-party liability to another. The Appellate Division further opined that N.J. Court Rules, Comment R.4:42-9(a)(6) should not be extended, beyond its expressed terms, to permit an award of counsel fees to an insured when the insured brings direct suit against the insurer to enforce casualty or other direct coverage. Once again, in *Enright*, it was held that only the title company can be found at the time of the omission or negligence to have intentionally refused to indemnify or defend the insured against the third party. In that instance, it would be foreseeable that the plaintiff would incur legal fees to compel the title company to perform under the title policy. Otherwise, the Plaintiff must, as a matter of law, bear the cost of his or her own legal fees in the breach of contract case.

This argument is further supported by *Dorofee v. Pennsauken Tp. Planning Bd.*, 187 N.J.Super 141, 453 A.2d 1341 (App.Div 1982). In *Dorofee*, the litigation expenses that were incurred were associated with the Planning Board's defense of Dorofee's claims. Given the trial court's finding that Tocco committed fraud against Dorofee and the Planning Board, which was not challenged on appeal, the Court in Dorofee concluded that the legal expenses reasonably incurred by the Planning Board in defending the litigation which foreseeably ensued may properly be considered as damages proximately caused by the tortious conduct. Contrariwise, recovery of those expenses attributable to the prosecution of the Planning Board claim against Tocco himself is interdicted by R. 4:42-9. Again, New Jersey case law does support the proposition that, although attorney fees are not ordinarily included as damages in a fraud action, one who is forced into litigation with a third party as a result of another's fraud may recover from the tortfeasor the expenses of that litigation, including counsel fees, as damages flowing from the tort. *See Hagen v. Gallerano*, 66 N.J. Super. 319 (App.Div.1961); *Feldmesser v. Lemberger*, 101 N.J.L. 184 (E. & A. 1925).

the express purpose of which was to provide the estate redress from the surety for the administrator's improper conduct. This is not the situation in the instant case. Plaintiff here was never even forced to commence an action against a third person, because through the fault of the Defendants' malpractice. Plaintiff here will receive her attorney fees if she successfully proves all four elements (duty, breach of duty, causation, and harm) in her underlying matrimonial action, by establishing that but for Defendants' negligence, Plaintiff sustained damages in addition to the element of breach of duty in the underlying matrimonial case. (Trial within a Trial) Plaintiff failed to prove causation and harm in the underlying matrimonial case. Thus, Plaintiff failed to prove her malpractice case. Plaintiff's own volition to commence an action to set aside a PSA and to obtain a new judgment of divorce cannot be foreseeable between the parties unless she proves a malpractice claim against the Defendants here. Only after the Plaintiff establishes her malpractice case in the underlying matrimonial case can the Defendants be considered liable for those legal fees because those fees are "merely a portion of the damages" the Plaintiff suffered at the hands of the tortfeasor. Plaintiff never established that the alleged Defendants' specific negligence for failure to incorporate terms In Chinese Agreements to English PSA or Defendants' "many other deviations" from standard practice during representation had caused any actual damages to Plaintiff in the underlying matrimonial action.

These authorities cited in *In re Estate of Lash* are in accord with the principle stated in Restatement, Torts 2d, § 914: (1). The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation; (2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action. However, this case does not apply here because Plaintiff here was not forced to litigate with a third person because of the alleged negligence on the part of her attorneys. Plaintiff must first establish that Plaintiff sustained a damage proximately caused by her attorneys in her underlying matrimonial action against the Defendants before being awarded legal fees incurred.

D. Counsel Fees, By Themselves, Cannot Constitute a Damage Giving Rise To A Cause of Action

Counsel fees, by themselves, cannot constitute a damage giving rise to a cause of action. In *In re Estate of Lash*, 169 N.J. 20, 26 (2001), the Supreme Court of New Jersey cited a series of precedents to illustrate what it meant when it declared that the fees incurred by the plaintiff are "merely a portion of the damages the plaintiff suffered at the hands of the tortfeasor."[26]

[26] In *Donovan v. Bachstadt*, 91 N.J. 434, 448, 453 A.2d 160 (1982), the fees spent by the plaintiff in a real estate purchase case was a "portion of the damages" because plaintiff proved the case of breach of contract and was awarded compensatory damages, which included the measure of damages of the fair

In the instant matter, the legal fees incurred by the Plaintiff were not to make corrections of the error committed. There were no errors to correct after the Family Court vacated all original Chinese Agreements between the parties. The Plaintiff went to court to set aside the entire deal with Mr. Fou. This incidentally means that the alleged mistake where Defendants to the instant action failed to incorporate

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market value of the property and the expenditures for the preparation of the closing. This is because those fees were a portion of the compensatory damages. This is not the situation here because, in the instant case, Plaintiff did not prove the underlying malpractice case against Defendants since the elements of causation and damage have still yet to be satisfied in the underlying matrimonial case.

In *Penwag Property Co., Inc., v. Landau*, 76 N.J. 595, 598, 388 A.2d 1265 (1978), the Supreme Court of New Jersey dismissed a counterclaim for malicious prosecution and vacated the legal fees awarded to defendant for defending an action of malicious prosecution. The Court in *Penwag* reached this determination because, "[c]ounsel fees and costs in defending the action maliciously brought may be an element of damage in a successful malicious prosecution, but do not in themselves constitute a special grievance necessary to make out the cause of action." This is similar to the instant case because the plaintiffs in both instances similarly failed to prove the underlying tort cases. Therefore, plaintiff here cannot be awarded with counsel fees and costs because those fees in themselves do not constitute a cause of action.

In *Feldmesser v. Lemberger*, 101 N.J.L. 184, the tenant brought an initial case to compel the landlord for specific performance to sell the property in accordance with the landlord's representation that he owned the property. The court dismissed the case because the landlord could not be compelled to convey the property that did not belong to him. The tenant brought a second case for fraud against the landlord to recover money paid to compel compliance with the contract and prevailed on the second case. The Court reasoned that: "[t]he defendant by his wrongful act started a train of circumstances which entailed the losses which the plaintiff sustained. Those losses, arising, not by the reason of the contract, but by reason of the defendant's deceit and fraud, were incurred by the plaintiffs in the enforcement of the contract which they believed to be honest and fair."

In *Katz v. Schachter*, 251 N.J.Super. 467, 473-474, 598 A.2d 923 (App. Div. 1991), *certif. denied*, 130 N.J. 6, 611 A.2d 646 (1992), plaintiff homeowners brought suits against various defendants, including realtors and a termite company to recover damages from the demolition of the property caused by an extensive termite infestation. Although the Court found that the defendant realtors committed common law fraud to certain defendants, the Court also found that plaintiffs did not rely on those representations by the realtors. The Appellate Division reversed the judgment denying counsel fees to plaintiffs as against defendant realtors and remanded the case for a finding as to whether plaintiffs were entitled to such fees because the action was brought as a result of defendant realtor' fraud. This case is directly on point. Even if the defendant realtors were making misrepresentations to other defendants, the plaintiff did not prove a case for misrepresentation against the defendant realtors because the plaintiff did not rely on the said misrepresentations. As such, legal fees incurred by plaintiff against the defendant realtors were denied. Therefore, plaintiff must first prevail on the underlying case for fraud against defendant realtors before they can be awarded legal fees. This is precisely the same situation in the instant case. Since Plaintiff failed to prove the underlying matrimonial case against the Defendants and spent legal fees to convert an uncontested divorce case to a heavily litigated contested divorce case, Defendants' attorneys shall not be held liable for those fees and costs.

provisions were not the causation for the fees incurred. This is largely because there is no error for Plaintiff to correct after Judge Weisberg sets aside all original Chinese agreements between Mrs. Fou and Mr. Fou. The Amended Judgment of Divorce is for a totally different remedy the Plaintiff was seeking for one half (1/2) of the amount of the family assets allegedly contained in the Will of Mr. Fou, for which Defendants were not told and asked to be incorporated in the original PSA by Plaintiff. Therefore, the case cited by the Appellate Division in its decision, *In re Estate of Lash*, 169 N.J. 20, 26 (2001), does not support the ruling that the Defendants here are liable for the Plaintiff's attorney fees per se.

E. Plaintiff Is Not Entitled to Attorney Fees to Set Aside PSA and to Obtain A New Judgment As a Result of "Natural and Necessary Consequence" of An Attorney's Negligence, Because of Lack of Causation and Damages.

In the Decision, the Appellate Division also cited *Lovett v. Estate of Lovett*, 250 N.J.Super. 79 (Ch.Div. 1991) to support its determination that Plaintiff here is entitled to attorney fees to set aside the PSA as a result of "natural and necessary consequence" of an attorney's negligence. (Da110) As analyzed above, this case actually supports the Defendants' argument that even if the legal fees incurred by the Plaintiff were "natural and necessary consequence" of an attorney's negligence, Plaintiff still has to prove causation and damages.[27] The Court in *Lovett* emphasized

[27] In *Lovett,* the plaintiffs sought to recover attorney's fees allegedly necessitated by defendants' negligence. Those legal fees were incurred by the plaintiff in suing many defendants, including their attorney for various claims. All of those claims were either settled or abandoned. Just as in the instant case,

that: "[e]ven if plaintiffs had proven malpractice, no losses were demonstrated which were proximately caused by Thomas (the attorney).[28] This is exactly the same situation in the instant case.

In the instant case, the record shows the trial judge found no causation and damages for the Plaintiff against the Defendants in the underlying matrimonial case. A direct verdict should have been granted to the defendants in the malpractice case. The trial judge however committed a reversible error by sending the case to jury to infer causation from circumstantial evidence and damages. This is why the jury returned an arbitrary award. The expert for the plaintiff never established and analyzed that the legal fees incurred by her was to make any corrections, or was to defend a third-party action caused by the wrongdoing of the Defendants. Therefore,

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plaintiffs there did not have any other losses except the legal fees incurred by the plaintiff. Like in the instant case, plaintiffs claimed that their attorney had deviated from the applicable standard of care in various ways but the plaintiff never proved causation. However, the plaintiffs in *Lovett* primarily claimed that their attorney deviated from the standard of care by negligently failing to advise his client during representation. Like here, the Court in *Lovett* was asked to determine if the attorney breached any duty and if so, whether that breach was causally related to any measurable loss. Just as the Court in the instant proceeding determined that Plaintiff Fou had not suffered any actual damages other than the legal fees incurred by the Plaintiff to set aside the PSA and obtain a new judgment, the Court in *Lovett* found, after a lengthy analysis, that the plaintiffs failed to prove by a preponderance of the evidence that the defendant attorney's actions constituted legal malpractice.

[28] In order for plaintiffs to succeed, they must demonstrate that they suffered a loss proximately caused by Thomas' negligence. Proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing a loss." Like in the instant case, the only losses plaintiffs claim are the legal fees incurred by the plaintiff. The Court *in Lovett* found that the fact that the decedent's children chose to bring various claims does not prove that they were reasonably necessary to correct defendant's negligence. The Court in *Lovett* found that the plaintiff failed to demonstrate that the legal fees they incurred were either reasonably necessary or caused by any wrongdoing by the attorney.

the fees should not be construed as a mere portion of the damage sustained by the Plaintiff.[29]

V. Rule 4:50-1(c) and 4:50-3 Permit Relief from Judgment Because of Fraud, Misrepresentation, or Other Misconduct of an Adverse Party (Raised Below: Da62)

A. Legal Fees Shall Not Be Awarded to Attorneys Who Had Committed Fraud Upon the Court As Shown With New Evidence

Defendants moved the Court below to vacate the judgment because legal fees shall not be awarded to attorneys who had committed fraud upon the court. New evidence was discovered after the malpractice trial was ended. Plaintiff's attorney James Plaisted openly admitted to the investigator from Office of Attorney Ethics that he had committed a fraud upon the court in 2019, a year after the trial for malpractice in 2018 was completed. (*See* Da116-139) To obtain relief from a judgment based on newly discovered evidence, the party seeking relief must demonstrate "that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the

[29] Plaintiff's expert only proffered a net opinion that Defendant shall be responsible for legal fees in a malpractice action. But the expert did not present to the jury anything showing what portion of the $$449,798.59 in attorney's fees and costs was for making corrections of the PSA or obtaining the Amended Judgment of Divorce. In fact, the Plaintiff's effort to set aside the PSA and the effort to obtain a new judgment has nothing to do with the alleged malpractice. The Family Part set aside the PSA and all Chinese agreements. Defendants cannot be found committing malpractice for failure to incorporate invalid Chinese agreements into the PSA. Nor can they be found to have committed malpractice based on a new judgment that is not a result of the parties' negotiation where Defendants represented them in an uncontested divorce. The new judgment was a result of a default judgment on the part of the husband from extensive litigation for a contested divorce. The Court cannot inject a different contract between the Plaintiff and Defendant attorneys for an uncontested divorce to make Defendants to pay for a heavily contested divorce case of the Plaintiff client.

evidence was not merely cumulative."[30] The admission of Plaintiff's attorney James Plaisted before Office of Attorney Ethics satisfied all the three conditions. First, the Family Court and Appellate Division judges were deceived by Attorney Plaisted's fraud upon the court and issued unconstitutional decisions in the absence of participation in the court proceedings by Defendant Tung. Said decisions were used by trial court Judge Paley to improperly influence the jury during deliberation in the malpractice trial. Thus, this new evidence will probably change the result of the malpractice trial. Second, this new evidence was unobtainable for use at the malpractice trial because Plaintiff's attorney James Plaisted made the confession after the end of the malpractice trial. Third, the evidence is not merely cumulative, because this new evidence shows that the Defendant Tung, a non-party attorney, was framed by the attorney James A. Plaisted, the opposing counsel, in the absence of Tung's participation in the Family Court proceeding when Plaintiff made her motion to set aside PSA in September 2012 and before Appellate Division in July 2016.[31]

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[30] *See DEG, LLC v. Township of Fairfield*, 198 N.J. 242, 262; 966 A.2d 1036, 1047; *Quick Check Food Stores v. Twp. of Springfield*, 83 N.J. 438, 445, 416 A.2d 840 (1980).

[31] Specifically, James Plaisted, Esq. told the Court that Defendant Tung was given all four Chinese Agreements during his closing argument, knowing that this was not true. (*See* Da130 and Da411-412) James Plaisted, Esq. intentionally and willfully committed the fraud upon the court by making this misstatement, even after he was told by his co-counsel, William Hu, Esq. in an email that only the third Chinese Agreement had been shown to Defendant Tung. (Da340 and Da128) James Plaisted, Esq. was also told by his client Mrs. Fou and opposing party Mr. Fou that only the third Chinese Agreement had been shown to Defendant Tung. (Da128-129) In 2019, attorney James Plaisted appeared before the Disciplinary Investigator Susan R. Perry-Slay and, for the first time, stated on the record that he had made "misstatements" to Judge Weisberg in the hearing in the matrimonial action *Fou v. Fou* after he was cornered with the facts that he was made known that Mr. Tung was only provided with the third Chinese agreement. James Plaisted further stated to Disciplinary Investigator Susan R. Perry Slay that "he should have said… and he should have said …" before the investigator. (Da134-135) If anyone can justify the misrepresentations made before the

court by later stating he should have said that …, no one would be found of committing fraud upon the court.

In addition, James Plaisted, Esq. applied for attorney's fees and filed a supporting brief on June 25, 2018, James Plaisted misrepresented to the court that Defendant Tung appeared in a hearing to testify for Mr. Fou, not his client Mrs. Fou. James Plaisted told the court that Mr. Tung's appearance was not subpoenaed by a lawyer to appear, but through fax or email from Mr. Fou. (*See* Da133) James Plaisted's intentional misrepresentation to court was for the sole purpose to mislead the court that Defendant Tung was colluded with Mr. Fou to manipulate Mrs. Fou in the divorce proceeding so that the Court would grant huge award of attorneys' fees requested by Attorney Plaisted as damages in order to deter Defendant Tung from committing the same wrong again. The truth is that it was James Plaisted, Esq. who subpoenaed Defendant Tung to court to give testimony. Defendant Tung still has the original subpoena from James Plaisted, Esq. in possession. (*See* Da217-218) The end result is that the Court granted his application for an astronomic and excessive attorney fee award of over $1.547 Million Dollars.

The Appellate Division was also misled by James Plaisted's misrepresentation. In the decision of August 25, 2021, the decision stated that "[i]n 2012, the court conducted a four-day hearing during which Tung testified as a witness for Fou (Mr. Fou)". (Da27) Plaintiff's attorney did not address the effect of his misrepresentations to Family Court when he moved to vacate the original divorce judgment. All the misrepresentations made by Plaintiff's attorney James Plaisted were for a sole purpose to have a ground to set aside the Property Settlement Agreement and later to start a fraudulent legal malpractice action against Defendant Tung.

Judge Barry A. Weisberg was clearly misled by those misrepresentations when decided the motion to set aside the Property Settlement Agreement in the absence of Plaintiff Tung's participation in the proceeding. On September 12, 2012, Judge Barry A. Weisberg rendered the decision. "Now what we have in this case are really not one agreement, but a series of agreements. Again, only one of which was presented to the Court at the time of the divorce, which is very troubling. Because there are some inconsistencies between the agreements. The agreement that -- agreements that were in Chinese, quite frankly, were the ones I would expect Mrs. Fou to understand better than anything else because that's her native language." (*See* Da130-131 and Da412-425) Judge Barry A. Weisberg had so much concerns why only 12 days after the Chinese Agreements were signed, the English PSA was so much different from the Chinese Agreement. "Now only 12 days later they come to court—or only in May, but only 12 days later, they come—they sign an agreement, which by their own agreement doesn't even mention the company." "Also these agreements, I don't know if they're superseding agreements, if they're read – intended to be read together. Certainly the Chinese agreements are not consistent, taken as a whole, with the English agreement. And I think the English agreement, quite frankly in the way it was presented to the Court, unfortunately rises to the level of a fraud upon the Court." "Certainly no judge reading that agreement would have any way of knowing that the separate Chinese agreements exist. At the very least, it was a knowing concealment of a relevant fact." "And I don't find that Mrs. Fou was – even if that was her burden, was sophisticated or savvy enough to bring that to the Court's attention. I find that she was being manipulated through this divorce process." (*See* Da131-132 and Da412-425) Needless to say, Judge Barry A. Weisberg's decision was entirely based on the misrepresentations James Plaisted, Esq. made to the Court. As a result of the misrepresentations, the Judge Barry A. Weisberg reached a wrong conclusion.

On June 8, 2016, the Appellate Division affirmed the findings and the decision of Judge Barry A. Weisberg. "Plaintiff claimed that the PSA differed substantially from the parties' prior Chinese Agreements." (Da431) "[T]he court found that plaintiff had been manipulated in the divorce proceedings, and it was 'very troubling' that there were inconsistences between the PSA and the Chinese Agreements. The court noted that the PSA, which was executed only twelve days after the Chinese Agreements of February 15, 2009, did not mention a division of the company assets." (*See* Da132 and Da432-433) The court pointed out the critical differences between the Chinese Agreements and the PSA, which showed that defendant had deceived and manipulated the divorce proceedings to plaintiff's disadvantage.

The record shows at no time upon learning that the false information was presented to Court, Plaintiff's attorney Plaisted and his associates had made any effort to inform the Court that material misleading information was made to the court. In fact, the record shows that the attorneys for the Plaintiff affirmatively made those misrepresentations to the Family Court for the purpose to have a ground to set aside the PSA and Divorce Judgment. Attorney Plaisted openly admitted that the representation he made to the court was "misstatement" to Office of Attorney Ethics during investigation after the trial for malpractice was ended.

On or about April 24, 2018, Judge Phillip Lewis Paley called the jury out of deliberations and specifically gave the decision of Judge Weisberg to the jury and advised the jury that this transcript was the decision to set aside the judgment in the matter Fou v. Fou and the Appellate Division upheld the decision. (Da131) Judge Paley's instruction was essentially instructing the jury that Defendant Tung's conduct had been found deviated from the standard, which had been decided by another court already. Clearly, James Plaisted's misrepresentation had significant impact on jury's determination of the outcome of the malpractice trial.

In addition, Attorney Plaisted's material misrepresentation in open court was just a portion of the misrepresentations that he knew was not true, when he made the misrepresentation to the Court to set aside the PSA. Mr. Plaisted's material

misrepresentation was actually in conjunction with the Certification of Janet Yijuan Fou dated September 28, 2011made in support of her motion to set aside the PSA.[32]

[32] On September 30, 2011, said certification was filed with the Court. (*See* Da221-239) This certification was deceptively drafted by the attorneys for Plaintiff Fou and adopted by Plaintiff Fou. On its face, this certification seems to give an accurate description that the English PSA does not reference any of the prior Chinese agreements executed between the parties, but it never mentioned a material fact that Defendant Tung was not given all the Chinese agreements. (Da128) It implied that Mr. Tung, upon receiving all Chinese agreements, had intentionally omitted those terms in the English PSA to manipulate his client, the Plaintiff Fou in the uncontested divorce proceeding.

In numerous sections, the certification tried to make the Court to believe that the Chinese agreements were not incorporated into the English PSA Agreement prepared by Mr. Tung, but without informing the Court a material fact that Mr. Tung was not shown or given all the Chinese Agreements. (*See* Da128)

Specifically, in paragraph 22, Plaintiff Janet Fou stated that "[t]his English Agreement did not reference any of the prior 'Chinese' agreements executed between myself and the Defendant and by signing this English Agreement, it was never my intention to waive any of the various entitlements afforded to me pursuant to our agreements written in Chinese and two of which were executed virtually simultaneously with the English Agreement." (Da231) Plaintiff intentionally omitted a material fact that Defendant Tung was not advised the existence of the various Chinese Agreements. Mr. Tung was not a party in the hearing to voice his side of the story and did not receive a copy of the certification until malpractice matter.

Again, in paragraph 26, Mrs. Fou stated that "[t]he English Agreement which was presented and filed with the Court was materially false and omitted material particulars of the Chinese Divorce Agreements, two of which were executed virtually contemporaneously with the English Agreement." (Da233) Again, Plaintiff intentionally omitted a material fact to court that Defendant Tung was not advised the existence of the various Chinese Agreements.

In paragraph 32, Janet Fou finally pointed her figures at Mr. Tung. "[W]hen I inquired of the Defendant (Mr. Fou) as to when he would begin to honor the Chinese Agreements which we had signed, most specifically the Agreement to provide an accounting as to the family company and transfer my ½ interest therein. At that time, Defendant indicated that he would not do so because the critical terms of the Chinese Agreements were omitted from the divorce decree and/or the English Agreement provided to the Court for incorporation into our Final Judgment of Divorce. It was based upon these statements that I began to question the appropriateness of Mr. Tung's representation of me and Defendant's role in orchestrating my execution of an English Agreement, which failed to mention our previous executed agreements." (Da236) Obviously, this was a material misrepresentation to Court, Plaintiff Fou knew that Mr. Tung was not provided with all the Chinese Agreements, when English Agreement was prepared by Mr. Tung.

Moreover, Plaintiff Fou made a false representation to Court that Defendant Tung represented both parties in *Fou v. Fou*. Said representation were not true and directly against her own testimony in the open Court. She specifically told the Court that her husband has a right to a lawyer, but he said he did not need it. This was her state of mind then that Mr. Tung was not representing her husband. (Da264-265)

With reference to the misrepresentation that Mr. Tung virtually had no communications with Mrs. Fou during the representation, (*See* D128) Janet Fou could have conversations with Mr. Tung to ask questions for at least four times on 2/15/2009, 2/27/2009, 4/18/2009, and 5/4/2009 before the judgment of divorce was entered. At least two of dates were not in the presence of Mr. Fou. She admitted during the trial and deposition. In fact, there was nothing to prevent her from contacting Defendant Tung for any concerns she might had. All those misrepresentations made was for a sole purpose to have a ground to set aside the PSA. Judge Barry A. Weisberg was clearly misled by those misrepresentations when decided the motion to set aside the PSA as demonstrated above.

Plaintiff's attorneys violated the RPC 3.3 by failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client.[33] Plaintiff's attorneys failed to take any of the remedial actions to correct the material representation before Judge Weisberg issued his ruling in setting aside the PSA. The Courts punish the parties who committed fraud upon the court by dismissing the action, because "fraudulent conduct did not simply impact the tainted evidence, the damages trial, or the adversarial proceedings as a whole – it represented a direct and brazen affront to the judicial process." *See In re Theokary*, 592 F.App'x 102 (3d Cir. 2015).

The standard for determination of fraud upon the court is clear and convincing standard, not beyond reasonable doubt.[34] The *Restatement* of Torts recognizes that "[a] statement of opinion as to acts not disclosed and not otherwise known to the recipient may" in some circumstances reasonably "be interpreted by him as an implied statement" that the speaker knows facts sufficient to justify him in forming" the opinion, or that he at least knows no facts "incompatible with [the] opinion."

[33] *See In the Matter of Jack L. Seelig*, 180 N.J. 234 (2004). If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. A lawyer shall not fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.

[34] *See Triffin v. Automatic Data Processing, Inc.*, 411 N.J.Super. 292, 986 A.2d 8 (2010); *see also Baxter v. Bressman*, 874 F.3d 142, 2017 U.S.App. (A court may set aside a judgment based upon its finding of fraud on the court when an officer of the court has engaged in egregious misconduct. Such a finding must be supported by clear, unequivocal and convincing evidence of (1) an intentional fraud; (2) by an officer of the court; and (3) which is directed at the court itself. In addition, fraud on the court may be found only where the misconduct at issue has successfully deceived the court.)

Restatement (Second) of Torts §539, p. 85 (1976). When that is so, the *Restatement* explains, liability may result from omission of facts. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 191, 135 S.Ct. 1318, 191 L.Ed.2d 253 (2015). Plaintiff Fou's false certification supporting the motion to vacate the PSA intentionally omitted a material fact that Defendant Tung was not shown all the Chinese agreements, which the Court had recognized in the decision dated August 25, 2021. (*See* Da31) The certification only asserted the statement that the PSA does not reference all the terms in the Chinese agreements. This seems to be an accurate description of the situation on its face. However, the recipient, which was the Court, at the time to decide the motion to vacate the PSA may reasonably interpret as an implied statement that it was Defendant Tung's willfulness to fail to include all the terms in the Chinese agreements to the PSA for the purpose to manipulate Plaintiff Fou in the *Fou v. Fou* matter. As demonstrated above, this was actually the situation.

In *In the Matter of Jack L. Seelig*, 180 N.J. 234 (2004), the Supreme Court of New Jersey emphasized that RPC 3.3(a)(5) states that "[a] lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." *See id.* at 245.[35] All those cases

[35] In *In re Herbstman*, 84 N.J. 485, 421 A.2d 592 (1980), the attorney was disciplined for certifying to court about ownership of fund under attorney's control without mentioning of competing claims made against fund. In *In re Turner*, 83 N.J. 536, 416 A.2d 894 (1980), the attorney was found ethical infraction when attorney failed to advise court about client's receipt of monies in the course of receivership action.

enunciate the principle that an attorney is under a duty, when the proper administration of justice so requires, to disclose all pertinent and relevant facts to the court so that it may act fairly. *See id.* at 80 N.J. 234, 248 (2004).[36]

Applying the law to the facts in the instant case, attorney James Plaisted's affirmative misrepresentations to various courts were fraud upon the court, resulting in the unconstitutional decision and opinion of Judge Barry A. Weisberg of the Superior Court New Jersey dated September 12, 2012 (Docket No.: FM-12-1685-09E) (Da352) and the decision and opinion of the Appellate Division of the Superior Court of New Jersey dated July 21, 2016 (Docket No.: A-1569-14T3) (Da429) in the matrimonial action *Fou v. Fou*. Ever since then, Defendant Tung, a victim of the fraud upon the court, had to spend his time and effort to defend various proceedings against him and his law firm, while the attorney who had committed the fraud upon the court is unpunished and in fact is awarded with attorney fees of $1,311,832.94 in the instant case. During the past eleven (11) years, Mr. Tung has sustained reputational damages and financial damages in defending the false claims against

[36] An attorney owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. *See id.* at 249. An attorney owes his first duty to the court. He assumed his obligation toward it before he ever has a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. *See In re Integration of Neb. State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265, 268 (1937). In State of New Jersey, "[b]oth the ABA Model Rules and the New Jersey Rules dismiss misrepresentation as a permissible litigation tactic, even when carried out in the name of zealous representation." *In the Matter of Jack L. Seelig*, 180 N.J. 234, 249 (2004).

him and his law firm. The law firm had to file for bankruptcy for protection against a judgment over $1.547 million dollars. Office of Attorney Ethics after more than seven years of investigation has not found any evidence of Defendant Tung's collusion with Mr. Fou to manipulate Mrs. Fou in the uncontested divorce proceeding. Where does the justice lie to award attorney fees of $1,311,832.94 to attorneys who had openly admitted to commit fraud upon the court at the expense of the innocent victim!

The power to vacate a judgment that has been obtained by fraud upon the court is inherent in courts. *See Universal Oil Products Co. v. Root Ref. Co.*, 66 S.Ct. 1176, 1179, (1946), 328 U.S. 575, 580, 90 L.Ed 1447. A decision produced by fraud on the court is not in essence a decision at all and never becomes final. *See Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968), *certiorari denied*, 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112. Therefore, the time to vindicate justice has not even begun in the instant case. *See Warner Co. v. Sutton*, 270 N.J.Super. 658, 637 A.2d 960 (1994) (On appeal, the court reversed and found that the motion was timely, because the movants wanted only to contest perceived illegalities in the amended consent order).

Furthermore, more than a hundred years ago, the Supreme Court of the United States set forth the Throckmorton doctrine in *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93, 95 (1878), the relief should have been granted to the party on the

ground that there is "some fraud practiced directly upon the party seeking relief against the judgment or decree", and "that party has been prevented from presenting all of his case to the court." This principle is based on the constitutional due process right, which can prevent the innocent from being maliciously prosecuted. This principle applies here because Defendant Tung was absent in the Court proceedings rendering decisions and opinions against Defendant Tung without first given Tung the due process necessary to prevent Defendant Tung to presenting his case to the courts.[37]

Pursuant to Rule 4:50-3 Relief from Judgment or Order, on the ground for fraud upon the court, the rule does not set a limit on the power of a court to set aside a judgment.[38] The Plaintiff's attorney Plaisted's admission of his fraud upon the

[37] The instant case at hand focuses on a classic fraud committed upon the court by an attorney under the *Throckmorton* doctrine. Despite the *Throckmorton* doctrine having been firmly established for well over one hundred years, the exact miscarriage of justice that the *Throckmorton* doctrine was designed to prevent was repeated here when the attorneys and fellow officers of the court representing Plaintiff Fou committed fraud upon the trial court by presenting false evidence and certifications against the non-party attorney, who was not afforded an opportunity to defend himself or present his case to the trial court below before negative findings of fact were rendered against the non-party attorney. To revisit this principal in this instant case will not only to assure to safe guard the innocent victim from the fraud upon the court, but also will promote the public confidence in the trust of the integrity of our judicial systems.

[38] *See* R.4:50-3; *Tara Enterprises, Inc. v. Daribar Management Corp.*, 369 N.J.Super. 45, 52, 848 A.2d 27 (2004) (R. 4:50-2 provides that a motion for relief from a judgment premised upon fraud must be made within one year from entry of the judgment. Rule 4:50-3, however, removes from that limitations period when a judgment is obtained through fraud upon the court. Relief under this rule may be obtained "without limitation as to time." *Shammas v. Shammas*, 9 N.J. 321, 327, 88 A.2d 204 (1952). *See also Hyland v. Kirkman*, 157 N.J.Super. 565, 385 A.2d 284 (1978) (Attorney General's Intervention to rectify a massive fraud upon the courts and land recordation system of the State by voiding judgments was permitted even after 6-year statute of limitations expired); *Catabene v. Wallner*, 16 N.J. Super. 597, 85 A.2d 300 (1951) (A third person may make a collateral attack on a judgment on the ground that it is fraudulent.) Furthermore, "The fraud is not cloaked with immunity merely because it was perpetrated by means of a legal form; it is just as vulnerable as if perpetrated by a deed or mortgage." *Catabene v. Wallner*, 16 N.J. Super. 597, 602; *see also Goldberg v. Yeskel*, 129 N.J.Eq. 404 (Ch. 1941), *affirmed* 129 N.J.Eq.

court will be the ground for relief from the Final Judgment of the malpractice action pursuant to NJ Rule 4:50-3. There is no statute of limitation on relief from judgment based on fraud upon the court. If Mr. Plaisted did follow NJRPC 3.3, one thing will be for sure is that the Court would not have a reason to make those false statements regarding Mr. Tung's representation of Mrs. Fou during his representation in *Fou v. Fou* case. There would be no ground for Mrs. Fou to commence the malpractice action against Mr. Tung. The Court below should have held a hearing to permit the parties to present evidence pursuant to Rule 4:50-1(c) and 4:50-3 to make a determination if the relief of judgment from fraud upon the court shall be granted.

VI. The Trial Court Abused Its Discretion By Awarding Over A Million Dollar Excessive Legal Fees for Legal Service Far In Excess of the No Actual Damages Sustained By the Plaintiff In A Private Tort Case (Raised Below: Da45-66, Da168-178)

The award of astronomic and excessive attorney fees of over $1.547 Million Dollars to Plaintiff's attorneys in the Final Judgment and now the award of $1,311,832.94 legal fees in the Amended Final Judgment in the private tort case where the Plaintiff has not sustained any actual damages were abuses of discretion by the trial court judges and are unconscionable. Rule 4:50-1(a) and (f) shall permit relief from the judgment because of mistake and in the interest of justice.

A. Plaintiff Is Not Entitled to Enhancement of the Lodestar Fee Calculation

410 (E & A. 1941); *Camden Safe Deposit & Trust Co. v. Green*, 124 N.J.Eq. 221 (Ch. 1938); 113 N.J.Eq. 431 (Ch 1933).

Not every tort case, the Court would award attorney fees to a wining party with enhancement of the lodestar fee calculation.[39] The case before the Court is not a case to end civil rights or discrimination violations, but a private tort case. Under the circumstances, there is no justification to resort to a lodestar methodology when plaintiff's attorneys agreed to a one-third contingent fee, a standard arrangement in tort and cognate actions. There is no sound reason to tinker with this standard retainer agreement, which has insured appropriate compensation in this case. *See Distefano v. Greenstone*, 357 N.J.Super. 352, 815 A.2d 496 (2003).

In determining a reasonable fee, the trial court shall take into consideration whether counsel fees arrangement is a fixed or contingent.[40] In the instant case, the alleged legal fees to be shifted incurred in a matrimonial action in *Fou v. Fou*. The RPC 1.5(d) prohibits contingent fee arrangements in domestic relations and criminal defense matters. Plaintiff's attorneys cannot assert that they are entitled to

[39] "The lodestar calculation is defined as the number of hours reasonably expended by the attorney, multiplied by a reasonable hourly rate." *See Rendine v. Pantzer*, 141 N.J. 292, 316, 661 A.2d 1202 (1995). Courts usually use this method in setting fee awards in civil rights and discrimination cases, or other fee shifting contexts. *See Packard-Bamberger & Co., Inc. v. Collier*, 167 N.J. 427, 445, 771 A.2d 1194 (2001). The policy behind lodestar enhancement calculation of legal fees is to promote the goal of ending civil rights and discrimination violations. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. *See Rendine v. Pantzer*, 141 N.J.292, 323, 338, 661 A.2d 1202, 1218 (1994).

[40] *See Rendine v. Pantzer*, 141 N.J.292, 661 A.2d 1202, 1218 (1994). To be entitled to enhancement of the lodestar fee calculation, the plaintiff must meet two conditions. First, "that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Pennsylvania v. Delaware Valley Citizens' Counsil for Clean Air,* 483 U.S. 711, 733 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). Second, "the fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency." *Id.* at 483 U.S. 733.

enhancement for contingency fee arrangement in a matrimonial case, because Plaintiff's attorneys are prohibited by RPC 1.5(d) to engage Plaintiff Fou in a matrimonial case for contingency fee arrangement.[41]

Although on its face, the matrimonial action retainer agreement between Plaintiff Fou and her attorney is not a contingent fee arrangement case, in realty this practice is a de facto contingency fee case. This is clearly a violation of the RPC 1.5(d), contingent fee arrangements are not permitted in domestic relations and criminal defense matters. This is the financial motive for James Plaisted, Esq. to make various misrepresentations to Court for the purpose to collect his fees. Therefore, Plaintiff has not demonstrated a compel reason that this case is an exception to the general principle that "enhancement for contingency is not permitted under the fee-shifting statutes". *See City of Burlington v. Dague*, 505 U.S. 557, 1112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

In addition, the trial court shall take into consideration that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees." *See Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76

[41] The record shows that on August 29, 2011, James Plaisted, Esq. entered two retainer agreements with Mrs. Janet Fou. One was for the representation in the matrimonial case *Fou v. Fou*. The other one was for the malpractice action against Mr. Tung. (*See* Da135-136) James Plaisted, Esq. stopped receiving any more payment of legal fees from Plaintiff Fou after the $50,000 retainer was exhausted. Plaintiff Fou promised to pay James Plaisted legal fees after they get from Mr. Tung's malpractice case. (*See* Da136-137) Nothing in the record showed that James Plaisted, Esq. agreed to represent Mrs. Fou on pro bono basis in *Fou v. Fou* matter. His continuance of representation of the matrimonial action *Fou v. Fou*'s was in fact contingency upon the fact that he can prevail on the malpractice action against Mr. Tung to collect his legal fees.

L.Ed.2d 40 (1983). "The district court should exclude hours that are not reasonably expended. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Further, the court can reduce the hours claimed on which the party did not succeed and that were 'distinct in all respects from' claims on which the party did succeed." *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 919 (3d Cir. 1985).[42] Plaintiff in the instant case has not proved that she had sustained any actual damages. Therefore, Plaintiff's attorneys are not entitled to enhancement of the lodestar fee for their personal gains, which is against the policy behind Lodestar fee.

In addition, this Court has pointed out in the decision dated August 25, 2021 that the reduced damages award of $449,798.59 renders the relief available under the offer of judgment rule inapplicable because plaintiff offered to accept judgment in the amount of $400,000, and the reduced damages award of $449,798.59 is less than 120 percent of the offer of judgment. *See* R.4:58-2(a) (providing for recovery of reasonable litigation expenses and reasonable attorney's fees where the money judgment obtained is 120 percent or more of the amount of the offer of judgment.

[42] "Similarly, a trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought. 'If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.' *Hensley*, *supra*, 461 U.S. at 436, 103 S.Ct. at 1941, 76 L.Ed.2d at 52; *see, e.g.*, *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 910 (6th Cir. 1991) (reducing lodestar by forty-five percent to reflect plaintiff's partial success)." *Rendine v. Pantzer*, 141 N.J. 336, 661 A.2d 1202, 1218 (1994).

Thus, on the remand for entry of a new judgment, the court below shall vacate the award of litigation expenses and attorney's fees and interest associated with the offer of judgment rule. (*See* Da161)

B. No Prejudgment Interest Shall Be Awarded to Attorney Fees

In addition, the Supreme Court of New Jersey prohibits the award of prejudgment interest on legal fees. *See N.Bergen Rex Transp. V. Trailer Leasing Co.*, 158 N.J. 561, 730 A.2d 843 (1997). Even where attorney fee shifting is controlled by contractual provisions, courts will strictly construe that provision in light of the general policy disfavoring the award of attorney fees. *See McGuire v. City of Jersey City*, 125 N.J. 310, 326, 593 A.2d 309 (1991).

VII. Trial Judge's Bias and Prejudice Against Asians in Performing Judicial Duties Warrant a New Trial (Not Raised Below)

Pursuant to Rule 3.6(C) of N.J. Code of Judicial Conduct, a judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the bases specified in Rule 3.6(A), and shall not permit court staff, court officials or others subject to the judge's direction and control to do so. It "is unnecessary to prove actual prejudice on the part of the court . . . rather 'the mere appearance of bias may require disqualification' so long as the belief of unfairness is 'objectively reasonable.'" *Chandok v. Chandok*, 406 N.J. Super. 595, 603-04, 968 A.2d 1196 (App. Div. 2009) (quoting *Panitch*, 339 N.J. Super. at 67). In *Caperton v. Massey Coal Co.,*

Inc., 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), the Supreme Court of the United States adopts this objective standard that do not require proof of actual bias.[43]

If no motion for judge's disqualification was made to the trial judge, and the disqualification claim is made for the first time on appeal, the appellate court shall "consider [the] argument within the rubric of the plain error doctrine." *State v. Medina*, 349 N.J. Super. 108, 129, 793 A.2d 68 (App. Div. 2002).[44]

On June 18, 2018, trial Judge Phillip Lewis Paley on the record dedicated the court proceeding to the memory of the United States of American Soldiers who were of the Caucasian race and were killed in combat on June 15, 1968 and June 18, 1968 in Vietnam by Asian soldiers. (*See* 1T3 1-13) The court proceeding on June 18, 2018 was to decide Defendants' motion for a new trial or to set aside the judgment notwithstanding a verdict on *Janet Fou v. Kevin Tung*. The trial Judge Paley' dedication of the court proceeding to the memory of the United States Soldiers who were killed in Vietnam by Vietnamese soldiers of Asian descent are plainly

[43] "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'" *See id.* at 2262. "In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *See id.* at 2263.

[44] Under this doctrine, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2. *See New Jersey Div. of Child Prot. & Permanency v. E.A. & D.A.*, 2023 N.J.Super. Unpub. LEXIS 291, 2023 WL 2293819.

inappropriate under any circumstances, especially the trial was involving an Asian attorney and his law firm as Defendants.

Throughout the proceeding, Judge Paley's hate motive toward Asians was not hidden, because he wanted to make the Asian Defendants to pay for the loss of his fellow soldiers killed by soldiers of Asian descent in Vietnam, regardless that Defendants had nothing to do with the killings. Judge Paley could not forget the events that took place in 1968, which was 50 years ago. Judge Paley attacked Defendant Tung because he is of Asian descent. Judge Paley's discriminatory and inexcusable conduct during the trial violated Cannon Rules of Judicial Conduct.[45]

To a minimum, Judge Paley should have disclosed his Anti-Asian animosity to the parties at the outset of the trial and asked the parties for consent to let him be the judge for the trial. For the past fifty years Judge had hard feelings for his fellow soldiers killed by soldiers of Asian descent in Vietnam, one cannot say his hard

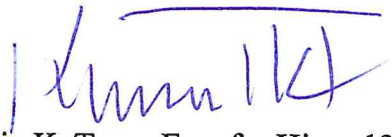
[45] Judge Paley' remarks at the beginning of the hearing on June 18, 2018 revealed his Anti-Asian motive and was reflective of trial judge displaying partiality during the entire *Fou v. Tung* tribunal proceedings. Judge Paley's racial remarks explains why so many irregularities occurred during the trial. Before the trial, Judge Paley became the tax auditor of Defendants' tax returns and bank records and threatened to report to tax authority for tax evasions to coerce Defendants to settle, when the tax and bank records were not relevant evidence to the instant malpractice case. (*See* Da331-334) At the end of the trial, Judge Paley intentionally committed a reversable error by denying the motion to dismiss complaint by Defendants for failure to prove damages by expert at the end of the trial, Judge Paley referred the case to the jury to infer causation and damage from circumstantial evidence in a professional malpractice case, knowing only the expert, not the jury, can opine causation and damages in malpractice cases. (Da111) Judge Paley called the jury out of deliberations and specifically gave the redacted version of the decision of Judge Weisberg to the jury and advised the jury that this transcript was the decision to set aside the judgment in the matter *Fou v. Fou* and the Appellate Division upheld the decision to prejudice Defendants. (Da133) Finally, Judge Paley awarded an outrageous, astronomic, excessive, and baseless and unconscionable attorney fees over $1.547 Million Dollars to Plaintiff's attorneys in this instant case where the Plaintiff sustained no actual damages.

feeling would not subconsciously affect his judgment and determination in the instant trial. A jury would be excluded from the panel if he or she discloses that he or she is tainted with such an experience with Asian descent. Because Defendants were prejudiced by a trial Judge who openly displayed his Anti-Asian animosity, a new trial shall be ordered and Judge Paley shall be disqualified for the purpose to rebuild the public confidence in the integrity of our judicial systems pursuant to either objective standard or subjective standard.

CONCLUSION

In short, for the foregoing reasons, the undersigned respectfully requests that this Court relieve the Defendants from the Amended Final Judgment and either to dismiss the complaint for failure to prove causation and damage or to order a new trial in the interest of justice.

Respectfully Submitted,



Kevin K. Tung, Esq. for Himself
and Kevin Kerveng Tung, P.C.

JANET YIJUAN FOU, Plaintiff/Respondent, v. KEVIN KERVENG TUNG, P.C. and KEVIN TUNG, ESQ, Defendants/Appellants.	DOCKET No.: A-003377-22T4 **ON APPEAL FROM**: SUPERIOR COURT, LAW DIVISION MIDDLESEX COUNTY DOCKET NO. BELOW: MID-L-6259-12 Sat Below: HON. J. RANDALL CORMAN, J.S.C. **Civil Action**

PLAINTIFF/RESPONDENT JANET FOU'S BRIEF IN OPPOSITION TO THE APPEAL FILED BY DEFENDANTS KEVIN TUNG AND KEVIN KERVENG TUNG, P.C.

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PRELIMINARY STATEMENT

This appeal represents at least defendants' sixth bite of the same apple, i.e. trying to vacate the jury verdict that was entered against them. More specifically, this is defendants' second time making the same arguments to this Court. At some point, defendants must be stopped.

Defendants were initially retained by plaintiff Janet Fou to represent her in what should have been a simple divorce matter. Instead of a simple divorce, plaintiff has gotten an endless nightmare with over a decade of litigation. In April 2018 a jury verdict was returned against defendants in the amount of $500,000 based on the jury finding that defendants had committed malpractice in their representation of plaintiff. Thereafter, a final judgment, which included an award of attorney's fees and interest, was entered by the trial court in January 2019. Defendants appealed the final judgment and in August 2021, this Court affirmed in part, vacated in part, and remanded the matter for the entry of an amended final judgment pursuant to this Court's findings. After this Court's decision, defendants sought leave to appeal to the New Jersey Supreme Court. Their application was denied. Following the denial before the New Jersey Supreme Court, defendants sought leave to appeal to the United States Supreme Court. The Supreme Court rejected

defendants' arguments.

On remand, even though this Court had already addressed defendants' arguments on appeal, defendants again attempted to overturn the jury verdict by filing a motion to vacate the final judgment. The trial court, now sitting before the Honorable J. Randall Corman, J.S.C., denied defendants' motion. Thereafter, on July 10, 2023, the trial court entered an amended final judgment which followed the instructions provided in this Court's opinion to reset plaintiff's damage award and recalculate the interest. The Appellate Division opinion did not disturb the attorney's fee award. As the amended final judgment was being entered pursuant to this Court's instructions, there was no need for the trial court to hear new argument from the parties.

Despite the fact that the amended final judgment was entered pursuant to the decision of this Court, here, the parties are again rehashing the same arguments from defendants. The only new argument defendants raise in this appeal is that the judge who oversaw the trial, the Honorable Phillip Lewis Paley, J.S.C., was biased against them because of his hatred towards Asians. This argument is so preposterous and baseless, it is not even worth it for plaintiff, who is also of Asian dissent, to respond to.

At this point, it is clear that defendants' arguments are rotten to the

core. Defendants argue that plaintiff did not prove that defendants' conduct was the proximate cause of her damages. This assertion is baseless. Additionally, the law is clear that as a successful plaintiff in a legal malpractice action, plaintiff is entitled to an award of attorney's fees. Defendants' argument against the awarding of attorney's fees is thus also baseless. Lastly, defendants' never-ending attacks on the character of plaintiff's counsel are also baseless as counsel did not commit any fraud on the court.

This court will see below, as it did the first time these arguments were presented, that this is a case of clear malpractice. As nothing has changed factually from the first time this Court heard this appeal, and the amended final judgment was entered pursuant to the instructions of this Court, this Court should not disturb the amended final judgment. Instead, the judgement below should be affirmed in full.

PROCEDURAL HISTORY

The Complaint herein was filed in September 2012. Discovery proceeded and trial was scheduled for December 8, 2014 before it was stayed. After the stay was lifted, discovery and proceedings restarted in this case. A jury trial commenced on April 16, 2018 and resulted in a jury verdict entered against defendants in the amount of $500,000. Following the jury

verdict, on May 7, 2018, defendants moved for judgment notwithstanding the verdict or alternatively, a new trial. On June 25, 2018, Judge Paley entered an order denying defendants' motion. On July 25, 2018, plaintiff moved for an award of attorney's fees. On January 3, 2019, Judge Paley authored an opinion that awarded plaintiff $702,000 in costs and fees. Da67.[1] On January 11, 2019, Judge Paley entered a final judgment that encompassed the jury verdict, the fee award, and pre and post judgment interest. Id. Defendants appealed the final judgment. On August 25, 2021, this Court rendered an opinion, affirming in part, vacating in part, and remanding for further proceedings pursuant to terms of this Court's opinion. Da25. Following the Appellate Division decision, defendants attempted to appeal the ruling to the New Jersey Supreme Court. The New Jersey Supreme Court denied his petition for certification on June 16, 2022. Fou v. Kevin Kerveng Tung, PC, 251 N.J. 192 (2022). When defendants were unsuccessful with the New Jersey Supreme Court, they attempted to seek relief from the United States Supreme Court. They filed a motion for leave to file a petition for writ of certiorari with an appendix under seal on August 29, 2022. The motion for leave was granted, and the petition was accepted, but the petition was

[1] "Da" refers to defendants' appendix on appeal.

denied by the US Supreme Court on January 23, 2023. Kevin Kerveng Tung, P.C. v. Fou, 214 L. Ed. 2d 450, 143 S. Ct. 746 (2023).

While defendants pursued the proper appeal channels for the final judgment, they simultaneously attempted to collaterally attack the judgment by attempting to intervene in the divorce proceedings of the Fous which had been concluded at the trial level in October 2014 and affirmed on appeal in July 2016. "In the fall of 2018, Tung filed motions in the Family Part and in [the Appellate Division] to intervene in the original divorce action. Both the Family Part and [the Appellate Division] denied Tung's motions." Yijuan Fou v. Zhuowu Fou, No. A-2145-18T1, 2020 WL 3124686, at *2 (App. Div. June 12, 2020); Da165. In denying defendants' motion to intervene, the Appellate Division found that defendants' "arguments lack sufficient merit to warrant discussion in a written opinion." Id.; Da166. The arguments that lacked enough merit to even warrant a discussion in a written opinion included many of the same arguments defendants raise in the present appeal, including two of their favorite arguments to repeat ad nauseum: Mr. Tung's due process rights were violated and plaintiff's attorney committed a fraud on the court. When they yet again failed to obtain the result they sought in the Appellate Division, defendants again petitioned for certification to the

New Jersey Supreme Court. That petition was denied in April 2021. Fou v. Fou, 246 N.J. 49 (2021).

When plaintiff learned that the petition before the US Supreme Court had been denied and thus defendants had exhausted all appeals, application was made to the trial court for entry of an amended final judgment pursuant to the terms of the Appellate Division's opinion. Back before the trial court, defendants again attempted to have the jury verdict thrown out via motion to vacate the final judgment. On June 23, 2023, the trial court entered an order denying defendants' motion. Da13. On July 10, 2023, the trial court entered an amended final judgment. Da15. The notice for the current appeal was filed by defendants on July 11, 2023 and amended on July 26, 2023. Da7;Da 1.

STATEMENT OF FACTS

For the sake of brevity and not wasting the Court's time, plaintiff relies on the statement of facts as set forth in the Appellate Division's August 25, 2021 opinion. Da25-42.

LEGAL ARGUMENT[2]

POINT I

STANDARDS ON APPEAL

[2] As defendants are repeating arguments this Court, and other courts, have already addressed and rejected, plaintiff will limit her argument as best as can be done so as not to waste the Court's time.

Defendants' brief yet again raises several contentions to argue why the judgment in plaintiff's favor should be set aside. What they do not address is the heavy burden defendants have to meet to be successful on this appeal. They do this because they cannot meet their burden.

The amended final judgment arises out of a jury trial. "In the American system of justice the presumption of correctness of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework." Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977).

> The judgment of the initial factfinder then, whether it be a jury, as here, or a judge as in a non-jury case is entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice. The process of "weighing" the evidence is not to encourage the judge to "evaluate the evidence as would a jury to ascertain in whose favor the evidence preponderates" and on that basis to decide upon disruption of the jury's finding. "(T)he judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror." Nevertheless, the process of evidence evaluation called "weighing" is not "a pro forma exercise, but calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury." It is only upon the predicate of a determination that there has been a manifest miscarriage of justice, that corrective judicial action is warranted.
>
> Id. at 597–98 (internal citations omitted).

"Although an appellate court has a duty to canvass the record to determine

whether a jury verdict was incorrect, that verdict should be considered 'impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice.'" Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 135 (1990). "Credibility is always for the factfinder to determine." Ferdinand v. Agric. Ins. Co. of Watertown, N.Y., 22 N.J. 482, 492 (1956). The Appellate Court shall "defer to the jury with respect to 'intangibles' not transmitted by the record (e.g., credibility, demeanor, 'feel of the case')." Dolson v. Anastasia, 55 N.J. 2, 6–8 (1969). This means accepting as true all evidence supporting the party opposing the appeal and according her the benefit of all favorable inferences, if reasonable minds could differ, the appeal must be denied. Id. at 5. While the Appellate Division reduced the jury award the first time it heard this appeal, it otherwise upheld the jury's finding that defendants had committed legal malpractice and caused damage to plaintiff. Defendants could not in 2021 and still cannot today, show that there was a miscarriage of justice so as to warrant reversing the jury's verdict so the amended final judgment should stand.

POINT II

PLAINTIFF PROVED HER DAMAGES

Legal malpractice cases of this type are a trial of a case within a case. E.g., Lieberman v. Employees of Wausau, 84 N.J. 325 (1980). What happened in the

underlying case is admissible and to be considered by the jury which has to decide whether there was malpractice committed by defendants and what damages were caused by that malpractice. The events in the underlying action are examined by the jury. See e.g., Jerista v. Murray, 185 N.J. 175, 191 (2005)("Plaintiffs in this malpractice action proceeded in the conventional way by attempting to prove the 'suit within a suit.' In other words, plaintiffs presented 'evidence that would have been submitted at a trial' in a personal injury case against Shop Rite, 'had no malpractice occurred.'")(citation omitted). In this case there was ample evidence that defendants committed malpractice and that the malpractice caused damages to plaintiff.

A. Defendants' Malpractice

During trial, plaintiff presented the expert testimony of Edward O'Donnell, Esq. Mr. O'Donnell testified to the standard of care in a matrimonial case. Specifically, he testified that an attorney is required to communicate with his client, make sure the client is aware of his/her rights at issue, and to be informed about the client's finances. 6T113:9-22. As it relates to communication, Mr. O'Donnell said that in his review of the file he did not see communication between Tung and his client Janet aside from a perfunctory email about the time and location of the court hearing. 6T:117-118:1. Instead, he saw that most of the communication from defendants was with Joe. 6T:118:2-

4. This observation matched the testimony of both Janet and Tung that almost all of defendants' communication during the divorce process was with Joe, not their client Janet. 4T180:8-9; 7T14:18-22. This lack of communication then led to Tung not meeting the other standards of care because without communicating with his client he did not learn information that was necessary to inform her of her rights and protect her in the judgment for divorce. 6T118:22-119:2. Janet was never advised about her options for proceeding with and finalizing the divorce. 6T119:21. According to Mr. O'Donnell, Tung's conduct was a clear deviation from the standard of care. 6T121:10-16.

Mr. O'Donnell further testified that Tung's failure to communicate with Janet led to a deviation in Tung's requirement to exercise independent judgment and render candid advice as required by RPC 2.1. 6T131:21-132:13. Without communicating alone and directly with his client, Tung could not exercise proper independent judgment. 6T131:21-25. Without meeting alone with his client, Tung could not competently render candid advice. 6T132:1-5. Likewise, only meeting with both Joe and Janet and then conducting himself as if he were representing Janet was a deviation from the standard of care by Tung. 6T135:12-16.

There was no reliable evidence that Tung explained the case to Janet to the extent reasonably necessary to permit her to make informed decisions. Tung

even admitted during his deposition, which was read into evidence, "[a]ll the information we receive is from Joe Fou. Not from Janet. We didn't talk to her." 7T13:3-8. Moreover, during the same deposition he also stated that he did not even intend for the Fous to come back to his office after the documents were prepared. 7T11:17-18. He thought everything could be done by mail. Id. From this testimony it is clear that Tung did not think it was important for him to explain the English agreement in detail to Janet. During trial Tung tried to subvert his deposition testimony by claiming he had a second meeting with the Fous so he could go over all of the documents with Janet. Janet testified that the second meeting lasted maybe half an hour (4T:18316-19) and it consisted of discussion between Joe and Tung that she did not really participate in (4T185:16-23). It is clear from the verdict that the jury rejected Tung's testimony that he explained the English PSA to Janet in detail.

Along with the violation of the standard of care for communicating with his client and the other issues that arose from the failure to communicate, Mr. O'Donnell also testified that Tung deviated from the acceptable standard of care for diligence. 6T126:8-11. Mr. O'Donnell testified that RPC 1.3 requires an attorney to do his job with diligence. 6T123:3-7. According to Mr. O'Donnell, "diligence requires that the client be informed. And it requires that you be informed as an attorney. You have to know what the assets are." 6T124:3-5. Not

asking questions of your client can be a violation of the diligence requirement. 6T124:25-125:2. Mr. O'Donnell opined that Tung deviated from the standard of care for diligence by not doing anything to find out financial information for the benefit of his client and just utilizing whatever information was provided by the adversary to complete the divorce documents. 6T126:13-17. Defendants' expert, Robert Zaleski, agreed with this observation in his testimony, "I don't think that the attorney would just - - would be doing his job if he simply said I'm going to take this information and use it." 8T89:21-23.

Tung's deviations from the standard of care carried over from preparing the divorce documents to when he appeared in court to finalize the divorce. Mr. O'Donnell testified that Tung deviated from the acceptable practices of candor to the tribunal set forth in RPC 3.3. 6T144:7-15. Mr. O'Donnell testified that in his *voir dire* of Janet, Tung should have asked her if she actually read and understood the English PSA, which was not in her native language, but he failed to do that. 6T144:12-15.

In addition to the deviation from standards represented by the Rules of Professional Conduct, Mr. O'Donnell also opined that Tung failed to comply with Court Rule 5:3-5 which requires a written retainer including a description of services to be rendered in matrimonial actions. 6T145:12-23. Mr. O'Donnell agreed, as Tung argued, that an attorney can limit the services he is going to

provide to a client in a matrimonial matter, but if that limitation is going to take place it has to be in writing and that was not present in Tung's representation of Janet. 6T148:8-12; 6T149:12-22. All of Mr. O'Donnell's opinions on Tung's failure to comply with the requirement for a proper retainer agreement were confirmed by Tung himself when he testified that he did not provide Janet with a retainer agreement and he did not even know the Rule that required the retainer agreement. 2T100:25; 2T111:14-17.

In addition to Mr. O'Donnell's testimony, Mr. Tung's testimony itself confirmed his malpractice. At a minimum, Tung testified that his role was "to take the information they give me, whatever the agreement they give me, and put that into the package that I had to create in – which includes a Property Settlement Agreement." 7T40:24-41:3. The Chinese Agreement that was provided to Tung to be used as the basis for the documents he was to prepare contemplated that the parties would account for personal property and company assets at a later time. Conversely, the English PSA prepared by Tung makes no mention of the company assets and completely cuts off any future distribution of assets. By omitting the key language about the separate distribution of company assets, Tung failed to properly do even the limited job he readily admits he was retained to do.

It is clear from the testimony offered that plaintiff provided evidence of

defendants' malpractice. In rendering a verdict in plaintiff's favor, the jury clearly accepted that testimony to find malpractice. Defendants have offered nothing to show that the jury's finding of malpractice was a "plain miscarriage of justice." Kassick, supra, 120 N.J. at 135. Accordingly, the jury's finding of malpractice should not be reversed so the amended final judgment should stand.

B. Plaintiff Proved the Amount of her Damages

Despite what defendants would have this Court believe, plaintiff proved the amount of her damages by presenting evidence of the amount of legal fees she incurred to correct defendants' malpractice. In In re Estate of Vayda, 184 N.J. 115 (2005), the New Jersey Supreme Court explained that:

> [I]f a plaintiff has been forced because of the wrongful conduct of a tortfeasor to institute litigation against a third party, the plaintiff can recover the fees incurred in that litigation from the tortfeasor [because t]hose fees are merely a portion of the damages the plaintiff suffered at the hands of the tortfeasor.
>
> Id. at 122 (quoting In re Estate of Lash, 169 N.J. 20, 26 (2001)).

The situation in Estate of Vavda is exactly what occurred here. In this case, plaintiff was forced to reopen the divorce litigation against Joe because of the wrongful conduct of defendants, thus plaintiff is entitled to recover from defendants the attorney's fees and costs incurred in reopening the divorce. Other jurisdictions have the same rule as New Jersey. See Rudolf v. Shayne, 8 N.Y. 3d 438, 443 (2007); Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264

(Alaska 2013). In Rudolf v. Shayne, 8 N.Y. 3d 438 (2007), the Court of Appeals of New York reaffirmed that the direct consequential damages from malpractice cases include the "legal and expert witness fees and related expenses." "Damages in a legal malpractice case are designated 'to make the injured client whole.' A plaintiff's damages may include 'litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct.'" Id. at 443 (citing cases and authorities). Mr. O'Donnell also testified that the counsel fees to set aside the English PSA and obtain a new judgment and expenses to attempt to locate and collect assets are recoverable damages for Janet. 6T156:18-157:2.

During trial, Peter Bracuti, Esq., the attorney originally responsible for handling the reopening of Janet's divorce, testified about the process to reopen the divorce and set aside the English PSA and how drawn out it became with Joe fighting it every step of the way by filing motions to dismiss and motions for reconsideration that took a year to deal with. 4T22:16-21. Mr. Bracuti noted how the file for the case came to consist of many boxes of documents. 4T31:3-7. He also explained how the case required multiple depositions including one in North Carolina. 4T35:8-22. This was all before a four-day plenary hearing. 4T38:18-21. Even after the AFJD was entered, the legal fighting did not end as Joe appealed the AFJD.

All of this work to get to and preserve the AFJD on appeal took a lot of time and cost a lot of money. Janet testified that to reopen the divorce, obtain the AFJD, and defend it on appeal, she paid her attorneys a retainer of $53,600 (5T211:3-5) and incurred an additional $396,198.59 in fees and costs (5T209:1-10). Da425. The total legal fees incurred in the process to reopen the divorce, $449,798.59 represent plaintiff's damages and that is how the Appellate Division arrived at $449,798.59 as the amount of damages that was to be awarded in the amended final judgment. Defendants had the opportunity to attack this evidence during trial but did not do so because there was no basis to attack the fees incurred by plaintiff. Defendants were not deprived of any due process rights, nor was any "mistake" made in the context of R. 4:50 by the Appellate Division setting the damage award at the amount of fees and costs incurred by plaintiff to correct defendants' malpractice. Contrary to defendants' classification of the award, the amount of $449,798.59 was not an award of attorney's fees, but an award for damages incurred by plaintiff as a result of defendant's malpractice.

C. Plaintiff Proved Defendants' Malpractice was the Proximate Cause of her Damages

Plaintiff does not dispute that to successfully prove her malpractice claim she needed to show injuries that were the proximate cause of Tung's breach of his duty. 2175 Lemoine Ave. Corp v. Finco, 272 N.J. Super 478, 487-88 (App.

Div. 1994). That is exactly what occurred here.

In addition to his testimony on Tung's various deviations from the proper standard of care, Mr. O'Donnell also testified about the connection between Tung's conduct and the damages suffered by Janet. Mr. O'Donnell testified that due to Joe's anxiousness to obtain a divorce, Janet had a great opportunity to negotiate and protect a fair equitable settlement for herself. 6T153:15-17. Tung himself acknowledged observing such an anxiousness in Joe. 2T194:1-5 (Joe was "so eager, right, to get rid, get over with this case, get over with this marriage."). According to Mr. O'Donnell, Janet had an equitable interest in all of Joe's assets pursuant to New Jersey law and she ended up waving those interests by being instructed by Tung to sign off on the quick divorce. 6T153:24-154:6. As Mr. O'Donnell explained it, by the divorce being pushed through so quickly, Janet lost leverage:

> [Leverage]. That's what I'm talking about in the period of time from when Mr. Tung first meets Mrs. Fou and they become engaged in the -- in their representation, and between that time and the divorce. During that period of time, that's when you have the right to take that discovery. That's when you have the right to take the deposition of a party. That's when you have the right to take depositions of third parties. That's when I can send out those third-party subpoenas. That's when I can get all of my information that I need to effectively and adequately represent my client and find out what's out there. Once you're divorced, you lose that opportunity…So during that period of time, that's when she could have cut the best deal she could – she could have.
>
> 6T154:22-155:19.

By failing to properly utilize the leverage Janet had before the divorce was entered, Tung cost Janet dearly in her ability to collect the assets that were rightfully hers and in the legal fees she had to incur to correct his mistakes. This is especially true considering Tung's knowledge that Joe was mostly residing in China (2T158:17-20; 2T159:11-20) and that it is impossible to enforce an American judgment in China (7T145:18-146:2). In 2009, Joe would have had to satisfy Janet's financial requests if he was going to secure the divorce he so desperately desired.

The *de bene esse* deposition of defendants' expert Chunsheng Lu, which was actually introduced by plaintiff, identified the various ways Tung could have protected Janet's interests prior to the divorce being entered. 10T26:5-21. Instead of taking any steps to protect Janet's interests, Tung's representation of Janet essentially let Joe off scot-free. Based on the verdict, the proximate cause between defendants' conduct and Janet's damages was evident to the jury. Accordingly, there is no reason to disturb the jury verdict and the amended final judgment should stand.

POINT III

THE AWARDING OF FEES TO PLAINTIFF'S COUNSEL WAS PROPER

Defendants concede, as they must, that an attorney is "responsible for a

client's loss if the loss is proximately caused by the attorney's legal malpractice." Def. Br. at 24. This position is in line with the holding in Saffer v. Willoughby, 143 N.J. 256 (1996) (due to plaintiff's success in the malpractice litigation, her counsel is entitled to an award of fees). Defendants then attempt to differentiate this rule from the present case by continuing to argue that plaintiff did not establish proximate cause, but for the reasons set forth above, this argument fails.

The awarding of attorney's fees lies in the discretion of the trial judge. A "fee determination by trial court will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)(quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). "That deferential standard of review guides [this Court's] analysis." Id. Contrary to what defendants argue, plaintiff's fee application was fully supported by certifications from counsel which identified and explained the fees and costs that had been incurred. In the end, Judge Paley found that the fees and costs he awarded were incurred because this litigation could be "fairly described as 'scorched earth." Da70. Judge Paley did not abuse his discretion in awarding plaintiff counsel's fees.

Judge Paley reviewed the filings carefully to measure compliance with Rule 1.5 and for all factors identified in Rendine and its progeny. Judge Paley

carefully adjusted and subtracted out billing amounts he found inadequately supported, too general in description or reflecting conferences between lawyers or a partner researching at a higher rate than an associate. Da71-81. This full analysis, including the calculating of the lodestar, was necessary and proper so the fee award should not be disturbed. Likewise, the interest calculations in the amended final judgment, which were completed pursuant to the Court Rules, as this Court instructed, should not be disturbed as well. The amended final judgment should be affirmed in full.

POINT IV

PLAINTIFF'S COUNSEL DID NOT MAKE COMMIT FRAUD UPON THE COURT

All throughout this litigation, during trial, and during his initial appeal, in an effort to avoid their own responsibility, defendants attempted to concoct a conspiracy theory centered on Janet making misrepresentations to the court. Those arguments all repeatedly failed. Now, having failed in their attack on Janet directly, defendants are attempting to undue the award entered against them by attacking plaintiff's counsel. Contrary to defendants' baseless assertions, attorney Plaisted did not "openly admit[] to the investigator from Office of Attorney Ethics" the he had committed fraud upon the court. Tung Br. at 32. This assertion is nothing but another fiction concocted by defendants in an attempt to skirt their own responsibility. As no admission was made by

plaintiff's counsel and there is no new evidence of fraud on the court, because no fraud occurred, defendants' entire argument that the amended final judgment should be set aside pursuant to R. 4:50 fails.

CONCLUSION

For all the foregoing reasons, this Court should dismiss defendants' appeal and the amended final judgment should be affirmed in full.

Pashman Stein Walder Hayden, P.C.

By: */s Michael J. Zoller*
Michael J. Zoller

Dated: February 23, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JANET YIJUAN FOU, Plaintiff-Respondent, v. KEVIN KERVENG TUNG, P.C. and KEVIN TUNG, ESQ., Defendants-Appellants.	DOCKET NO.: A-003377-22T4 CIVIL ACTION ON APPEAL FROM AMENDED FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO. BELOW: NID-L-6259-12 SAT BELOW: HON. J. RANDALL CORMAN, J.S.C.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS KEVIN KERVENG TUNG, P.C. AND KEVIN TUNG, ESQ.

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REPLY BRIEF

Appellants submit this Reply to rebut the points raised in Respondent's brief.

I. Litigants Are Entitled to Notice of the Points the Court Thinks Constitute Plain Error and Have a Right to be Heard Before a Final Determination.

In the Defendants-Appellants' brief, Defendants have demonstrated that there was a miscarriage of justice under the law. Where does the justice lie in awarding attorney fees of $1,311,832.94 to attorneys who had openly admitted to commit fraud upon the court before the investigator from the Office of Attorney Ethics at the expense of the innocent victim and who had failed to establish the elements of causation and actual damage in the underlying matrimonial case within the legal malpractice case. Even though there is a heavy burden, a judgment can still be vacated when the judgment is so distorted and wrong, in the objective and articulated view of a judge as to manifest with utmost certainty of a plain miscarriage of justice.

By Article I of the NJ Constitution, paragraph 9, the right of trial by jury is made inviolable; and the review on appeal from a judgment rendered on a jury verdict is ex-necessitate restrained by this constitutional guaranty. An inquiry into the weight of the evidence, either in a civil or a criminal case, governed by the cited standard, is not in derogation of the right of trial by jury secured by the organic law. The award of a new trial on appeal where the verdict clearly gives rise to the inference of mistake, passion, prejudice, or partiality does not constitute an undue interference with the constitutional right of trial by jury or the constitutional integrity

of the inferior tribunal, for the jury has transcended its constitutional sphere to the substantial injury of the party adversely affected; and on the plainest principles of justice this fundamental error is remediable by the appellate process. *See Hager v. Weber*, 7 N.J. 201, 81 A.2d 155 (1951) (The Supreme Court affirmed the order of the appellate court that reduced the award of damages to plaintiff injured person because the verdict was clearly excessive and directed a new trial as to damages if plaintiff refused to consent to the reduction.)

In *Taylor v. Public Serv. Interstate Transp. Co.*, 13 N.J.Super. 125, 80 A.2d 220 (App. Div. 1951), the Court reversed the judgments entered against defendants, bus driver and bus company, because the Court found the manifest weight of evidence did not support a finding that defendants were liable. The Court stated that where neither the facts nor the permissible inferences from them vindicate the verdict and it is manifest that the verdict was fabricated by the influences of sympathy, or passion, or prejudice, or based upon mistake, it must in the course of the administration of justice be annulled.

In the instant case, unlike what Plaintiff attempted to characterize this appeal as the second time making the same arguments to this Court, Defendants never had an opportunity to present their argument when the Appellate Division substituted an unsubstantiated jury award of $500,000 due to plain error, which was vacated by Appellate Division for Plaintiff's failure to prove actual damages, with a new award

for $449,798.50 to Plaintiff for attorney fees despite the fact that Defendants were not afforded an opportunity to challenge this new award and the trial records are devoid of any analysis regarding the amount of legal fees claimed by Plaintiff. Defendants should be given the opportunity to present their views before they found themselves bound by the court's edict.[1]

In addition, to decide if a miscarriage of justice has occurred, the reviewing court gives deference to the trial court with respect to factors that are not apparent in the record on appeal such as the credibility and demeanor of witnesses. Beyond those considerations, a reviewing court may independently scrutinize the record in order to determine whether the result was just. *See Kimmel v. Dayrit*, 301 N.J.Super. 334, 693 A.2d 1287 (App. Div. 1997), *Carrino v. Novotny*, 78 N.J. 355, 360–61, 396 A.2d 561 (1979); *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 597–98, 379 A.2d 225 (1977); N.J. Ct. R. 2:10-1.

Plaintiff Respondent missed this point altogether in the Point I of the brief in opposition. Defendants Appellants in their appellate brief did not argue that this Court shall review the credibility and demeanor of the witnesses during the jury trial.

[1] *See Ford v. Reichert*, 23 N.J. 429, 435, 129 A.2d 439 (1957) ("In the procedure before us, however, the judicial fundamental of the right to be heard seems to have been completely forgotten. … If and when the Appellate Division concludes substantial justice requires the invoking of the plain error rule and the issues have not been presented or argued, the litigants are entitled to notice of the points the court thinks constitute plain error and have a right to be heard before a final determination. The court should not deprive the parties of their day in court or their right to be heard on matters which may defeat their cause.")

Defendants asked this Court to review whether Plaintiff had proved causation and damage in the underlying matrimonial case, where the Defendants represented the Plaintiff, in the "trial within a trial" legal malpractice case after the Appellate Division substituted an unsubstantiated jury award of $500,000, which was vacated by Appellate Division for Plaintiff's failure to prove actual damages before awarding the $449,798.50 to Plaintiff for attorney fees, because this Court in its decision had rendered a proposition which had no direct support from any precedent in the State of New Jersey and across the nation. Rather, this case establishes a dangerous precedent that plaintiff can create damages in any legal malpractice case just by commencing an action to incur legal fees so long as there are some evidences that the defendant has breached the duty in providing legal services to the plaintiff.

This ruling is against the current law that Plaintiff must prove that she suffered actual damages in the underlying matrimonial case as a result of Defendants' breach of duties before the Court can award legal fees incurred by Plaintiff to vindicate her rights, not the other way around! To review the issue whether the manifest weight of evidence supports a finding that Defendants were liable under the circumstance is fully within the scope of this Court's jurisdiction. If this Court finds that where neither the facts nor the permissible inferences from them vindicate the verdict and it is manifest that the verdict was fabricated by the influences of sympathy, or

passion, or prejudice, or based upon mistake, it must in the course of the administration of justice be annulled. *See Taylor*, 13 N.J.Super. 125, 80 A.2d 220.

II. Incurring Legal Fees Per Se Is Not the Damage Suffered by the Plaintiff, Because Legal Fees Incurred in the Underlying Matrimonial Case Has to Be a Mere Portion or a Part of the Total Damages Suffered by the Plaintiff in the Underlying Matrimonial Case.

In Point II of the brief in opposition, Plaintiff Respondent missed the point altogether again. Defendants are not asking this Court to review the credibility and demeanor of witnesses during malpractice trial. Defendants are asking this Court to review a legal proposition whether a plaintiff can create damages in any legal malpractice case just by commencing an action in the underlying matrimonial (being specific here) or other kind of case (being general otherwise) to incur legal fees so long as there are some evidences that the defendant has breached the duty in providing legal services to the plaintiff. Incurring legal fees alone per se is not the damages suffered by the Plaintiff. In order to consider legal fees incurred in the underlying matrimonial case to be the damages suffered by the Plaintiff for the malpractice case, those legal fees must be a "mere portion" or a part of the total damages suffered by the Plaintiff in the underlying matrimonial action. *See In re Estate of Lash*, 169 N.J. 20, 26 (2001). Plaintiff must prove that she had suffered other damages first before she can be awarded legal fees in the underlying matrimonial case. The legal fees incurred in the underlying matrimonial case cannot stand by itself as the damages sustained by the Plaintiff, because Plaintiff had failed

to prove the causation and the actual damage sustained as a result of the negligence on the part of the attorneys in underlying matrimonial case. When Plaintiff failed to prove that she had suffered any actual damages, she failed to successfully prove that the negligence on the part of the Defendants had caused any damages to her in the underlying matrimonial case. *See Lovett v. Estate of Lovett*, 250 N.J.Super. 79, 593 A.2d 382 (CDAC 1991) (Even if attorney was negligent and breached his duty in his representation, plaintiffs must demonstrate that they suffer a loss proximately caused by attorney's negligence). *Lovett* is on point and it is one of the two cases relied on by the Appellate Division to render its prior opinion that Defendants are responsible for Plaintiff's legal fees to vacate the PSA and judgment of divorce. Appellate Division had misapplied law in the prior opinion.

The Appellate Division correctly found that Plaintiff had not suffered any actual damage other than incurring legal fees in the underlying matrimonial case as this Court in the prior decision found that Plaintiff suffered $449,798.59 in damages as a direct and proximate result of defendants' negligence, because plaintiff incurred $449,798.59 in attorney's fees and costs to remedy the errors in the PSA and original judgment of divorce resulting from defendants' negligence. (Specific Negligence on the Part of the Defendants) But in the meantime, this Court also found that the balance of the jury's $500,000 damages award in the amount of $50,201.41 was without any competent evidence that plaintiff suffered any actual damages—beyond

the fees incurred to vacate the PSA and original judgment of divorce and obtain the AFJD-as a direct and proximate result of defendants' negligence (Da34), because the record showed that there was no evidence of any disposition of assets between 2009 when the divorce judgment was granted and when the divorce judgment was set aside in 2011. (*See* Da115.) This reasoning raises a question whether the negligence on the part of the Defendants had proximately caused any actual damage to the Plaintiff, Plaintiff's legal fees cannot be a "mere potion of the damages" suffered by the Plaintiff as a result of Defendants' negligence when Plaintiff sustained no actual damages.

In Plaintiff's brief in opposition, Plaintiff cited *In re Estate of Vayda*, 184 N.J. 115 (2005), and *Lash*, 169 N.J. 20, to support her position that Plaintiff can recover the legal fees incurred in the litigation from tortfeasor. The cases cited by Plaintiff actually support Defendants' argument that unless the legal fees incurred in the litigation are a "mere portion of the damages" or a part of the total damages suffered by Plaintiff, the legal fees incurred are otherwise not considered as damages suffered by Plaintiff. The cases cited by Plaintiff clearly illustrate a proposition that a plaintiff cannot create damages in the legal malpractice case just by commencing an action in the underlying matrimonial to incur legal fees so long as there are some indication that the defendant has breached the duty in providing legal services to the plaintiff.

In *Vayda*, 184 N.J. 115 , the Supreme Court of New Jersey declined to create an exception to the American Rule, one that would allow attorney fee shifting whenever a non-attorney executor is removed because of, among other things, breach of a fiduciary duty and bad faith against co-beneficiaries. The legal fees incurred should be paid by the estate in accordance with the statute. This case does not apply here. But in any event, the co-beneficiary in *Vayda* recovered 45% of her shares of the estate beneficiary in comparison to the Plaintiff in the instant case who had suffered no actual damages.

In *Lash*, 169 N.J. 20, where the administrator of an estate misappropriated the estate's funds, the Supreme Court must decide whether the estate can recover counsel fees incurred in the proceeding to recover the misappropriated amounts from the surety on the bond, or whether the estate is responsible for those fees. The plaintiff was awarded a judgment of $800,000 against the administrator. The surety settled the claim to compensate the estate for the loss of $800,000, but not the legal fees incurred by the estate to pursue the action. The Supreme Court reversed the decision of the court below that the estate, rather than the surety, is liable for the attorneys' fees. The Supreme Court determined that the surety shall pay the attorneys' fees incurred in the bond litigation on the ground that those fees are merely a portion of the damages plaintiff suffered at the hands of tortfeasor. Again, the award of legal fees is in addition to the actual damages of $800,000 suffered by

plaintiff estate, not because the estate incurred legal fees by commencing an action against the administrator for his wrongful act per se, but because the estate, after successfully recovering damages caused by an administrator, requested that the surety bear liability for the attorneys' fees incurred in the proceeding on the bond. The Supreme Court specifically stated that "[t]hose fees do not implicate the American Rule because they were incurred in the litigation on the bond, rather than the litigation against Lopez (the administrator)." *See Lash*, 169 N.J. at 32.

Plaintiff in the brief in opposition also cited *Rudolf v. Shayne*, 8 N.Y.3d 438, 443 (2007) to support her proposition that legal fees incurred in the underlying matrimonial case is the damages sustained by the Plaintiff. *Rudolf* again supports Defendants argument that unless plaintiff successfully proves the underlying tort case, then legal fees incurred is part of the damages sustained by the plaintiff.[2]

Plaintiff also cited *Gefre v. Davis Wright Tremaine, LLP*, 306 P.3d 1264 (Alaska 2013), to support her proposition that legal fees incurred in the underlying matrimonial case is the damages sustained by Plaintiff. Again, *Gefre* is supporting Defendants' proposition.[3] In *Gefre*, the Court specifically stated that "if the

[2] In *Rudolf*, plaintiff successfully proved that he should not be responsible for the any liability as compared to the first trial where the plaintiff was found by the jury to be responsible for 50% negligence. This reduction of contribution on the part of the plaintiff was the actual damages sustained by the plaintiff in *Rudolf*, thereby the legal fees incurred to correct defendants' error were part of the total damages sustained by the plaintiff.

[3] In *Gefre*, the Court specifically stated that "if the Shareholders are successful on the spoliation and legal malpractice claims on remand, then the fact-finder must determine what, if any, of their attorney's fees incurred against Steffen would not have been incurred in the absence of SWT's and

Shareholders are successful on the spoliation and legal malpractice claims on remand, then the fact-finder must determine what, if any, of their attorney's fees incurred against Steffen would not have been incurred in the absence of SWT's and BPK's specific wrongdoing, and, thus, are recoverable as damages. This is exactly the proposition that Defendants are advancing that a plaintiff cannot create damages in any legal malpractice case just by commencing an action in the underlying matrimonial case to incur legal fees so long as there are some indications that the defendant has breached the duty in providing legal services to the plaintiff.

In short, Defendants have demonstrated that applying N.J. Ct. R. 4:50-1(a) and N.J. Ct. R. 4:50-1(f) to the facts in the instant case, the Court below should have vacated the Amended Final Judgment. This Court's prior ruling that the Plaintiff had sustained no actual damages other than incurring legal fees to re-open the case for a different amended judgment of divorce because of the alleged Defendants' breach of duties during the representation, thereby Defendants are liable for the legal fees incurred by the Plaintiff. This ruling is the result of misapplying the law and introducing "new law" into our jurisprudence that may well come back to haunt the citizen of the State of New Jersey. Plaintiff cannot find any case law to rebut Defendants' proposition that this ruling is unsupported by existing case law in New

BPK's specific wrongdoing, and, thus, are recoverable as damages. But the Shareholders may not recover as special damages attorney's fees incurred in asserting claims against DWT and BPK." *See Gefre*, 306 P.3d 1264.

Jersey or perhaps across the entire nation and the result is also fundamentally unfair. Under the circumstances, the trial court should have dismissed the complaint when at the end of the trial, the Plaintiff could not establish that she suffered any actual damage in the underlying matrimonial action. The case should have never been referred to jury to determine causation and damage because this is a professional malpractice case. Only the expert can determine causation and damage.

III. The Newly Discovered Evidence of Plaintiff's Attorney's Open Admission to OAE Investigator Will Definitely Change the Outcome of Trial.

Plaintiff in the brief in opposition denied outright that James Plaisted, the attorney for Plaintiff, never made admission to the investigator from Office of Attorney Ethics that he had committed fraud upon the court in 2019, thereby no new evidence of fraud on the court was presented by the Defendants. (Fou Br. 20.)

In the footnote 31 in Defendants' Appellate Brief, Defendants described the detailed events how the attorney James Plaisted finally admitted to the investigator from Office of Attorney Ethics that he made misstatement to the Court during the process to set aside the PSA prepared by Defendants. (*See* DA134–135.) A copy of the Investigative Report is reproduced in the appendix. (*See* DA124–139.) Plaintiff in the brief in opposition did not proffer any explanation other than denying the allegation outright. Here are some of the highlights in footnote 31:

- James Plaisted, Esq. told the Court that Defendant Tung was given all four Chinese Agreements during his closing argument, knowing that this was not true. (*See* Da130 and Da411–412.)

- ¥ James Plaisted, Esq. intentionally and willfully committed the fraud upon the court by making this misstatement, even after he was told by his co-counsel, William Hu, Esq. in an email that only the third Chinese Agreement had been shown to Defendant Tung. (Da340 and Da128.)
- ¥ James Plaisted, Esq. was also told by his client Mrs. Fou and opposing party Mr. Fou that only the third Chinese Agreement had been shown to Defendant Tung. (Da128–129.)
- ¥ In 2019, James Plaisted appeared before the Disciplinary Investigator Susan R. Perry-Slay and stated on the record that he had made "misstatements" to Judge Weisberg in the hearing in the matrimonial action *Fou v. Fou.*
- ¥ James Plaisted further stated to Disciplinary Investigator Susan R. Perry Slay that "he should have said . . . and he should have said . . . " before the investigator. (Da134–135.)
- ¥ In addition, James Plaisted applied for attorney's fees and filed a supporting brief on June 25, 2018, James Plaisted misrepresented to the court that Defendant Tung appeared in a hearing to testify for Mr. Fou, not his client Mrs. Fou. James Plaisted told the court that Mr. Tung's appearance was not subpoenaed by a lawyer to appear, but through fax or email from Mr. Fou. (*See* Da133.) James Plaisted's intentional misrepresentation to court was for the sole purpose to mislead the court that Defendant Tung was colluded with Mr. Fou to manipulate Mrs. Fou in the divorce proceeding. The truth is that it was James Plaisted, Esq. who subpoenaed Defendant Tung to court to give testimony. Defendant Tung still has the original subpoena from James Plaisted, Esq. in possession. (*See* Da217–218.)
- ¥ The Appellate Division was also misled by James Plaisted's misrepresentation. In the decision of August 25, 2021, the decision stated that "[i]n 2012, the court conducted a four-day hearing during which Tung testified as a witness for Fou (Mr. Fou)". (Da27.) All the misrepresentations made by Plaintiff's attorney James Plaisted were for a sole purpose to have a ground to set aside the Property Settlement Agreement and later to start a fraudulent legal malpractice action against Defendant Tung.
- ¥ Family Court Judge Barry A. Weisberg was clearly misled by those misrepresentations when decided the motion to set aside the Property Settlement Agreement in the absence of Plaintiff Tung's participation in the proceeding.

- ¥ On September 12, 2012, Judge Barry A. Weisberg rendered the decision. "Now what we have in this case are really not one agreement, but a series of agreements. Again, only one of which was presented to the Court at the time of the divorce, which is very troubling. Because there are some inconsistencies between the agreements. The agreement that -- agreements that were in Chinese, quite frankly, were the ones I would expect Mrs. Fou to understand better than anything else because that's her native language." (*See* Da130–131, Da412–425.)
- ¥ Judge Barry A. Weisberg had so much concerns why only 12 days after the Chinese Agreements were signed, the English PSA was so much different from the Chinese Agreement.
- ¥ Judge Barry A Weisberg was misled by James Plaisted to draw a conclusion that the Chinese agreements are not consistent, taken as a whole, with the English agreement. And I think the English agreement, quite frankly in the way it was presented to the Court, unfortunately rises to the level of a fraud upon the Court." "Certainly no judge reading that agreement would have any way of knowing that the separate Chinese agreements exist. At the very least, it was a knowing concealment of a relevant fact." "And I don't find that Mrs. Fou was – even if that was her burden, was sophisticated or savvy enough to bring that to the Court's attention. I find that she was being manipulated through this divorce process." (*See* Da131–132, Da412–425.)
- ¥ On June 8, 2016, the Appellate Division affirmed the findings and the decision of Judge Barry A. Weisberg. "Plaintiff claimed that the PSA differed substantially from the parties' prior Chinese Agreements." (Da431.) "[T]he court found that plaintiff had been manipulated in the divorce proceedings, and it was 'very troubling' that there were inconsistences between the PSA and the Chinese Agreements. The court noted that the PSA, which was executed only twelve days after the Chinese Agreements of February 15, 2009, did not mention a division of the company assets." (*See* Da132, Da432–433.) The court pointed out the critical differences between the Chinese Agreements and the PSA, which showed that defendant had deceived and manipulated the divorce proceedings to plaintiff's disadvantage.

Under those circumstances, Defendant Tung was referred to OAE for investigation and prosecution by Appellate Division without first giving Defendant

Tung a due process hearing to explain after the court had heard the fabricated one-sided lies from James Plaisted to courts and had issued opinions thereafter. After almost seven (7) years investigation and prosecution, all charges against Defendant Tung were dismissed after a three-day hearing before the panel from District VII Ethics Committee. (*See* Da454–473 in the Supplemental Appendix, a copy of the Hearing Report.) During the hearing, the unconstitutional decision and opinion of Judge Barry A. Weisberg of the Superior Court New Jersey dated September 12, 2012 (Docket No.: FM-12-1685-09E) (Da352) and the decision and opinion of the Appellate Division of the Superior Court of New Jersey dated July 21, 2016 (Docket No.: A-1569-14T3) (Da429) in the matrimonial action *Fou v. Fou*, which were resulted from attorney James Plaisted's affirmative misrepresentations and fraud upon the various courts, were not permitted to be introduced as evidence upon the objection made by the trial attorney from OAE to avoid James Plaisted being called as a witness. Therefore, Defendants here successfully demonstrated that the newly discovered evidence in 2019, a year after the malpractice trial in 2018, when Plaintiff's attorney James Plaisted admitted to the investigator from Office of Attorney Ethics that he made misstatement to the court during the process to set aside the PSA prepared by Defendants, which resulted two court opinions from James Plaisted's misrepresentations. Had those two opinions not presented by Judge Paley to improperly influence the jury in the malpractice trial (*See* Defs' Br. 35–36),

the outcome of the trial would have definitely been changed as now shown that all charges against Defendant Tung were dismissed after a three-day hearing before the panel from District VII Ethics Committee. Therefore, Defendants demonstrate "that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative." *See DEG, LLC v. Township of Fairfield*, 198 N.J. 242, 262; 966 A.2d 1036, 1047. Pursuant to N.J. Ct. R. 4:50-1(c) and N.J. Ct. R. 4:50-3, the relief of Amended Final Judgment from fraud upon the court shall be granted.

CONCLUSION

In short, for the foregoing reasons, the undersigned respectfully requests that this Court relieve the Defendants from the Amended Final Judgment and either to dismiss the complaint for failure to prove causation and damage or to order a new trial in the interest of justice, and for other relief as the Court deems proper.

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Dated: March 9, 2024

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July 8, 2024

VIA ECF
Appellate Division Judges
Superior Court of New Jersey
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Trenton, New Jersey 08625

RE: Janet Yijuan Fou v. Kevin Kerveng Tung, PC and Kevin Tung, Esq.
Superior Court Docket No. MID-L-6259-12
Appellate Division Docket No. A-003377-22T4

Dear Judges of the Appellate Division:

Plaintiff feels compelled to submit this sur-reply in response to defendants' reply brief and the reply appendix that contains the January 8, 2024 hearing report of the Office of Attorney Ethics investigation into defendants. The OAE investigated defendants at the request of the Appellate Division. Ms. Fou became involved in the investigation, at the request of the OAE, only as a witness and was not represented by counsel during the proceedings. Although plaintiff herself did not file an ethics complaint against defendants, the jury verdict that was entered against defendants at the completion of the civil malpractice case plaintiff did file against defendants demonstrates that when

given the opportunity to make her case, plaintiff was able to prove that defendants committed malpractice in their representation of her.

It is this jury verdict that is the heart of the present appeal. This appeal has nothing to do with the OAE investigation of defendants. The fact that the OAE Judge did not discipline Mr. Tung on ethics charges brought against defendants is holey irrelevant to the current appeal and the hearing report submitted in defendants' reply appendix has no bearing in this litigation. The OAE proceedings were based on a referral of defendants to the OAE from the Appellate Division in 2016. Ms. Fou was not the grievant. Ms. Fou's only involvement in the proceedings was, at the OAE's request, to serve as a witness. She was not represented by counsel during the proceedings. In reaching its decision, the OAE considered different standards and claims than what were involved in a civil jury trial. That decision cannot invalidate a verdict this Court already upheld on appeal. Da25. The judgment entered in plaintiff's favor, and reviewed and upheld through numerous rounds of appellate practice by defendants should not be subject to disturbance years later due to an ethics opinion on claims that were not even brought by plaintiff. Accordingly, and as it was never part of the record of this case, this Court should not consider the OAE hearing report submitted in defendants' reply appendix.

As addressed in plaintiff's opposition, this action represents defendants' sixth or seventh attempt to disturb the jury verdict entered against them. The sister appeal to this one, docket no. A-000557-23, addresses defendants' appeal of the trial court's August 11, 2023 order awarding plaintiff attorney's fees to plaintiff for having to defend against defendants' frivolous motion to vacate the final judgment at the trial court level after this Appellate Court had already significantly affirmed the final judgment and remanded the case for the sole purpose of having the trial court recalculate the attorney's fee award after the jury verdict had been marginally reduced. The trial court awarded attorney's fees to plaintiff for the defendants' "frivolous per se as a matter of law" motion. Defendants keep filing baseless appeals because Mr. Tung believes that if he can keep plaintiff's claims in active litigation, then his many interests in real estate can remain free from liens. The result is endless appeals on grounds barred by the law of the case and res judicata. Just like the trial court did below, at the conclusion of this appeal, this Court should allow plaintiff to file for attorney's fees and costs for having to defend against this equally frivolous appeal. Sanctioning defendants for their ceaseless frivolous conduct may be the only thing that gets them to stop.

PashmanStein WalderHayden
A Professional Corporation

For all the reasons set forth in plaintiff's opposition brief and further above, defendants' current appeal should be rejected and the revised final judgment entered by the trial court should be affirmed in full.

Respectfully submitted,

/s/ James A. Plaisted

JAMES A. PLAISTED

cc: Kevin K. Tung, Esq. (via regular mail and email)