No.

IN THE

Supreme Court of the United States

KEVIN KERVENG TUNG, P.C., AND KEVIN TUNG, ESQ.,
PETITIONER

v.

JANET YIJUAN FOU

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of New Jersey denied the Petition for Certification from a decision of the Appellate Division of the Superior Court of New Jersey, which had affirmed in part, vacated in part, and remanded for further proceedings.

In the history of American Jurisprudence, this case is likely the first instance where the original an astronomic attorney fee award in the amount of $1,547,063.31 was compounded with attorney fees in a legal malpractice case of an uncontested divorce case involving a mere $1,000 in legal fees, where the elements of causation and damage were never established by the plaintiff.

Three questions are presented:

1. Whether the Petitioner's constitutional right to due process was violated when the Appellate Division of the Superior Court of New Jersey substituted an unsubstantiated jury award of $500,000 (which was vacated for Plaintiff's failure to prove damages) with a new award for $449,798.50 to Plaintiff for attorney fees despite the fact that Petitioner was not afforded an opportunity to challenge this award and the trial records are devoid of any analysis regarding the legal fees claimed by Plaintiff.

2. Did the trial court commit an error by sending the case to a jury to infer causation and damages from circumstantial evidence in a legal malpractice trial where the Plaintiff failed to prove causation and damages with direct evidence proffered

by the opinion of the Plaintiff's expert in the underlying malpractice action.

3. Between Plaintiff and Defendant in a legal malpractice trial where Plaintiff was found to sustain no damages in the underlying malpractice case, who bears the burden to prove (i) the element of causation and the amount of legal fees permitted to be shifted, and (ii) the element of causation and the amount of damages sustained (through use of an expert witness or through inference from circumstantial evidence by the jury)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a federal question that has been properly presented to the highest state court in the State of New Jersey, the Supreme Court of New Jersey in this case, which issued a final order that denied the petition for certification (Appendix ("Pet. App." 1a)), likely due to a lack of a proper forum after New Jersey Supreme Court Judges had to recuse themselves due to their personal relationships with one of the founding partners of Plaintiff's law firm, who is a retired judge of the New Jersey Supreme Court. The Supreme Court of New Jersey only has seven total judges. Therefore, it was the final judgment of the highest state court in New Jersey that the federal question was properly raised by petitioner and was expressly passed upon in the state court proceedings.

OPINION BELOW

The Superior Court of New Jersey's order (per Paley, Judge of Superior Court) denying Petitioner's motion to vacate jury verdict or for a new trial ("Pet. App." 55a-68a) is not otherwise published. The Superior Court of New Jersey's opinion and final judgment (per Paley, Judge of Superior Court) granting final judgment ("Pet. App." 69a-99a) is not otherwise published. The Appellate Division of the Superior Court of New Jersey's opinion (per Ostrer, Accurso, and Vernoia, Appellate Judges) affirming in part, vacating in part, and remanding for further proceedings of the final judgment of the Superior Court of New Jersey ("Pet. App." 2a-48a) is not otherwise published.

STATEMENT OF JURISDICTION

The Supreme Court of New Jersey entered its order on June 14, 2022. ("Pet. App." 1a) Petitioner invokes this Court's jurisdiction under 28 U.S.C.§1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or [any person] be deprived of life, liberty, or property, without due process of law; ...

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

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., ("Petitioners") for their representation in an uncontested divorce matter involving a $1,000 legal fee, the Plaintiff-Respondent failed to prove causation and damages sustained by the Plaintiff at the end of the trial. ("Pet. App." 51a-54a) During the trial, the expert for the Plaintiff only proffered a net opinion stating that the Defendants shall be responsible for legal fees in a

malpractice action. ("Pet. App." 49a-50a) However, 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 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 so-called corrections to the alleged errors made by the Defendants during their representation of the Plaintiff in the uncontested divorce proceeding.

On the appeal, the Appellate Division of the Superior Court of New Jersey substituted an unsubstantiated jury award of $500,000 (which was vacated by Appellate Division for Plaintiff's failure to prove damages) with a new award for $449,798.50 to Plaintiff for attorney fees despite the fact that Petitioner was not afforded an opportunity to challenge this 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 problematic. (See, foot note 7 at "Pet. App." 47a-48a) The Petitioner appeals the decision of the Appellate Division on the ground that his constitutional right to due process was violated. The Supreme Court of New Jersey denied the petition for certification ("Pet. App." 1a). This appeal to the Supreme Court of the United States follows.

THE SUPERIOR COURT OF NEW JERSEY DECISION

At the end of the trial, Defendants' attorneys moved to dismiss the Plaintiff's Complaint and requested a direct verdict in favor of the Defendants. The trial Court judge agreed that there was no direct evidence establishing causation and damages. However, the trial court Judge curiously still denied Defendants' motion stating on the record that, "there was no direct evidence, but one can infer and the jury will be told that there was not only direct evidence, there was circumstantial evidence." ("Pet. App." 54a) The trial Court Judge then sent the case to a jury to infer causation and damages from circumstantial evidence. The trial Court's denial of motion to dismiss the complaint on failure to prove causation was a clear error on the law, when there was no direct evidence of causation derived during the trial and the Court was asking the jury to infer from circumstantial evidence. Causation is to be established by the expert, not jury in a professional legal malpractice case. See, *Froom v. Perel*, 377 N.J.Super. 298, 318, 872 A.2d 1067 (App. Div. 2005) Jury is not permitted to infer causation from circumstantial evidence in professional malpractice case. See, *Townsend v. Pierre*, 221 N.J. 36, 55-58 110 A.3d 52. Despite the undisputed lack of direct evidence, the jury returned with an arbitrary verdict of $500,000 for damages against the Defendants, of which the Appellate Division reversed. Later, the trial Court Judge awarded about $702,000 in attorney fees and prejudgment interest on the damages award ($65,250) and attorney's fees and costs ($279,813.31) to the Plaintiff for a total final judgment of $1,547,063.31 against the Defendants. ("Pet. App." 70a) In the history

of American Jurisprudence, this case is likely the first instance where an astronomic attorney fee award was compounded with attorney fees in a legal malpractice case where the elements of causation and damage were never established.

THE APPELLATE DIVISION DECISION

Defendants appealed to the Appellate Division. In the decision to be appealed, the Appellate Division vacated the jury verdict of $500,000 on the ground that the Plaintiff sustained no damage in the malpractice case but still awarded the Plaintiff with astronomical attorney's fees in the amount of $449,798.59 as her damages. ("Pet. App." 29a-31a) The Appellate Division affirmed in part, vacated in part and remanded the case for further proceedings. ("Pet. App." 46a)

The Appellate Division of the Superior Court of New Jersey's opinion includes contradicting conclusions of law on the finding of the same facts. First, the Appellate Division found that there was no competent evidence supporting the notion that the Plaintiff suffered any actual damages beyond the fees that were incurred to vacate the PSA and original judgment of divorce and to obtain the Amended Final Judgment of Divorce as a direct and proximate result of Defendants' negligence. ("Pet. App. 29a-31a) Later, the Appellate Division rejected the Defendants' argument that the Defendants' alleged negligence was not the proximate cause of the Plaintiff's damages because the original Chinese agreements were all set aside by the Family Court and any alleged mistake on the Defendants' part is therefore moot. The Appellate Division justified its ruling by stating 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 Plaintiff's negligence claim is based on the Defendants' negligence in failure to incorporate the terms in Chinese Agreement into the PSA. ("Pet. App." 42a-43a) The fact that the original Chinese Agreements were all set aside, what else needs to be corrected in PSA that was prepared by the Defendants? Such a justification is not in line with the current law for fee-shifting and Plaintiff's failure to prove all four elements, duty, breach, causation and damages, of a negligence case does not warrant fee-shifting.

Even if the Appellate Division were correct on the law, the Petitioner's constitutional right to due process was violated when the Appellate Division of the Superior Court of New Jersey substituted an unsubstantiated jury award of $500,000 (which was vacated by Appellate Division for Plaintiff's failure to prove damages) with a new award for $449,798.50 to Plaintiff for attorney fees despite the fact that Petitioner was not afforded an opportunity to challenge this 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 problematic. (See, foot note 7 at "Pet. App." 47a-48a)

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted for the following reasons:

In the instant case, the very basic fundamental due process right of a defendant is violated, when

Defendants was not provided with an opportunity to challenge the award of attorney fees of $449,798.50 by the Appellate Division of the Superior Court after it had vacated an unsubstantiated jury award of $500,000 on the ground of the failure of plaintiff to prove causations and damages sustained by the plaintiff, but it substituted with its award of attorney fees when the trial records are devoid of any analysis regarding the legal fees claimed by Plaintiff.

By permitting fee-shifting in a tort case where causation and damage were never established, 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-existent malpractice case simply for their personal financial gains by repeatedly misrepresenting facts to the Court, as was finally admitted by Plaintiff's attorneys before an Attorney Ethics investigator. ("Pet. App." 110a-111a) Now, the Court seeks to reward abuse of the legal process by Plaintiff's attorneys with an astronomical attorney fee award despite the fact that there was no direct evidence of legal malpractice and the elements of causation and damages were never established by Plaintiff. The instant matter demonstrates the urgency that the Courts below need guidance from this Court to determine when it is proper to permit fee-shifting, especially in a tort case where no causation and damages are found. Should the actions of the Plaintiff's attorneys and the Court in the instant matter be upheld, it will become clear that actions constituting an abuse of the legal process will be rewarded even when there is no evidence to satisfy the necessary elements of a claim.

The Appellate Division vacated a portion of the judgment where the jury awarded $500,000 and instead 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 were adopted by the jury. The record also shows that the Plaintiff's expert did not analyze any facts and draw a conclusion that the $449,798.50 in damages were proximately caused by the defendants' negligence. Rather, the Plaintiff's expert offered a net opinion during the trial. ("Pet. App." 49a-50a) 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." ("Pet. App." 50a) Beyond this single instance where the 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 damages allegedly sustained by the Plaintiff were never proven, analyzed or discussed further in any capacity. 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 damages in the amount of $449,798.50 was groundless.

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. 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. The record shows that as of June 7, 2017, 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?

In addition, the Plaintiff's expert never opined why any portion of the legal fees incurred by the Plaintiff shall be permitted under the applicable laws to be shifted to the Defendants during the trial. Whether the legal fees incurred by the Plaintiff were recoverable under the pertinent law must always be proved by an expert for the Plaintiff in any professional malpractice case. In general, both parties bear their own legal fees under the law. Only very limited situations allow legal fee-shifting. The legal fees incurred by the Plaintiff in the instant case were not permitted fee shifting under the current law. In the instant case, the Court had already concluded that the Plaintiff failed to prove damages other than the legal fees incurred to remedy the PSA and to obtain the Amended Judgment of Divorce. Incurring legal fees by itself is not a per se cause of action for damages sustained by plaintiff. If this were the case, any plaintiff would be deemed to have proved a malpractice case as long as he spends legal fees to remedy some errors committed by his attorneys. In contrast to what occurred in the instant action, the law is clear that the Plaintiff must prove causation and damages in addition to breach of duty and deviation from the standard of care.

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. 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. 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.

a. 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. 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. 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 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. See, *Saffer v. Willoughby*, 143 N.J. 256, 272, 670 A.2d 527 (1996) In the instant case, plaintiff did not prove the underlying malpractice case because the court found that she suffered no damages other than the legal fees she spent to set aside the PSA and to obtain a new judgment.

In *Hagen v. Gallerano*, 66 N.J.Super. 319, 332-33, 169 A.2d 186 (App.Div. 1961), the Court ruled that, in their previous opinion, they indicated their uncertainty as to what compensatory damages plaintiff could prove in the fraud case until it is determined what, if anything, he recovers on his primary cause of action for negligence. It was further stated how, "[t]hat question was not before us for resolution then, nor is it now, and we express no opinion on it, except to say that the reasonable expense of the litigation to establish the invalidity of the release is an item that is recoverable in the fraud case." *Feldmesser v. Lemberger*, 101 N.J.L. 184, 41 A.L.R. 1153 (E. & A. 1925). Again, Plaintiff can be compensated only if Plaintiff successfully proves a fraud case. However, as a matter of law, this should not have occurred in the instant action because Plaintiff failed to prove damages in the underlying malpractice case.

b. Plaintiff was Not Forced to Litigate with A Third Party 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. ("Pet. App." 29a) 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." In *Estate of Lash*, the administrator tortiously breached his fiduciary duty and caused the estate to file suit against 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 surety, a third party, 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, 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 never even commenced an action against a third party. Plaintiff here will receive her attorney fees if she successfully proves her

malpractice claim against the Defendants by establishing that any legal fees incurred were a foreseeable consequence of the Defendants' negligence. 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 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.

Similarly, in *Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291, 300, 225 A.2d 328 (1966), this Court ruled that the counsel fees and costs incurred by the Plaintiff insured in defending a workman's compensation claim and 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). These authorities 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 was not forced to litigate with a third party because of the fraud on the part of her attorneys.

c. 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." 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 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 *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."

Again, those costs were foreseeable at the time the landlord committed the wrongful act to defraud the tenant and were necessary to correct the wrongful act of the defendant leading to the breach the contract. 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 set aside the entire deal with Mr. Fou. This incidentally means that the alleged mistake where Defendants to the instant action failed to incorporate 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.

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 suit 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 malpractice case 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.

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. To be clear, Plaintiff here fails to prove her malpractice claim against Defendants if the legal fees she incurred were not incurred in the same manner as

any of the situations listed above. Therefore, the legal fees spent by the Plaintiff should not be construed here as damages and should not be shifted to Defendants.

d. Plaintiff here 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.

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. ("Pet. App." 29a) This case actually supports the Defendants' argument that the legal fees incurred by the Plaintiff to set aside PSA and to obtain a new judgment of divorce in the instant case are not "natural and necessary consequence" of an attorney's negligence. 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, plaintiffs there did not have any other losses except the legal fees incurred by the plaintiff. Like in the instant case, plaintiffs claim that their attorney deviated from the applicable standard of care in various ways. 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 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. The Court in *Lovett* emphasized that: "[e]ven if plaintiffs had proven malpractice, no losses were demonstrated which were proximately caused by Thomas (the attorney). 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 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.

In the instant case, the record shows the trial judge found no causation and damages for the Plaintiff against the defendants. A direct verdict should have been granted to the Defendants. The trial judge however committed an error by sending the case to jury to infer causation from circumstantial evidence and damages. The trial Judge stated on the record that

"there was no direct evidence, but one can infer and the jury will be told that there was not only direct evidence, there was circumstantial evidence" ("Pet. App." 54a) This why the jury returned an arbitrary award. The expert for the Plaintiff never established and analyzed that the legal fees incurred by Plaintiff was to make any corrections, or was to defend a third-party action caused by the wrongdoing of the Defendants' attorneys. Therefore, the fees should not be construed as a mere portion of the damage sustained by the Plaintiff.

Plaintiff's expert only proffered a net opinion that Defendant shall be responsible for legal fees in a malpractice action and said nothing more. In fact, in the instant case, the efforts to set aside the PSA and 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 to have committed malpractice for failing 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 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 for Plaintiff's heavily contested divorce case.

Furthermore, the Petitioner Kevin Tung was first framed by the attorney James A. Plaisted in the

absence of Tung's participation in the Family Court when Plaintiff made her motion to set aside PSA in September 2012 and before Appellate Division in July 2016. In fact, James Plaisted openly admitted to the investigator from Office of Attorney Ethics that he committed a fraud upon the court. In 2019, attorney James Plaisted appeared before the Disciplinary Investigator Susan R. Perry-Slay and stated on the record that he had made a "misstatement" 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. ("Pet. App." 110a-111a) If anyone can justify the misrepresentations made before the court by later stating he should have said that ..., no one would be found committing fraud upon the court.

Investigative Report of the Office of Attorney Ethics of James Plaisted, Esq. ("Pet. App." 100a-115a) sends a clear and important message to the public that an attorney lying to court is tolerated in the New Jersey Judiciary systems. Mr. Plaisted did not receive any punishment, not even a modest admonishment simply stating, "Do not do it again." The official reasoning was that there was no clear and convincing evidence. ("Pet. App." 114a-115a) When the wrongdoer has already admitted making misstatements to court, what else could possibly be required to prove the case with clear and convincing evidence. Publicly available documents may shed different lights. Mr. Plaisted works for a law firm by the name of Pashman Stein Walder Hayden, P.C. The founders of the Pashman law firm are deeply connected with the New Jersey Judiciary systems in some ways. Mr. Louis Pashman

was the former Chair of the Disciplinary Review Board of the Supreme Court of New Jersey. Mr. Pashman worked closely with Charles Centinaro, Director of the Office of Attorney Ethics, who is supervising the investigation and prosecution of Mr. Tung and Mr. Plaisted's alleged ethics violations. The rest of the founding partners are all retired judges and law clerks from Supreme Court of New Jersey and Superior Court of New Jersey. On the other hand, Mr. Tung, a minority Asian attorney and an out-of-state attorney, has no connection with the New Jersey Judiciary other than being admitted to practice law in the State of New Jersey. These improper connections have led to the issues presented in the instant matter at hand. Currently in the New Jersey Judiciary system, connected attorneys can openly admit to committing fraud upon the court without facing any consequences whatsoever. On the other hand, Petitioner Tung, who is an out-of-state minority Asian attorney, must face the consequences resulting from James Plaisted's actual fraud upon the court without even being afforded an opportunity to defend himself, because various New Jersey Courts then issued decisions against Mr. Tung without notifying him or letting him to defend himself. Minority attorneys are presumed dishonest in the New Jersey Judiciary system.

James Plaisted's fraud upon the court resulted 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) 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) in the matrimonial action Fou v. Fou. Ever since then, Kevin

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. During the past ten (10) years, Kevin Tung has sustained reputational damages and financial damages in defending the false claims against him and his law firm. The law firm had to file for bankruptcy for protection against a judgment over $1.5 million dollars.

One only needs to look at the Pashman Stein Walder Hayden P.C. website, which had been changed recently, to know that something is not right within the New Jersey Judiciary System. On the original website, it is actually listed as a point of pride how the Pashman law firm has regularly represented judges over the years when faced with their own legal problems. The website states in relevant part, "We take great pride in the fact that other leading law firms, judges and lawyers have repeatedly turned to us over the years when faced with their own legal problems." This statement contained on Pashman Stein Walder Hayden P.C.'s website raises the question, why have New Jersey judges needed to be regularly represented by private law firms in their own personal legal matters over the years? The Pashman law firm further advertises their connection with the New Jersey Judiciary system when they state, "Judges know us well, for our insight, our thoughtful analysis, and our creativity." "With a deep bench of carefully selected lawyers that includes a retired New Jersey State Supreme Court justice, a retired Presiding judge of the Appellate Division of the New Jesey Superior Court, a retired New Jersey Superior Court judge, ..., it is no wonder why our firm is admired and respected by our

peers." These connections are in plain sight for all to see. Meanwhile, Petitioner Tung is an out-of-state Minority Asian attorney and has no such connections with the New Jersey judiciary system.

To be clear, Petitioner Tung in this appeal does not allege that any wrongdoing is discovered on the part of the Pashman law firm other than the actions of Mr. Plaisted, who has already admitted to making misstatements to Judge Weisberg. Judge Weisberg then rendered an unconstitutional decision against Petitioner Tung based on the fraud upon the court committed by Mr. Plaisted. The point raised by the Petitioner here is that the court administrators of the New Jersey Judiciary should be concerned about creating a justice system that can be equally accessed by all with clear due process procedures implemented to eradicate any possibility of unfairness in handling the administration of justice. In the instant matter at hand, the New Jersey Judiciary has presumed that Minority out-of-state attorneys are dishonest and are not worthy of the constitutional protections afforded by pertinent due process procedures. Situations such as this can no longer continue, especially while New Jersey attorneys deeply connected with the judiciary system can walk away with no punishment after they have openly admitted that they have committed fraud upon the court.

To achieve the goal of fairness in the administration of justice, the court administrators of New Jersey Judiciary shall implement pertinent due process procedures to ensure that all have equal access to the justice system. Whenever conflicts of interest arise, the appropriate procedures shall be implemented

to avoid such a conflict of interest. In the case at bar, the New Jersey Judiciary shall implement due process procedures to safe guard the officers of the court, such as, the Petitioner or attorneys similarly situated in the future from being maliciously prosecuted by fraud upon the court where Petitioner or attorneys similarly situated are not a party to the action and are not given opportunity to defend themselves. When the Director of the Office of Attorney Ethics overseeing the investigation of an attorney's alleged wrongdoings in a case has a relationship with the partners of a law firm which operates as the opposing counsel in the same malpractice case, the investigation of wrongdoing of an employee of the law firm should be conducted by an independent committee. The failure to do so has severe consequences as can be seen in the instant matter at hand. For example, Petitioner Tung's law firm was forced to file for bankruptcy to avoid the immediate enforcement of a wrongful judgment. The professional reputations of Petitioner Tung and his law firm have been impaired and damaged. The New Jersey Judiciary's position that Petitioner Tung was able to defend himself in the malpractice action and in the Office of Attorney Ethics' investigation and prosecution later after an unfair decision was rendered against Petitioner Tung in the absence of participation by the Petitioner is in contravene with the current due process law. The disparity in the treatment of Minority attorneys with no connections with the New Jersey Judiciary System in comparison to the treatment of attorneys with deep connections with the New Jersey Judiciary System demonstrated that the New Jersey Judiciary System has a systematic policy that violates the equal protection clause of the constitution of the United States.

In short, in the history of American Jurisprudence, this case is likely the first instance where an astronomic attorney fee award was compounded with attorney fees in a legal malpractice case where the elements of causation and damage were never established. Why should the Defendants be responsible for Plaintiff's legal fees? A direct verdict should have been rendered for the Defendants in a tort case. The general principle in American Jurisprudence is that the parties shall bear their own legal fees. These legal principles are so basic that even every first-year law school student would have known, but they were not followed by the Appellate Division of the Superior Court of New Jersey. The tort law should not be re-written just for the purpose to award a power law firm with astronomic attorney fees at the expense of the innocent people.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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251 N.J. 192
Supreme Court of New Jersey Petitions for Certification. This disposition is referenced in the Atlantic Reporter.
Supreme Court of New Jersey.

Janet Yijuan **FOU**, Plaintiff-Respondent,

v.

KEVIN KERVENG **TUNG**, PC, and Kevin **Tung**, Esq., Defendants-Petitioners.

C-584 September Term 2021086230
June 16, 2022

ORDER

A petition for certification of the judgment in A-004690-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

All Citations

251 N.J. 192, 276 A.3d 649 (Table)

2021 WL 3745131
Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Janet Yijuan FOU, Plaintiff-Respondent,

v.

KEVIN KERVENG TUNG, PC, and Kevin Tung, Esq., Defendants-Appellants.

DOCKET NO. A-4690-18
Submitted February 3, 2021

Decided August 25, 2021

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6259-12.

Attorneys and Law Firms

Lewis Brisbois Bisgaard & Smith, LLP, attorneys for appellant Kevin Kerveng Tung, PC (James M. Strauss, on the brief).
Kevin Tung, Esq., appellant pro se.
Pashman Stein Walder Hayden, PC, attorneys for respondent (James A. Plaisted and Michael J. Zoller, on the brief).
Before Judges Ostrer, Accurso, and Vernoia.

Opinion
PER CURIAM

Following a jury trial and verdict in this legal malpractice case, the court entered a January 11, 2019 final judgment against defendants Kevin Kerveng

Tung, P.C. (Tung, P.C.) and Kevin Tung, Esq. (Tung) imposing joint and several liability for $1,547,063.31 in damages ($500,000), attorney's fees ($702,000), prejudgment interest on the jury's damages award ($65,250), and prejudgment interest on the award for attorney's fees and costs ($279,813.31). Defendants appeal from the final judgment; a June 25, 2018 order denying their motion for judgment notwithstanding the verdict or a new trial; a May 22, 2019 order denying their motion for reconsideration of the court's January 28, 2019 order striking paragraph four of a December 27, 2018 order relating to purported double recovery; and various evidentiary rulings made by the trial court. Based on our review of the record and the arguments of counsel in light of the applicable legal principles, we affirm in part, vacate in part, and remand for further proceedings.

I.

The legal malpractice claim against defendants arises out of Tung, P.C.'s and Tung's representation of plaintiff Janet Yijuan Fou in a matrimonial case against plaintiff's former husband, Joe Fou (Fou).[1] Based on the malpractice trial record, we first summarize the facts pertinent to the matrimonial matter and then detail the facts concerning the malpractice case.

Tung's Representation of Plaintiff in the Matrimonial Action

Married in 1975, plaintiff and Fou discussed dissolving their marriage in 2007. On September 22, 2007, they signed an agreement written in Chinese expressing their intention to divorce and providing that plaintiff

would receive approximately $400,000, representing one-half of the marital assets, and $10,000 annually in support payments.[2]

Shortly thereafter, plaintiff discovered what she described as a draft will on Fou's computer showing the family had personal and business assets totaling more than $2,200,000. Around the same time, plaintiff found encrypted computer records that she later learned in 2013 described family business assets valued at $2,200,000. In November 2007, plaintiff and Fou signed another agreement written in Chinese stating plaintiff had received $400,000 and other property, and providing that the assets of the family business would be "counted separately."

In 2009, Fou contacted Tung at Tung, P.C., and arranged a meeting to discuss the filing of an action for an uncontested divorce. On February 15, 2009, plaintiff and Fou met with Tung. They brought a tax return reflecting Fou's income, and a typewritten page that included biographical information. During the meeting, Tung did not inquire about Fou's business or Fou's and plaintiff's assets. It was decided Tung would represent plaintiff in the divorce matter; Fou would be the named defendant in the case; and Fou would appear as a self-represented litigant in the matter.

Plaintiff and Fou brought two new agreements written in Chinese to the February 15, 2009 meeting with Tung. One of the agreements, labeled "Divorce Agreement," provided that Fou would pay plaintiff one-third of his salary as alimony in four installments each year, and plaintiff and Fou would share the tuition expenses of their younger son and maintain the marital home until

their older son married. The Divorce Agreement further stated plaintiff and Fou had completed the division of family assets but agreed the "real property and company assets [were] to be accounted for separately." According to plaintiff, she and Fou signed three copies of the Divorce Agreement in Tung's presence, Tung notarized their signatures, and she, Fou, and Tung each retained a copy of the agreement. Plaintiff testified Tung retained a copy of the agreement because he was to translate it into English and incorporate its terms into the divorce property settlement agreement.

During the February 15, 2009 meeting, plaintiff and Fou also signed a second agreement, labeled "Supplemental Divorce Agreement," but they did not show the agreement to Tung or give him a copy. The agreement, which was written in Chinese, provided that upon the "close of business" of the family's company, "G&E," plaintiff would receive one-half of the business's assets. The agreement also provided that plaintiff would assist in the ongoing operation of the business, and Fou would pay $20,000 into plaintiff's and Fou's medical expense fund.

Less than two weeks later, on February 27, 2009, plaintiff and Fou again met with Tung. At the meeting, Fou presented Tung with a putative retainer agreement for Tung's representation of plaintiff in the divorce proceeding. Tung later testified he was unaware of New Jersey Court Rule 5:3-5 that required he have a retainer agreement with plaintiff as his client in the divorce case. The agreement Fou presented states Tung "acts as the attorney" for plaintiff, but the agreement did not define or limit the scope of his

representation of her. Tung testified he was retained solely to act as a scrivener of the terms for the uncontested divorce, preparing the documents necessary to reflect the agreement plaintiff and Fou had reached on their own. Plaintiff testified at the malpractice trial that Tung never advised her of any limitations on his representation of her in the matrimonial action.

During the meeting, Tung presented plaintiff and Fou with various documents, written in English, that he and another employee at Tung, P.C. prepared, including a proposed summons and complaint for divorce, a case information statement (CIS), and a property settlement agreement (PSA). Tung reviewed the documents in plaintiff's and Fou's presence. The CIS listed gross family assets of $234,688 and a prior year's joint income of $77,536.

Plaintiff and Fou signed the PSA, which stated they made a full disclosure of all assets and income to each other. The PSA further stated that, beginning in January 2009, Fou would pay one-third of his annual salary as alimony to plaintiff; each party was responsible for his or her own debts; plaintiff and Fou would maintain the marital home until their older son married; and plaintiff and Fou would retain all other assets in their possession with "no further equitable distribution." The PSA was consistent with the Divorce Agreement plaintiff and Fou signed on February 15, 2009, and gave to Tung, except the PSA did not make a provision separately addressing plaintiff's and Fou's real property and company assets, and the PSA precluded further equitable distribution of their assets.

Although Tung and Tung, P.C. represented plaintiff in the divorce, during the two meetings at Tung's office, the conversations were primarily between Tung and Fou. Tung testified that during the meetings, plaintiff "didn't talk; she'd just sit there," and he "always" spoke with Fou. Following the first meeting, Tung and his office communicated with Fou when additional information was needed or Fou had questions. During his deposition testimony, which was read into the record at the trial in the malpractice case, Tung explained: "Pretty much we dealt with ... Fou for th[e] divorce case. All the information we receive is from ... Fou. Not from [plaintiff]. We didn't talk to her."

Following the February 27, 2009 meeting, Tung spoke with plaintiff only during two brief phone calls—one of which was for the purpose of confirming she was "still alive," and the other to inform her of the court hearing date. At the subsequent court proceeding, Tung first met briefly with plaintiff and informed her to answer affirmatively the questions he and the court posed. Fou did not appear at the court proceeding on the divorce. During the proceeding, plaintiff testified through an interpreter and Tung presented plaintiff with the PSA he drafted in English. As noted, the PSA did not make a provision for the separate allocation of plaintiff's and Fou's real property and company assets as set forth in the February 15, 2009 Divorce Agreement, and the PSA barred plaintiff from seeking any further equitable distribution of property. The court incorporated the PSA into the final judgment of divorce, which was entered on May 4, 2009.

In 2009, while living in New Jersey, plaintiff applied for Medicaid benefits using a New York address and

stating she was a New York resident. Plaintiff did not move to New York until July 2010. Her Medicaid application stated she received only $600 per month in alimony, and that she had only $3,000 in assets.[3] Her annual Medicaid reapplication forms listed comparable amounts. The amounts were inconsistent with those set forth in the PSA.

Plaintiff's Medicaid benefits terminated in late 2011, when she turned sixty-five and qualified for Medicare. The following year, plaintiff received a letter from the New York City Human Resources Administration demanding repayment of her Medicaid benefits because she had applied for Medicaid in New York before moving there. Plaintiff settled the claim in May 2015; she agreed to repay $10,500, and she acknowledged the Medicaid benefits were "incorrectly received." Plaintiff's settlement agreement states plaintiff's payment "is not to be construed as an admission of wrongdoing." Following the filing of plaintiff's malpractice case against him, Tung alerted authorities of potential fraud in plaintiff's application for Medicaid benefits.

Plaintiff Retains New Counsel

In April 2011, plaintiff sought a division of the business assets from Fou pursuant to the Divorce Agreement. Fou refused. Plaintiff first contacted Tung, but later retained her current counsel to reopen the matrimonial action and set aside the PSA. At the same time, plaintiff retained her current counsel on a contingent fee basis to pursue a malpractice action against Tung and Tung, P.C. The contingent fee agreement initially provided counsel would receive thirty-three-and-a-

third percent of any recovery, and later was amended to provide counsel would receive fifty percent of the first $500,000 recovered and thirty-three-and-a-third percent of anything over $500,000, with counsel paying all disbursements.

Plaintiff's Motion to Vacate the Judgment of Divorce and PSA

In September 2011, plaintiff's counsel filed a motion to set aside the judgment of divorce and the PSA, and to obtain discovery of Fou's income and assets. Fou opposed the motion.

In support of the motion, plaintiff submitted a certification describing the contents of the four agreements between her and Fou that had been written in Chinese (the Chinese agreements) and Tung's reliance on Fou for the information used to draft the PSA and documents for the matrimonial matter. Plaintiff certified that because of her limited ability to understand English, she did not realize the PSA omitted the terms of the agreements written in Chinese between her and Fou regarding the business assets. She asserted Tung did not ask her about other agreements during his representation or "mention the 'Chinese [a]greements' previously executed" to the court at the divorce hearing on May 4, 2009. She further certified Fou concealed assets in China.

On December 2, 2011, the Family Part ordered a plenary hearing on the enforceability of the PSA. In 2012, the court conducted a four-day hearing during which Tung testified as a witness for Fou, advocating in favor of the validity of the PSA, and acknowledging he

prepared the PSA in accordance with Fou's instructions. Fou acknowledged making wire transfers to China in connection with his business in an amount of close to $1,000,000. He disputed the $2,200,000 figure in his draft will but acknowledged sending the encrypted financial information to his son, which included figures supporting an asset valuation of $2,200,000.

In September 2012, the court rendered an oral opinion and entered an order finding the PSA to be null and void. The court found invalid the retainer agreement between plaintiff and Tung, and determined Tung did not provide independent counsel to plaintiff. The court also found plaintiff was "manipulated through th[e] divorce process" because Fou was the "conduit of all information" with Tung. The court further held the PSA was inconsistent with the Chinese agreements between plaintiff and Fou, and that all the agreements were invalid. The court's order barred plaintiff and Fou from transferring, selling, or encumbering any marital assets, and directed that a plenary hearing be held to address equitable distribution and alimony.

Fou did not cooperate or provide discovery in the reopened matrimonial litigation. The court suppressed his pleadings with prejudice and entered a default against him. The court later ordered Fou to pay $7,929 in counsel fees in connection with his failure to provide discovery. The court directed that plaintiff submit a notice of equitable distribution under Rule 5:5-10. Plaintiff complied with the court's order.

In February 2014, a different judge held a plenary hearing to determine equitable distribution and alimony. The court found the evidence, including

plaintiff's testimony as to the couple's assets and Fou's draft will, and "many thousands of other pages," demonstrated assets totaling $2,200,000. Fou did not appear for the hearing and therefore did not dispute the value of the marital assets.

The court entered an Amended Final Judgment of Divorce (AFJD) awarding plaintiff: permanent annual alimony in the amount of the greater of $18,000 or one-third of Fou's income; $1,100,000, representing one half of the total value of the family business as of November 2007; and a share of any subsequent increase in the business's value. The court further permitted plaintiff's filing of a lis pendens on property Fou purchased in North Carolina. The court also awarded plaintiff $229,389.69 in counsel fees.

Fou appealed from the AFJD. We affirmed the order and the court's counsel fee award. See Fou v. Fou, No. A-1569-14 (App. Div. July 21, 2016) (slip op. at 24-25). The Supreme Court denied Fou's petition for certification. See Fou v. Fou, 238 N.J. 370 (2019).[4]

Following entry of the AFJD, plaintiff was unable to collect on the judgment, aside from her attachment of Fou's social security benefits. In November 2017, the court issued an arrest warrant for Fou for unpaid alimony and equitable distribution, but it appears Fou resides in China. The court's order states Fou had "not complied with any of the [AFJD's] equitable distribution" requirements.

The Malpractice Action Against Tung and Tung, P.C.

In her malpractice action, plaintiff alleged defendants were negligent in their representation of her in the initial uncontested divorce case. Plaintiff alleged defendants were negligent by failing to: conduct discovery of her and Fou's assets; include key terms from the Chinese agreements in the PSA; and address in the PSA "issues that necessarily arise in a [d]ivorce proceeding," including the division of the family's business assets. Plaintiff alleged defendants' negligence deprived her of her share of the marital business assets, real property, and other assets, and caused her to incur expenses and legal fees to vacate the PSA and obtain the AFJD. Defendants filed an answer denying the allegations. The court stayed the malpractice action pending the disposition of Fou's appeal from the AFJD in the matrimonial case.

On May 13, 2014, plaintiff made a $400,000 offer of judgment in the malpractice action. Tung denied his malpractice carrier authorization to accept entry of judgment in response to plaintiff's offer.

The Malpractice Trial

During the 2018 malpractice trial, plaintiff called Tung as a witness. He testified he did not provide plaintiff with a statement of client rights and responsibilities or a retainer agreement. He acknowledged Fou drafted his putative agreement with plaintiff. Further, he testified he was retained only to "prepare the paperwork to obtain a divorce judgment."

Tung explained he corresponded with Fou rather than plaintiff because Fou spoke better English. According to Tung, it was decided he would represent plaintiff because Fou "was in a rush to go to China for business." Tung testified plaintiff did not tell him about any of the Chinese agreements, including the agreements from September 2007 and November 2007, or the February 15, 2009 Supplemental Divorce Agreement.

Tung testified plaintiff and Fou gave him the February 15, 2009 Divorce Agreement that he notarized at the end of their meeting that day. He explained that he did not read it, review it, or offer any opinion on its contents and instead "was asked to do a notary" and merely served as a "witness for the signature[s]." Tung acknowledged he nonetheless told plaintiff and Fou the agreement would not be binding, and that only the PSA would be binding. He testified he did not give plaintiff any advice concerning the agreement or determine if signing the agreement was in her best interests. He stated he did not keep a copy of the agreement because he did not have a copier in his New Jersey office. His records from the meeting, however, include copies of plaintiff's and Fou's driver's licenses.

An attorney who represented plaintiff in the Family Part in connection with the motion to vacate the PSA testified concerning plaintiff's certification in support of the motion. He explained the certification did not assert that the four Chinese agreements were given to Tung and that, instead, plaintiff certified Tung never asked plaintiff about the existence of any agreements between Fou and her. The attorney further testified that encrypted financial records were admitted into evidence at the plenary hearing in the Family Part, and

the records, including Fou's draft will, reflected plaintiff and Fou had $2,200,000 in assets.

Plaintiff testified on her own behalf. She explained Fou handled the finances during the marriage, and most of the family's bank accounts were in Fou's name. Plaintiff testified that prior to the meeting with Tung, she understood the family's business assets were worth $2,200,000.

Plaintiff also testified that, at their first meeting with Tung, Fou brought three copies of the Divorce Agreement, but he did not bring the two 2007 agreements. She did not ask Tung for his opinion about the Divorce Agreement or for legal advice before signing it. Plaintiff explained she and Fou each kept a copy of the signed agreement, and Tung kept one for himself so he could translate it to English. According to plaintiff, Tung said he needed a week to translate the document and prepare the divorce papers, and he told her she would be the plaintiff in the divorce action because she was unhappy in the marriage. Plaintiff testified Tung did not ask her about equitable distribution, child support, or insurance.

Plaintiff also described the February 27, 2009 meeting, explaining Tung and Fou spoke with each other and she did not participate in the discussion. The meeting lasted approximately thirty minutes, and she signed many documents which were to be sent to the court. On the day of the divorce proceeding, plaintiff met with Tung briefly at the courthouse, but he did not go over the documents with her.

In 2011 or 2012, Fou stopped making support payments to plaintiff. Fou also refused to share the family business assets with her. In March 2011, plaintiff met with Tung to discuss obtaining her share of the business assets from Fou. She showed Tung the February 15, 2009 Divorce Agreement, and he told her it was poorly written and that it would cost her a lot of money to recover anything from Fou. Plaintiff then realized the PSA did not address the division of the business assets, and she obtained new counsel. Plaintiff testified she incurred legal fees totaling $449,798.59 to vacate the PSA and judgment of divorce and obtain the AFJD against Fou.

Plaintiff also testified she never received the promised $400,000 payment from Fou, but instead received access to a mutual fund account with approximately that amount, titled in Fou's name. The account was later supplemented by an additional $62,276.50 plaintiff netted from a $100,400 payment from Fou. Plaintiff purchased an apartment in New York with the funds from the account. Plaintiff explained the marital residence was sold but she did not receive the proceeds from the sale because she gave them to her older son.
Plaintiff called Edward J. O'Donnell, Esq., as an expert witness in matrimonial law. O'Donnell reviewed the fee agreement Fou prepared, the PSA, the divorce complaint, transcripts of the matrimonial proceedings, the AFJD, the malpractice complaint, and Tung's deposition transcript, as well as "some miscellaneous correspondence."

O'Donnell opined that Tung deviated from the standard of care for a matrimonial attorney, as established by both acceptable practice and the Rules of Professional

Conduct, during Tung's representation of plaintiff. O'Donnell testified Tung deviated from the standard of care by: meeting with plaintiff in Fou's presence because privacy is required for candid communications between an attorney and client; failing to inquire of plaintiff, his client, about marital assets and income, and whether either plaintiff or Fou had a will; and failing to take any steps to verify the parties' assets and instead accepting the information provided by Fou, who was the adverse party. O'Donnell opined that the PSA's declaration there was full disclosure between the parties concerning marital assets and income was incorrect. He testified standard practice required that plaintiff execute a formal waiver if she intended to disclaim her rights to Fou's business interests.

O'Donnell also testified the record showed no "real communications as between ... Tung and [plaintiff]," and extensive communications between Tung and Fou, the "adverse party." O'Donnell testified that Tung did not advise plaintiff of her options, inform her of her right to obtain discovery of Fou's financial information, or make plaintiff "aware of what [her] rights are." O'Donnell also opined the Chinese agreements should have been incorporated into, or at least referenced in, the PSA, but that Tung could not have done so for the agreements that neither plaintiff nor Fou disclosed to him.

Further, O'Donnell testified Tung deviated from the standard of care barring an attorney from representing both sides in a matrimonial case. O'Donnell found it was clear Tung represented plaintiff, but O'Donnell explained it was unclear whether Tung also

represented Fou because Tung may have formed an attorney-client relationship with plaintiff and Fou, and Tung conducted himself as though he represented Fou. O'Donnell also opined Tung deviated from the standard of care requiring candor with the tribunal because, during the uncontested divorce proceeding, he failed to ask plaintiff whether she read and understood the PSA.

Finally, O'Donnell testified Tung deviated from the standard of care requiring written retainer agreements because the document Fou provided to Tung did not comport with Rule 5:3-5. O'Donnell also noted the agreement did not include any limitation on the scope of Tung's representation of plaintiff in the uncontested divorce proceeding as required if his representation was subject to the limitation that he serve only as scrivener as he contended.

O'Donnell explained plaintiff experienced adverse consequences as a result of Tung's deviations from the standards of care. O'Donnell opined plaintiff "lost time and she lost opportunity" in her negotiations with Fou, waived her equitable interest in marital assets, including the couple's business assets, and lost leverage in resolving financial issues with Fou during the divorce proceeding. According to O'Donnell, plaintiff's loss is equal to "whatever she would have gotten ultimately by way of the divorce." O'Donnell also explained that as a result of defendants' deviations from the standards of care, plaintiff incurred counsel fees and costs to set aside the first judgment of divorce and obtain the AFJD. O'Donnell was not sure if Fou transferred or dissipated any assets between February 2009 and September 2012, when the AFJD was entered.

Chunsheng Lu, an expert in the field of "Chinese law as it relates to American law," testified for plaintiff by video. Lu testified a New Jersey Superior Court matrimonial judgment would not be recognized or enforced in China because there is no treaty between China and the United States providing for enforcement of judgments.

Following presentation of plaintiff's evidence, defendants moved for an involuntary dismissal, arguing plaintiff failed to present evidence establishing they deviated from the standard of care. Defendants further argued plaintiff failed to present evidence establishing causation because plaintiff did not demonstrate Fou depleted or transferred any assets following entry of the original judgment of divorce and prior to entry of the AFJD. Defendants also argued plaintiff would obtain a "double recovery" if the jury awarded damages because she also could recover for the same alleged losses from Fou under the AFJD.

The court denied the motion, finding O'Donnell's testimony established defendants' alleged deviations from the applicable standards of care, and that evidence showing Fou purchased a home in North Carolina demonstrated he had the opportunity to move assets following the initial judgment of divorce. The court declined to address defendants' double-recovery contention, explaining it would consider the claim if the jury awarded compensatory damages.

Tung testified that Chinese was his native language, and that he earned his undergraduate and graduate degrees in the United States. He explained he practiced

law for twenty years and had handled "at least 500" matrimonial cases.

Tung acknowledged Fou asked him for assistance in an uncontested divorce case, and he then met with plaintiff and Fou on February 15, 2009. During the meeting, they spoke in Chinese.

Fou told Tung he and plaintiff received insurance through a government program, and they had no children under the age of twenty-one. According to Tung, he asked them about alimony, pensions, retirement benefits, and the division of property, but plaintiff and Fou told him that they had resolved those issues themselves. Tung claimed he told Fou and plaintiff that his representation was limited to serving as a scrivener in an uncontested divorce, and that he would not render any legal advice as to the fairness of the division of property. He also told them the parties waive their right to discovery in an uncontested divorce. Fou further explained that one of them would have to be designated as the plaintiff and that he would represent that person only. He explained that plaintiff appeared to understand. Tung testified plaintiff told him and his staff to communicate with Fou for any additional information.

He also explained that at the end of the meeting, plaintiff and Fou asked him to notarize a document and he did so, but he did not read it and was not given a copy of that document or any other agreements between plaintiff and Fou. He testified that had he been given a copy of plaintiff's and Fou's agreements, he would have included their terms in the PSA.

Tung also described the February 27, 2009 meeting with plaintiff and Fou during which they reviewed the matrimonial pleadings and the PSA. He testified he reviewed the PSA with plaintiff line by line, in her native language, and told her she was waiving her right to discovery of Fou's assets. He also testified plaintiff did not identify any assets missing from the CIS.

Robert Zaleski, Esq., testified as an expert for the defense in the field of matrimonial law and the standard of care applicable to Tung's representation of plaintiff. He identified the pleadings, documents, and transcripts he reviewed in preparing his report, and he testified Tung did not breach any duty to plaintiff and did not deviate from the standard of care required. Zaleski opined Tung did not represent Fou at any time, and that plaintiff and Fou merely wanted Tung to memorialize the terms of their own agreements and "didn't want any help negotiating those terms." According to Zaleski, Tung did not have a duty to provide an opinion as to the fairness of the PSA.

Zaleski also testified Tung's actions were not the proximate cause of any damages. He explained the AFJD granted plaintiff the exact relief she sought in the matrimonial action, including a $1,100,000 judgment against Fou, and that, as a result, Tung's representation of plaintiff did not result in any losses for her. Zaleski testified plaintiff could pursue collection of the judgment against Fou, and Zaleski did not find Tung caused plaintiff to incur counsel fees to vacate the PSA and initial judgment of divorce. Zaleski acknowledged, however, plaintiff had unsuccessfully tried to collect on the AFJD, Fou was in arrears on his alimony obligations, and the court ordered Fou's arrest

in November 2017 because he failed honor his financial obligations under the AFJD.

At the close the evidence, defendants moved for judgment again, and the court summarily denied the motion. The jury returned a $500,000 damages verdict in plaintiff's favor.

Defendants moved for judgment notwithstanding the verdict or, alternatively, for a new trial, arguing plaintiff failed to prove causation, and that "the verdict violated basic fairness and judicial estoppel." They alleged plaintiff did not prove Tung caused her harm, and did not prove the quantum of the marital estate as of the time of the divorce, or at the time of the Family Part's September 12, 2012 order freezing the marital assets. They alleged misrepresentations in plaintiff's trial testimony concerning the agreements shown to Tung at the February 15, 2009 meeting, and they again argued plaintiff might obtain a double recovery because the jury verdict awarded damages for amounts plaintiff might collect from Fou under the AFJD. Defendants further argued the court erred by admitting evidence concerning Fou's 2007 draft will, claiming it constituted inadmissible hearsay as against defendants.

The trial judge issued a written decision on defendants' motion, finding the trial evidence supported the jury's verdict, and noting plaintiff's damages included "those legal fees required to invalidate the" PSA and pursue the malpractice claim.

The court rejected defendants' claim plaintiff provided false testimony at trial about showing Tung the agreements. The court also found that, contrary to

defendants' claim, plaintiff's certification supporting the motion to vacate the PSA did not state she showed Tung all of her agreements with Fou. The court also rejected the claim the 2007 draft will was inadmissible, explaining it was "probative of the approximate quantum of the marital estate, just as the Appellate Division concluded [in the matrimonial action]." The court further found the $500,000 jury award was not inconsistent with the proofs because there was evidence permitting the jury's estimation of damages with a reasonable degree of certainty, which is sufficient to support a damages award.

Plaintiff's counsel moved for an attorney's fee award for the services provided in prosecuting the malpractice action, together with an "enhancement" of the fees based on the nature of the case and the offer of judgment rule. See R. 4:58-1 to -6. The claimed fees totaled $1,105,624.58, for which plaintiff sought a fifty-percent enhancement, for a total of $1,626,162,58. Defendants opposed the motion. The court issued a letter opinion granting plaintiff's motion in part, entering an order awarding $702,000 in fees based on a lodestar calculation.

The court also issued a July 27, 2018 order barring Tung from transferring assets pending the outcome of an appeal from the judgment, and permitting the ongoing operation of Tung, P.C. The order further required that defendants file a bond and defendants' malpractice carrier pay the policy balance into court.

Defendants sought an amendment of the court's July 27, 2018 order without filing a formal motion. Defendants' proposed amended order included a

provision addressing plaintiff's potential double recovery. The provision required that plaintiff provide defendants with semi-annual accountings, through December 31, 2025, of any monies or assets received from Fou. The provision further required an equal split between plaintiff and defendants of the monies and assets plaintiff received from Fou, with defendants' share of the split credited against any sums due to plaintiff from defendants under the final judgment in the malpractice action.

Plaintiff's counsel opposed the requested amendment to the July 27, 2018 order, but on December 27, 2018, the court entered the proposed amended order including the double-recovery provision defendants had included. Plaintiff moved for reconsideration of the amended order, noting the court erroneously deemed defendants' request for entry of the order unopposed. On January 28, 2019, the court granted the reconsideration motion and entered an order striking the double-recovery provision defendants had proposed. On May 22, 2019, the court denied a motion filed by defendants for reconsideration of the January 28, 2019 order. This appeal followed.

II.

A.

Defendants first contend the court erred by denying their motions to dismiss, for judgment notwithstanding the verdict, and for a new trial, and that the jury's verdict should otherwise be reversed, because plaintiff failed to prove they proximately caused her alleged damages. More particularly, they assert the motions should have been granted for the following reasons:

plaintiff failed to prove she suffered damages resulting from the relief in obtaining the alimony and equitable distribution of marital assets provided for in the AFJD because plaintiff failed to present any evidence Fou dissipated any marital assets prior to entry of the AFJD; O'Donnell's testimony did not establish plaintiff suffered any financial damages as a result of defendants' negligence; plaintiff is equitably estopped from claiming damages as a result of any negligence concerning the preparation of the PSA because she testified in the divorce proceeding that the PSA was "fair and equitable" and was entered into following a "full disclosure of all assets"; plaintiff failed to prove she cannot collect the attorney's fees awarded in the matrimonial action and the marital assets and payments due under the AFJD directly from Fou, and, as a result, the verdict in the malpractice case constitutes an impermissible double recovery; and the jury's $500,000 damages award is not supported by the evidence or applicable law.[5]

Our review of defendants' arguments is guided by the following principles. A jury verdict "is cloaked with a 'presumption of correctness,' " Cuevas v. Wentworth Grp., 226 N.J. 480, 501 (2016) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977)), and "is entitled to considerable deference," Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011). We will overturn a jury verdict only if it "is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality." Maison v. N.J. Transit Corp., 460 N.J. Super. 222, 234 (App. Div. 2019) (quoting Wytupeck v. City of Camden, 25 N.J. 450, 466 (1957)).

Where a party claims a trial court erred by denying a motion for involuntary dismissal, we decide whether the evidence, together with the legitimate inferences that can be drawn from it, sustains a judgment in favor of the party opposing the motion. R. 4:37-2(b). We must accept as true all evidence supporting the position of the party opposing the motion and we accord that party the benefit of all favorable inferences. Dolson v. Anastasia, 55 N.J. 2, 5 (1969).

Similarly, our review of motions for judgment under Rule 4:40-1 and for judgment notwithstanding a verdict under Rule 4:40-2(b) requires that "we apply the same standard that governs the trial courts," Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); that is, "if, accepting as true all the evidence which supports the position of the party defending against the motion[s] and according [that party] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion[s] must be denied," ibid. (quoting Verdicchio v. Ricca, 179 N.J. 1, 30 (2004)).

Under Rule 4:49-1(a), a trial court shall grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." "An appellate court will not reverse a trial court's determination of a motion for a new trial 'unless it clearly appears that there was a miscarriage of justice under the law.' " Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 572 (2016) (quoting R. 2:10-1). We give "considerable deference to a trial court's decision" on a motion for a new trial because "the trial court has

gained a 'feel of the case' through the long days of the trial." Lanzet v. Greenberg, 126 N.J. 168, 175 (1991).
To prove a claim for legal malpractice, a plaintiff must demonstrate "(1) the existence of an attorney-client relationship ..., (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff." Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)). "The burden is on the client to show what injuries were suffered as a proximate consequence of the attorney's breach of duty." 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 487-88 (App. Div. 1994).

To establish proximate causation of damages in a legal malpractice action, the plaintiff "must demonstrate that he or she would have prevailed, or would have won materially more ... but for the alleged substandard performance." Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003). "The test of proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss." 2175 Lemoine Ave. Corp., 272 N.J. Super. at 487; see also Froom v. Perel, 377 N.J. Super. 298, 313 (App. Div. 2005) ("To establish the requisite causal connection between a defendant's negligence and plaintiff's harm, plaintiff must present evidence to support a finding that defendant's negligent conduct was a 'substantial factor' in bringing about plaintiff's injury ...." (citation omitted)).

"[T]he measure of damages is ordinarily the amount that the client would have received [or would not have had to pay] but for his [or her] attorney's negligence." Gautam v. De Luca, 215 N.J. Super. 388,

397 (App. Div. 1987); see also Conklin v. Hannoch Weisman, 145 N.J. 395, 417 (1996). "[D]amages should be generally limited to recompensing the injured party for his [or her] economic loss." Gautam, 215 N.J. Super. at 399.

"[M]ere uncertainty as to the amount of damages will not preclude a recovery even though proof of the amount of damages is inexact. Evidence which affords a basis for estimating damages with some reasonable degree of certainty is sufficient to support an award." Viviano v. CBS, Inc., 251 N.J. Super. 113, 129 (App. Div. 1991) (citation omitted). However, "the 'law abhors damages based on mere speculation,' " Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128 (App. Div. 2002) (quoting Caldwell v. Haynes, 136 N.J. 422, 442 (1994)), and a plaintiff must lay a foundation allowing the factfinder to reach a fair and reasonable estimate of damages with sufficient certainty, id. at 128-29. A legal malpractice plaintiff does not satisfy this burden "by mere 'conjecture, surmise or suspicion.' " 2175 Lemoine Ave. Corp., 272 N.J. Super. at 488 (quoting Long v. Landy, 35 N.J. 44, 54 (1961)). Damages must be proven through "competent credible evidence which proves material facts." Lamb v. Barbour, 188 N.J. Super. 6, 12 (App. Div. 1982).

Defendants' contention plaintiff failed to prove she suffered damages proximately caused by their negligence is founded on the premise that plaintiff did not present evidence she suffered a loss of any marital assets or from a failure to collect payments she would have otherwise received if the terms of the AFJD had been first included in the original judgment of divorce. Defendants claim plaintiff failed to prove Fou took any

action prior to entry of the AFJD that resulted in plaintiff receiving less from him than she would have had the original judgment of divorce included the provisions concerning the division of the business assets and payment of alimony later included in the AFJD.

Defendants' argument ignores the evidence presented at trial, as well as plaintiff's entitlement to recover $449,798.59 for fees and costs she incurred in vacating the PSA and original judgment of divorce and obtaining the AFJD. Accepting the evidence favorable to plaintiff, as well as the reasonable inferences from that evidence, plaintiff's and O'Donnell's testimony established defendants deviated from the standard of care for matrimonial attorneys by: failing to adequately confer with plaintiff about, and verify, the marital and family business assets prior to preparing the PSA and proceeding to judgment in the matrimonial action; failing to properly advise plaintiff concerning her right to an equitable division of the assets; and failing to incorporate the provisions of the February 15, 2009 Divorce Agreement, which allowed for a later division of the marital and family business assets, into the PSA.

O'Donnell and plaintiff further testified that, as a result of defendants' deviations from the applicable standards of care, plaintiff was required to move to vacate the PSA and original judgment of divorce and obtain the AFJD. The evidence showed 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. Thus, the evidence established plaintiff suffered $449,798.59 in damages as a direct and proximate result of defendants'

negligence. See In re Estate of Lash, 169 N.J. 20, 26 (2001) (explaining a plaintiff "forced because of the wrongful conduct of a tortfeasor to institute litigation against a third party ... can recover the fees incurred in that litigation from the tortfeasor" and finding "[t]hose fees are merely a portion of the damages the plaintiff suffered at the hands of the tortfeasor"); see also Lovett v. Estate of Lovett, 250 N.J. Super. 79, 94 (Ch. Div. 1991) (noting attorney's fees incurred in litigation that are the " 'natural and necessary' consequence" of an attorney's negligence are recoverable as damages in a malpractice case against the attorney).

We are therefore convinced plaintiff presented sufficient evidence that the fees and costs she incurred were the direct and proximate result of defendants' negligence, and we affirm the jury's damages award in that amount. For the same reason, we reject defendants' contention the court erred by denying their motions for judgment, a new trial, and judgment notwithstanding the verdict as to plaintiff's claim she suffered damages in the amount of $449,798.59 as a direct and proximate result of defendants' negligence.

The same cannot be said of the $50,201.41 balance of the jury's $500,000 damages award. The trial record is bereft of any competent evidence 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. And, in her brief on appeal, plaintiff points to none. Plaintiff did not present evidence Fou dissipated the marital or business assets following entry of the original judgment of divorce and prior to

entry of the AFJD, or that she was damaged or suffered any financial losses as a result of the delay, occasioned by defendants' negligence, in obtaining the relief in the matrimonial matter with the entry of the AFJD.

Relying on O'Donnell's testimony, plaintiff claims she lost "leverage" in the initial matrimonial proceeding as a result of defendants' negligence, and she also contends in a conclusory fashion she was unable to actually collect payments and her share of the marital assets from Fou that she would have otherwise collected had defendants' negligence not delayed her from obtaining the terms later incorporated in the AFJD. Plaintiff's contentions are unsupported by evidence establishing any actual monetary loss, or monetary loss that can be reasonably approximated, that was directly and proximately caused by defendants' negligence. For example, plaintiff did not present any evidence that had the original judgment of divorce included the same terms as the AFJD, she would have collected more money or recouped more assets from Fou than she otherwise did. As a result, the jury's award of damages in excess of the $449,798.59 in costs and fees she incurred in vacating the PSA and original judgment of divorce and obtaining the AFJD was based on mere speculation and is not supported by evidence.

A jury award that is unsupported by the evidence, see Caldwell, 136 N.J. at 438-40, or is founded on a vague, theoretical damages claim, see McConkey v. Aon Corp., 354 N.J. Super. 25, 63-64 (App. Div. 2002), cannot be sustained. Having carefully reviewed the record, we find no competent evidence supporting the

jury's damages award beyond the $449,798.59 in fees incurred by plaintiff in vacating the PSA and original judgment of divorce and obtaining the AFJD, and we vacate the $50,201.41 balance of the $500,000 awarded by the jury. We affirm the jury's damages award in the amount of $449,798.59.

B.

We also reject defendants' claim that plaintiff was equitably or judicially estopped from asserting a malpractice claim. Defendants assert plaintiff should have been estopped from asserting in the malpractice case that the PSA was unfair and did not properly reflect her and Fou's agreement to divide the marital and business assets because she testified during the divorce proceeding that the PSA was "fair and equitable" and was made following a "full disclosure of the assets." Defendants also contend plaintiff made a material omission of fact during the plenary hearing in the Family Part on her motion to vacate the PSA and original judgment of divorce by failing to inform the court she did not show Tung three of the four Chinese agreements when she and Fou met Tung on February 15, 2009.[6]

We find defendants' estoppel arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following. The doctrine of equitable estoppel prevents a party from repudiating prior "conduct if such repudiation 'would not be responsive to the demands of justice and good conscience.' " Carlsen v. Masters, Mates & Pilots Pension Plan Tr., 80 N.J. 334, 339 (1979) (quoting W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144,

153 (1958)). "To establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action." Miller v. Miller, 97 N.J. 154, 163 (1984). "Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment." Ibid.

The purpose of the judicial estoppel doctrine is to protect the integrity of the judicial process. Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). A threat to such integrity arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding. Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 620 (App. Div. 1990). Such equitable principles, including the doctrine of "unclean hands," are "applicable whenever it appears that the litigant seeks to be relieved of the consequences of a fraud in which he has been an active participant." Prindiville v. Johnson & Higgins, 93 N.J. Eq. 425, 428 (E & A 1922).

Application of these equitable doctrines is not supported by the evidence here. Plaintiff's testimony at the divorce proceeding, that the PSA was fair and the PSA was made following a full disclosure of the marital assets, is not inconsistent with her subsequent claim defendants failed to include the terms of the Divorce Agreement in the PSA. To the contrary, plaintiff testified she did not read the PSA prior to the divorce proceeding, and, during that proceeding, Tung never asked plaintiff if she reviewed or understood the PSA. Moreover, plaintiff's testimony during the divorce proceeding was premised on her understanding that

defendants had done what they were retained to do—incorporate the terms of the Divorce Agreement into the PSA.

There is also no evidence supporting defendants' claim plaintiff misled the Family Part in her application to vacate the PSA by failing to inform the court of the existence of the two 2007 Chinese agreements and the February 15, 2009 Supplemental Divorce Agreement, which was also written in Chinese. Plaintiff's malpractice claim is simply not dependent on those agreements or whether they were ever shown to Tung. Plaintiff acknowledged during her testimony in the malpractice case that those agreements were never shown to Tung. It was defendants' failure to incorporate the February 15, 2009 Divorce Agreement into the PSA and initial judgment of divorce upon which plaintiff's malpractice claim is based. There is no dispute that agreement was disclosed by plaintiff to the Family Part during the proceedings supporting her application to vacate the PSA and the original judgment of divorce.

In sum, defendants' equitable defenses to plaintiff's malpractice claim find no support in the evidence. We reject any claim plaintiff is equitably or judicially estopped from prosecuting her malpractice claim.

C.

Defendants also contend the final judgment should be reversed because it could result in a double recovery to plaintiff. Defendants contend there is no evidence establishing that plaintiff cannot collect from Fou the sums for attorney's fees awarded to plaintiff by the

Family Part for her prosecution of her motion to vacate the PSA and original judgment of divorce, and to obtain the AFJD, and therefore she could not be properly awarded damages for those fees by the jury in the malpractice case.[7] We are not persuaded.

In the first instance, the record shows Fou stopped making alimony payments to plaintiff in 2011 or 2012; Fou relocated to China; the marital business assets, and Fou's assets, are in China; China will not honor a New Jersey judgment or order; and the Family Part issued a warrant for Fou's arrest based on his failure to honor his obligations under AFJD. In addition, the AFJD requires that Fou pay plaintiff $1,100,000, plus a minimum of $18,000 per annum in alimony, and $229,389.69 in attorney's fees, but the record shows plaintiff has been able to attach only Fou's social security benefits as a source of collecting the enormous sums due. Thus, defendants' claim the evidence does not demonstrate plaintiff's inability to collect the sums due under the AFJD, including the attorney's fee award, is undermined by the record.

We recognize "[i]t is fundamental that no matter under what theories liability may be established, there cannot be any duplication of damages," Ptaszynski v. Atl. Health Sys., Inc., 440 N.J. Super. 24, 39-40 (App. Div. 2015) (quoting P. v. Portadin, 179 N.J. Super. 465, 472 (App. Div. 1981)), but the mere possibility of a double recovery does not require the reversal of the damages award on plaintiff's malpractice claim, see, e.g., Distefano v. Greenstone, 357 N.J. Super. 352, 357 (App. Div. 2003) (explaining the plaintiff could properly receive a $90,000 settlement in an underlying personal injury action without a deduction for the $30,000 fee

otherwise due to her former attorney who committed malpractice because "the duplicate recovery, even though a windfall to the plaintiff, is considered the lesser evil to crediting the attorney with an undeserved fee where he has botched the job").

Moreover, the mere fact that plaintiff might recover monies from Fou under the AFJD does not equate to a double recovery by plaintiff of the sums she will collect from defendants based on the jury's verdict. That is because the damages awarded by the jury in the malpractice case are limited to the attorney's fees and costs incurred by plaintiff in the proceedings to vacate the PSA and original judgment of divorce and obtain the AFJD, and the sums due plaintiff under the AFJD are attributable to equitable distribution ($1,100,000), alimony (minimum $18,000 annually since around 2012), and other sums wholly separate from the AFJD's award of damages based solely on attorney's fees and costs. It is only plaintiff's recovery of attorney's fees from Fou under the AFJD that provides a potential double recovery for the damages—attorney's fees and costs in the proceedings to vacate the PSA and original judgment of divorce and obtain the AFJD—awarded by the jury in the malpractice case. Also, and as noted, plaintiff presented evidence establishing the collection of anything from Fou is unlikely.

Under these circumstances, we discern no basis to reverse the jury's damages award on what appears to be nothing more than an improbable and theoretical possibility plaintiff might recover some of what is owed to her from Fou under the AFJD, including a double recovery of the attorney's fees and costs for which the jury awarded her damages in the malpractice case. As a

result, we affirm the jury's damages award against defendants, as modified by our decision, in the amount of $449,798.59.

The record shows that in December 2018, defendants submitted a proposed order to the court purportedly amending a July 27, 2018 order that, in part, limited defendants from transferring assets and required them to file a bond. Defendants' submission of the amended order was untethered to any motion filings, and the order appears to have been submitted as the result of discussions between the parties concerning issues related to the judgment and defendants' disposition of their assets. According to plaintiff's counsel, defendants submitted the order to the court with a representation there was no objection to its entry.

The order included a provision, proposed by defendants, putatively addressing the double recovery issue.[8] In pertinent part, the provision required that plaintiff supply defendants with semi-annual accountings of monies received from Fou through December 31, 2025, and directed that any monies plaintiff collected from Fou be evenly split between plaintiff and defendants "[t]o ensure there is no double recovery." The court entered the amended order on December 27, 2018.

Plaintiff moved for reconsideration of the order. As the court explained in detail in its subsequent written decision, it entered the December 27, 2018 order solely based on an erroneous assumption plaintiff consented to the double-recovery provision when, in fact, plaintiff had not consented and her counsel had properly filed an objection to the provision's inclusion in the order. The

court granted plaintiff's motion for reconsideration based solely on its error, and entered a January 28, 2019 order amending the December 27, 2018 order by deleting the putative double-recovery provision.

In its written decision on the motion for reconsideration of the December 27, 2018 order, the court noted defendants had not made a formal motion seeking the relief afforded by the putative double-recovery provision—an accounting of plaintiff's receipt of funds from Fou as a vehicle to ensure there is no double recovery. The court further stated counsel for defendants could apply for the relief "by filing a motion in the ordinary course."

Defendants declined the court's invitation. Defendants never filed a motion seeking an order providing for periodic accountings of monies received by plaintiff from Fou to permit an assessment of whether plaintiff obtained a double recovery and to provide an appropriate remedy for any double recovery.[9]

Defendants' failure to file a motion seeking the relief set forth in the proposed double-recovery provision deprived plaintiff the opportunity to respond, and the motion court of an opportunity to address the merits of the proposed double-recovery provision in the first instance. "An application to the court for an order shall be made by motion," R. 1:6-2(a), not a letter. Defendants' contention the court erred by failing to include the relief in the proposed provision is tantamount to making its motion for an order including a double-recovery provision for the first time on appeal. We reject defendant's belated effort. Defendants' newfound arguments on their claimed entitlement to an

order addressing plaintiff's purported potential double recovery do not go to the court's jurisdiction or involve a matter of public interest, and, therefore, we will not consider the arguments for the first time on appeal. Nieder v. Royal Indem. Ins., 62 N.J. 229, 234 (1973).

We do, however, affirm the court's January 28, 2019 order amending the December 27, 2018 order because, as the court detailed in its written decision, it entered the December 27, 2018 order based solely on the mistaken understanding the order was not opposed by plaintiff. We find no error in that determination, and defendants do not claim the court erred by reconsidering the December 27, 2018 order for that reason. We affirm the court's May 22, 2019 order denying defendants' motion for reconsideration of the January 28, 2019 order on the same basis.

D.

Defendants next claim the court erred in its award of counsel fees to plaintiff. Defendants do not dispute plaintiff is entitled to a counsel fee award based on her successful prosecution of her malpractice claim against them. As the Court explained in Saffer v. Willoughby, "a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting the legal malpractice action." 143 N.J. 256, 272 (1996); see also Bailey v. Pocaro & Pocaro, 305 N.J. Super. 1, 6 (App. Div. 1997).

Defendants argue only that the court erred by calculating the amount of fees and costs because plaintiff's retainer agreement with her counsel

provided for a contingent fee, and the court awarded fees exceeding those that would have been due under the contingency fee arrangement by basing its award on a lodestar calculation.[10] Attorney "fee determinations by trial courts 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) (citation omitted). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). We find no abuse of discretion here.

Defendants' argument the court erred by awarding attorney's fees and costs in excess of the amount to which plaintiff's counsel was entitled under its contingent fee arrangement with plaintiff ignores that "[t]here is a significant, material difference between an award of counsel fees under a fee-shifting statute, court rule, or contractual provision, and a fee dispute between a client and [his or] her own attorney." Lucas v. 1 on 1 Title Agency, Inc., 460 N.J. Super. 532, 539 (App. Div. 2019). Thus, "a 'client who has retained an attorney and promised to pay him [or her] stands on a completely different footing from the recipient of a fee-shifting allowance,' " ibid. (quoting Gruhin & Gruhin, P.A. v. Brown, 338 N.J. Super. 276, 281 (App. Div. 2001)), "and the amount a plaintiff seeks to recover under fee shifting is separate and distinct from the amount the plaintiff owes [his or] her attorney," id. at 539-40.

In Rendine v. Pantzer, the Court did not limit the plaintiffs' entitlement to attorney's fees under the fee-shifting provision of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -50, to the agreed-upon contingency fee in the plaintiffs' retainer agreement with their counsel. 141 N.J. 292, 317, 344-46 (1995). To the contrary, the Court allowed for the enhancement of attorney's fees otherwise due under a contingency fee agreement between a plaintiff and his or her counsel based on a lodestar calculation and a consideration of various other factors including, for example, the risk of nonpayment for services provided under a contingency fee arrangement. Id. at 337-41. The Court further explained that under a fee-shifting paradigm, the first step in determining the appropriate fee award is the calculation of the lodestar, which consists of the hours reasonably expended by counsel multiplied by a reasonable hourly rate. Id. at 316; see also Packard-Bamberger, 167 N.J. at 445. A court must then "consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." Rendine, 141 N.J. at 337.

Defendants rely on our decision in Distefano, where we affirmed the trial court's rejection of the successful plaintiff's claim in a malpractice case for a $48,250 fee based on a lodestar calculation in favor of a $30,000 fee under the contingent fee agreement with the plaintiff's counsel. 357 N.J. Super. at 360-61. In Distefano, however, we cited Rendine and explained that "[c]ourts usually use [the lodestar calculation] method in setting fee awards in ... fee[-]shifting contexts." Id. at 361. We also noted the plaintiff's attorneys did not apply "for an

enhanced contingent fee." Ibid. Without any further analysis, we found "no need to resort to a lodestar methodology" because the plaintiff's attorneys in the underlying matter and malpractice case each "agreed to a one-third contingent fee," and those agreements "insured appropriate compensation." Ibid.

We find Distefano inapposite. Here, plaintiff applied for an enhanced contingent fee, and Rendine requires calculation of the lodestar in a fee-shifting case where such an application is made. See Rendine, 141 N.J. at 334-45 (explaining standards for a fee application in a fee-shifting case).

Defendants do not otherwise challenge the court's thoughtful and detailed analysis and determination of the lodestar, or its calculation of the attorney's fee award based on the pertinent factors required by Rendine and R.P.C. 1.5. We affirm the attorney's fee award substantially for the reasons set forth in the court's written opinion.

We note the court awarded attorney's fees to plaintiff as a successful litigant in the legal malpractice action under the principles established in Saffer and also based on the offer of judgment rule, R. 4:58-1 to -6. The court also awarded interest on the attorneys' fees awarded in accordance with Rule 4:58-2(a). Our determination the damages award must be reduced to $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). Thus, on the remand for entry of a new judgment, the court shall vacate the award of interest per Rule 4:58-2(a) and determine such interest as is otherwise appropriate under the Rules of Court.

E.

Tung separately makes a series of arguments directed to what he contends are insufficiencies of plaintiff's evidence and the court's erroneous admission of evidence. We briefly address the arguments in turn.

Tung contends his failure to incorporate provisions from the agreements written in Chinese into the PSA did not proximately cause any damages to plaintiff because the agreements were invalid, the Family Part found the agreements were unenforceable, and plaintiff therefore could not have recovered anything under them. We reject the argument because 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. O'Donnell testified that, independent of the agreements, defendants negligently failed to inquire about plaintiff's and Fou's marital and business assets in their representation of plaintiff and preparation of the PSA. Moreover, as noted, plaintiff testified Tung was given the Divorce Agreement for the purpose of incorporating its terms into the PSA, and those terms included plaintiff and Fou's agreement to later divide property and business assets. Tung cites to no legal authority establishing those terms would have been

unenforceable if incorporated into the PSA, and, as plaintiff demonstrated in the Family Part proceeding, but for Tung's failure to include those terms in the PSA, plaintiff would not have suffered damages by incurring the expenses to vacate the PSA and original judgment of divorce and obtain the AFJD. See Conklin, 145 N.J. at 417 (explaining proximate cause is established by showing a plaintiff's damages would not have occurred "but for" the defendant's negligence (citation omitted)). Tung's failure to incorporate those terms and inquire about the status of the marital and business assets referenced in the Divorce Agreement support a finding his negligence caused plaintiff's damages.

Tung also argues the court erred by denying his motion in limine to bar evidence concerning Fou's will that plaintiff found on a computer in 2007. Tung contends plaintiff would not have been able to prove her alleged damages without the admission of the will, which revealed $2,200,000 in marital assets. We review a court's decision to admit evidence for an abuse of discretion, Estate of Hanges v. Metro. Prop. & Cas. Ins., 202 N.J. 369, 383-84 (2010), but the court's decision denying defendants' motion in limine is untethered to a citation to any legal authority supporting the admission of the will. We need not address the merits of the court's decision to permit testimony concerning the will, however, because the testimony, if accepted, established only that plaintiff and Fou had assets totaling $2,200,000 in 2007, and, prior to the malpractice case, the Family Part decided as a matter of fact and law that plaintiff and Fou shared assets valued in that amount, and entered the AFJD granting plaintiff one-half of that amount in equitable distribution. The AFJD

was admitted in evidence in the malpractice case and it showed the Family Part's division of the marital assets. Thus, the admission of the testimony concerning Fou's will was merely cumulative and harmless. Additionally, plaintiff's damages award, as modified by our decision, does not include any amounts for any claimed loss of marital assets due to defendants' negligence. Thus, even if the will was admitted in error, it does not require or permit a reversal of the court's final judgment. See R. 2:10-2.

Tung also claims plaintiff's resolution of Medicaid's claim for reimbursement of her benefits constitutes "an unimpeached guilty plea in a criminal proceeding [that] bars recovery in a legal malpractice action." We reject the claim in the first instance for the simple, but dispositive, reason that plaintiff was never charged with a criminal offense related to her collection of Medicaid benefits and there is no evidence she ever pleaded guilty to anything. Moreover, Tung's claim, that our decision in Alampi v. Russo, 345 N.J. Super. 360 (App. Div. 2001), stands for the broad proposition that a plaintiff who pleads guilty to a criminal offense may not assert a legal malpractice claim against his or her lawyer, is frivolous. We need not distinguish the facts and circumstances in Alampi from those extant here other than to note that no reasoned reading of the case permits a supportable argument that it stands for the proposition asserted by Tung. His claims to the contrary do not merit any further discussion. R. 2:11-3(e)(1)(E).

Tung further argues the court erred by admitting the Family Part's decision on plaintiff's motion to vacate the PSA and the original judgment of divorce, and our

decision affirming the Family Part's order. Tung generally argues he was not a party to those proceedings and the admission of those documents resulted in a denial of due process as to him and a "fraud upon the court." We find no merit to Tung's arguments. The court did not abuse its discretion by admitting the opinions as evidence of the proceedings in the Family Part that were required to obtain relief from the PSA and original judgment of divorce that were entered as a result of Tung's negligence. Pursuant to defendants' request, the trial court redacted the opinions to eliminate any findings concerning, or references to, defendants' negligence. Tung makes no showing the court abused its discretion in admitting the redacted opinions, and he also fails to demonstrate that, even if they were entered in error, their admission was clearly capable of producing an unjust result. R. 2:10-2. Nor could he demonstrate prejudice because the testimonial evidence otherwise established plaintiff successfully moved to vacate the PSA and original judgment of divorce and obtained the AFJD in the Family Part, and that those proceedings were required because Tung negligently failed to obtain for plaintiff that to which she was entitled when he represented her in the divorce proceeding.

Tung also argues for a reversal of the jury's verdict and the court's orders denying the motions for judgment, for judgment notwithstanding the verdict, and for a new trial, because the court erred by sustaining plaintiff's objections to the admission of attorney-client communications and work product documents that were inadvertently turned over during discovery; providing purported erroneous mid-trial instructions to the jury concerning "negligence" and "discovery"; and

permitting the reading of portions of his deposition testimony to the jury. We find each of the arguments lack sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), except we note the arguments are not supported by the facts or applicable law, and Tung fails to demonstrate that any of the purported errors were clearly capable of producing an unjust result, R. 2:10-2.

In sum, we affirm the court's orders denying defendants' motions for judgment, for judgment notwithstanding the verdict, and for a new trial. We also affirm the court's January 28, 2019 order granting plaintiff's motion for reconsideration of the December 27, 2018 order, and we affirm the court's May 22, 2019 order denying defendants' motion for reconsideration of the January 28, 2019 order. We vacate that portion of the final judgment awarding plaintiff $500,000 in damages, and awarding plaintiff interest pursuant to Rule 4:58 on the attorney's fee award, and otherwise affirm the other provisions of the judgment. We remand for the court to enter a revised judgment awarding plaintiff $449,798.59 in damages and providing for interest on the attorney's fee award in accordance with the Rules of Court.

Any arguments we have not directly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Footnotes

1Tung was employed by Tung, P.C. during his representation of plaintiff in the matrimonial action. The record shows that subsequent to the entry of the final judgment in this matter, Tung, P.C. filed for bankruptcy and has advised it is currently a debtor in possession.

2English translations of plaintiff's and Fou's putative agreements, which were written in Chinese, were admitted in evidence at trial.

3Plaintiff testified during the malpractice trial that her net alimony income, after paying her son's tuition, was $600 per month, and the value of the total assets in her name was $3,000, at the time she completed the Medicaid application.

4In the fall of 2018, Tung filed a motion to intervene in the underlying matrimonial action, and the Family Part denied the motion. On June 12, 2020, we issued an opinion affirming the denial of the motion to intervene in Fou v. Fou, No. A-2145-18 (App. Div. June 12, 2020) (slip op. at 9). We also denied plaintiff's motion for fees and costs incurred in responding to Tung's motion.

5Tung, P.C. and Tung filed separate briefs on appeal. To the extent their respective arguments are duplicative or complimentary, we discuss them collectively for convenience and to avoid repetition.

6The three agreements include the two 2007 agreements and the February 15, 2009 Supplemental Divorce Agreement, all of which were written in Chinese and none of which were provided to defendants by plaintiff or Fou.

7We observe that the amount of the fees awarded by the Family Part in the various proceedings resulting from plaintiff's efforts to vacate the PSA and original judgment of divorce and obtain the AFJD, including

appeals, are not exactly the same as the evidence in the malpractice showed plaintiff incurred during the Family Part proceedings. It is unnecessary that we address the discrepancy because defendants do not challenge plaintiff's testimony during the malpractice trial that she incurred $449,798.59 in fees and costs prosecuting the proceedings in the Family Part and on the appeal from the Family Part's orders.

8The December 27, 2018 order also addressed other issues not pertinent to this appeal.

9The certification of counsel supporting defendants' motion for reconsideration generally requested that the court reconsider its decision to eliminate the double-recovery provision that defendants included in the December 27, 2018 order, but the certification offered no facts supporting the request.

10Plaintiff argues the court erred in its calculation of the attorney fee award and, as a result, the award was too low. We do not address the argument because plaintiff did not cross-appeal from the fee award.

would have dealt differently with his wife if he needed to.

BY MR. PLAISTED:

Q You mean before he was actually divorced?
A Yeah. During that period of time, I would imagine

MR. ANESH: Objection. That's pure and utter speculation.
THE COURT: I agree with you.
MR. ANESH: Thank you.
THE COURT: I sustain the objection.
Next question.
BY MR. PLAISTED:

Q Are there other consequences to Mrs. Fou from the deviations you have identified?
A The fees, I would imagine.
Q What do you mean, fees?
A The counsel fees and whatever other fees she is expending to try to, first of all, to set aside that judgment, to have a new judgment entered, the new hearing that I read about I think in 2014. I can't imagine that was all done without there being—her incurring large expenses. And even the last judgment that was entered by the Court, the amended judgment of divorce really gives Mrs. Fou the right to go out and find the assets, and she's going to spend probably a lot of money doing that. She may be fine spending the rest of her life chasing after all these assets which she could have secured—

MR. ANESH: Objection. It's pure speculation what she could have done.

THE COURT: 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. He can finish his answer.

Counsel, may I see you at sidebar, please, for a moment?

(At sidebar)

MR. PLAISTED: I'm virtually—unless Mr. Zoller tells me I have a question or two, areas that I missed—

THE COURT: So you want to take five minutes

MR. PLAISTED: Oh, yeah.

THE COURT:— let's finish, and then we'll take a break. Thank you very much.

MR. PLAISTED: Okay. I may say no questions.

(Sidebar concluded)

MR. PLAISTED: Thank you, Your Honor.

that you have at this time.

MR. ANESH: Well, Your Honor, the third part of our causation argument is the fact that there is no evidence of any depletion of assets. Mrs. Fou found herself in if not the exact same position, a better position then she would have had she never retained Mr. Tung.

She had got a judgment of $1.1 million and you have to show that but for the lawyer's acts she was damaged and on the financial side, I don't see how you show but for his acts.

The divorce was in 2009. That was it. There's no evidence of any disposition of assets between 2009 and when it was set aside. There's no evidence of any disposition of assets between when it was set aside and when she got a new judgment.

There's just nothing. She's in the exact same if not better position than she was before and that goes to not being able to show but for causation and the case should be dismissed.

MR. PLAISTED: Your Honor, I don't believe the charge is but for causation but nevertheless we would satisfy it any way. Mrs. Fou's—

THE COURT: Well, wait. Wait. Let's let the other shoe drop. What do you think the charge is? If it's not but for causation, what else—

MR. PLAISTED: I thought what I read in Your Honor's charge was that it's a substantial factor.

THE COURT: Yes. Oh—

MR. PLAISTED: Not but for.

THE COURT: It's the same.

MR. PLAISTED: Oh, it's different I think.

THE COURT: Well, this isn't Scafidi. Scafidi is medical malpractice.

MR. PLAISTED: Right.

THE COURT: This has nothing whatsoever to do with that. That's where there's a pre-existing condition. There was no pre-existing condition. This is a financial case.

MR. PLAISTED: Right.

THE COURT: So are you making a distinction between but for and substantial factor—

MR. PLAISTED: I think we satisfy both. I'm not going to try to—

THE COURT: Thank you.

MR. PLAISTED:—waste everybody's time.

THE COURT: Why do you think that? What's the basis of that thinking?

MR. PLAISTED: The basis of that thinking is in substantial part Mr. O'Donnell's testimony. Mr. O'Donnell's testimony was that as of May of 2009 Mrs. Fou had every ability to bargain.

She had leverage. She had knowledge at that time of what was supposed to be there at that time. She knew that the Vanguard accounts had supposedly $800,000 in them, Mr. Fou had shown it to her.

She knew at that time very much what there was an in that position where Joe Fou is saying to Mr. Tung he can't—he can't—Mr. Tung said he was the most anxious client I ever had to see if he could get rid of, get out of his marriage and so—

THE COURT: Yes.

MR. PLAISTED:—he was anxious, we know the next year, he went back to China and remarried and so that was the time Mr. O'Donnell said. That is when you must negotiate it when the assets are here, when there's a motivation to settle and you can get both disclosure and you can get an actual security under those kinds of circumstances.

That was—it's particularly true in this particular case because of Mr. Fou's anxiety, his desire for a great rush forward and so the quickie divorce harmed her immensely and the difference in time between May 2009 and both October of 2014 which is just when the final amended judgment is finally entered is enormous.

It isn't affirmed on appeal till 2016 and so she is largely on hold for seven years and the money is nowhere to be found except for our efforts to take the house that the lis pendens was—

MR. ANESH: Well, that's a great point. The money was nowhere to be found, it was no way to be found in '09, it was no way to be found in '12. There was no way to be found in '14.

Your Honor, it's pure and utter speculation pure and utter speculation what would have happened had Mr. Tung done X, Y, and Z in 2009. The money doesn't fall out of the trees, Your Honor. It's utter speculation that they would have gotten to give this, to give that, to give this, to give that.

There's just no evidence on causation, Your Honor. No evidence at all.

THE COURT: Mr. Plaisted, go ahead.

MR. PLAISTED: I was just going to point again to Mr. O'Donnell's very strong testimony in that regard he testified directly on causation and it's in his report. It's just very clear in terms of that particular theory.

THE COURT: I disagree with Mr. Anesh's characterization. I believe that there is evidence that Mr. Fou had the opportunity to in effect make himself judgment proof and it may very well have been that the bulk of these assets were in China or otherwise unreachable, I don't know, but having gotten a divorce, having been free to remarry which we know he did having been free to purchase a home in North Carolina

which he did with his new wife, I believe all of that put together shows that he had the opportunity to move items.

Now, one—I think the error in Mr. Anesh's argument on this motion is that if he's saying there's no direct evidence, that's probably correct, but one can infer and the jury will be told that there's not only direct evidence, there's circumstantial evidence.

And while I agree that if you look at the entire case let's say the read may be slenderer then in other cases it's still a read and I think it can support the decision to have a jury decide this case. The jury will decide it. I deny the motion.

Is there any other motion that you have at this time?

MR. ANESH: Two more small issues, Your Honor.

THE COURT: Yeah. Go ahead.

MR. ANESH: One of them I think is pretty

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JANET YIJUAN FOU, Plaintiff v. KEVIN KERVENG TUNG, P.C. and KEVIN TUNG, ESQ. Defendants,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-6259-12 CIVIL ACTION ORDER

THIS MATTER, having been brought before the Court by Lewis, Brisbois, Bisgaard & Smith, LLP, counsel for Defendants, Kevin Kerveng Tung, P.C., and Kevin Tung, Esq. ("Defendants"), and the Court having considered the papers submitted, argument of counsel, if any, and for other good cause shown,

IT IS on this 25th day of June 2018,

ORDERED that judgment is hereby entered in favor of Defendants, and against Plaintiff, notwithstanding the verdict, because Plaintiff failed xxxx xxxx Defendants proximately caused her any damages;

ALTERNATIVELY ORDERED that Defendants xxxx for a new trial is hereby granted;

ORDERED that an executed copy of this Order shall be served upon all parties within seven (7) days of the date hereof.

Opposed____ Unopposed_____

FOR REASONS STATED IN THE JUNE 25th, 2018 LETTER OPINION, APPENDED HERETO.

SUPERIOR COURT OF NEW JERSEY

CHAMBER OF
PHILLIP LEWIS PALEY
JUDGE

MIDDLESEX COUNTY COURT HOUSE
PO. BOX xxx
NEW xxxx, NEW JERSEY, xxxx

June 25, 2018

James A. Plaisted, Esquire
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Re: Fou v. Tung
Docket No: MID-L-6259-12

Dear counsel:

This was a legal negligence case. Janet Fou, plaintiff, charged her former attorney, Kerveng Tung, Esquire, with negligence in representing her in her divorce. A jury was selected on April 16, 2018; on April 25, 2018, it returned a verdict in favor of Mrs. Fou, awarding her $500,000 in damages.

Mr. Tung now moves for judgment

notwithstanding the verdict ("n.o.v.") [R. 4:40-2(b)]; alternatively, he seeks a new trial [R. 4:49-1],

MR. TUNG'S MOTION: Mrs. Fou did not prove that Mr. Tung proximately caused her financial harm. Mrs. Fou had to prove that Mr. Tung was negligent in preparing the property settlement agreement (in English) which was incorporated within the divorce judgment. She also had to prove both the quantum of the marital estate as of February 15, 2009, when she first met with Mr. Tung (with Mr. Fou), and which specific assets were dissipated or transferred by Mr. Fou thereafter, until September 12, 2012, when his assets were frozen. Mrs. Fou did not prove her case.

Mrs. Fou moved into evidence a draft will of Mr. Fou, which she found on his computer after her divorce. The values derived from the draft will were accepted by the court and reflected in the amended final judgment of divorce ("amended judgment"). Mrs. Fou had discovered certain "decoded" financial documents which also were deemed evidential in this trial; those documents referred to assets in existence before February 15, 2009. The draft will had no probative value. Reasonable minds could not accept it as adequate evidence to support the Jury verdict *Kulbacki v. Sobchinsky*, 38 N.J. 435, 445 (1962).

The draft will was not authenticated; no one contended that it was a valid will. The draft will showed that in 2007 the family had $2.2 million in assets. Even if true, that does not prove the quantum of the marital estate in 2009 or thereafter. That draft will does not prove what assets were removed from the estate by Mr. Fou from February, 2009, until September of 2012. Therefore, it lacked probative value. Similarly, as noted, the amended judgment was largely based on the figures reflected in the draft will. The "decoded"

documents discuss assets in Mr. Fou's businesses for years prior to February 15, 2009. These documents do not show the contents of the marital estate or which assets were dissipated by Mr. Fou. These materials are insufficient to prove proximate cause; Mr. Tung is entitled to judgment n.o.v.

At trial, Mrs. Fou testified that she showed Mr. Tung only one of four written agreements (in Chinese) between the parties: that testimony creates an intervening cause that breaks any causal connection between Mr. Tung's conduct and damages. Mrs. Fou's trial testimony contradicted her prior testimony at her divorce hearing and her position in the Appellate Division [as well as the allegations in her complaint]. Mr. Tung admitted having seen the one Chinese agreement, but testified that he was asked only to notarize the signatures of the parties to it. That agreement stated that business assets would be divided post-divorce. Arguably, had Mr. Tung seen all four of the Chinese agreements, he might have drafted a completely different English property settlement agreement.

When the Appellate Division sustained the amended judgment, it made this case academic: Mrs. Fou then received everything she had sought earlier - a division of marital assets based on the material found in Mr. Fou's computer, plus attorney's fees. That circumstance entitles Mr. Tung to judgment n.o.v.

Mrs. Fou's positions in family court, the Appellate Division, and at this trial were materially inconsistent. The award here is part of the award that she received in the amended judgment. Accordingly, she may well receive an impermissible double recovery. She presented no proof that the estate awarded her by the amended judgment is uncollectible, as she was

required to do. Therefore, she did not prove proximate cause.

The verdict is against the weight of the evidence, $500,000 is not logically connected to the evidence proffered at trial. The award ignores that Mrs. Fou has already received several hundred thousand dollars, all of which should be credited against any award here. Mrs. Fou's misrepresentation to prior courts that she showed all four Chinese agreements to Mr. Tung precludes a finding of proximate cause.

The draft will should not have been admitted. The marital estate should have included only assets within the period of February 2009 to September 2012. The jury should not have seen the opinions of Judge Weisberg (invalidating the English agreement) and the later Appellate Division opinion affirming the amended judgment.

The jury charge did not include reference to R.P.C. 1.2, which addresses limited representation. The charge did include reference to Mr. Tung's "fiduciary obligations." Mr. Zaleski, Mr. Tung's legal expert, opined that Mr. Tung effectively limited his representation in accord with R.P.C. 1.2. The jury should have been charged as to limited representation with informed consent. Rather, it measured Mr. Tung's conduct against a standard of core applicable to an ordinary divorce practitioner, rather than an attorney representing his client on an uncontested divorce only. Last, the court erred in failing to bifurcate this trial as between liability and damages when it considered Mr. Tung's motion to do so on April 17, 2018.

OPPOSITION: There was substantial evidence of proximate cause, Peter Bracuti, Esquire, and Edward O'Donnell, Esquire, matrimonial lawyers, testified as to

causation in fact and as to substantiality. Mrs. Fou was compelled to incur responsibility for nearly $400,000 in outstanding legal fees, over and above the $52,000 which she paid as an initial retainer. The value of the marital estate was proved to exceed $2.5 million before the divorce, according to Mr. Fou's financial documents and Mrs. Fou's testimony. In earlier pleadings in this matter, Mr. Tung noted that the amended judgment determined the amount of damages. That amended judgment, as affirmed by the appellate court, sets a floor for damages. There is no requirement that Mrs. Fou prove that she cannot collect money due her under the amended judgment before receiving an award here.

Mr. Tung claims that Mrs. Fou did not tell Judge Hyland, the judge who granted the divorce originally, about three of the Chinese agreements executed between husband and wife, and that that constitutes a misrepresentation. There was no reason for Mrs. Fou to disclose this information; she understood from Mr. Fou that those agreements would govern her rights. The jury may well have concluded that Mr. Tung's negligence included his failure to have inquired about any additional agreements.

The documents prepared by Mr. Fou, and especially the draft will, were properly admitted. There is no basis in law to limit proofs of the quantum of the marital estate as Mr. Tung argues. The jury had every right to review the opinions rendered by Judge Weisberg (invalidating the financial aspects of the original divorce judgment) and the Appellate Division (affirming the marital award made by Judge Rafano and reflected in the amended judgment of divorce), which were redacted to exclude any characterization of Mr. Tung's conduct made by the court. There is no challenge to the probity of any redaction.

Finally, the instructions to the jury were correct. Limited representation under R.P.C. 1.2 requires compliance with R. 5:3-5(1) (2) and *Lemer v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003) and its progeny. There was no such compliance here. The court did allow the defense to argue that Mr. Tung's representation was limited. No objection to the court's draft charge were made on this point. The charge included reference to the duty of loyalty, required of every New Jersey lawyer. There was no objection to including that duty in the charge. Mr. Tung communicated effectively and substantively only with Mr. Fou, accepted money only from Mr. Fou, and allowed Mr. Fou to direct his representation of Mrs. Fou. There was no error here, let alone plain error. See R. 1.7-2; *State v. Singleton*, 211 N.J. 157,181-82 (2012). Defendant's application for judgment n.o.v. and/or new trial must be denied.

ANALYSES: R. 4:49-1 establishes the standards for a new trial:

> A new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge.... The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.

On a motion for a new trial, the court must consider both tangible and credibility factors and the feel of the case to determine if the jury's verdict was a clear error or mistake. *See Kita v. Borough of Lindenwold*, 305 N.J.

Super. 43, 49 (App. Div. 1997). Jury verdicts should be set aside sparingly, and only in clear cases of injustice. *See Little v. KIA Motors America, Inc.*, 425 N.J. Super. 82, 92 (App. Div. 2012). Only when the verdict is so contrary to existing evidence that it was a result of mistake, passion, prejudice or partiality. *Aiello v. Myzle*, 88 N.J. Super. 187, 194 (App. Div. 1965), *cert. denied*, 45 N.J. 594 (1965). The court must consider whether reasonable minds might accept the evidence as adequate to support the jury verdict, including the credibility of witnesses, demeanor evidence, and the intangible feel of the case. *See Kulbacki v. Sobchinsky*, 38 N.J. 435, 445 (1962).

R. 4:40-2: Reservation of Decision on Motion; Motion for Judgment Notwithstanding the Verdict provides:

> "(b) Renewal of Motion. If a motion for judgment is denied and the case submitted to the jury, the motion may be renewed in accordance with the procedure prescribed by R. 4:49-1 (new trial)... A motion so renewed may include in the alternative a motion for a new trial, and every motion made by a party for a new trail shall be deemed to include, in the alternative, a renewal of any motion for judgment made by that party at the close of the evidence."

The Official Comment to R. 4:40-2 provides:

> 1. ... The standard for determining both a motion for judgment under R. 4:40-1 and a motion for judgment notwithstanding the verdict under R. 4:40-2 is the same as the

> governing the determination of a motion for involuntary dismissal under 4:37-2(b), namely, the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences which can be deduced therefrom. Thus, if reasonable minds could differ, the motion must be denied. *See Dolson v. Anastasia*, 55 N.J. 2, 5-6 (1969).

Accordingly, R. 4:40-2 mandates that a court, when determining a motion for judgment n.o.v., must afford the opposing party the benefit of all "legitimate inferences which can be deduced therefrom." *Dolson v. Anastasia*, 55 N.J. 2, 10 (1969). Therefore, if reasonable minds could differ, the motion must be denied. Prowler & Verniero, *Current N.J. Court Rules*, comment 1 to R. 4:40-2 (2013). Motions for judgment n.o.v must be denied where a question of credibility as to a material fact has been raised. *Alves v. Rosenberg*, 400 N.J. Super. 553. 566 (App. Div. 2008). Moreover, a motion for judgment n.o.v. cannot be entered unless an appropriate motion has first been made during trial Pressler & Verniero, *Current N.J. Court Rules*, comment 3 to R. 4:40-2 (2013); *see also Surkis v. Strelecki*, 114 N.J. Super. 596 (App. Div.), *certif. den.* 59 N.J. 266 (1971).

In considering an application for judgment n.o.v., the court utilizes the same standard applicable to determining whether a new trial is warranted, as articulated in R. 4:49-1 quoted above. *See Barber v. Shoprite of Englewood*, 405 N.J. Super. 32, 51-52 (App. Div.), *certif. den.* 200 N.J. 210 (2009); R. 4:49-1(a).

Here, Mr. Tung's motions for judgment n.o.v. or alternatively, for a new trial, are denied. The quantum of damages was supported by the evidence presented by Mr. Bracuti, Mr. O'Donnell, and Mrs. Fou herself. Her damages are those legal fees required to invalidate the English property settlement agreement, drafted by Mr. Tung, as well as fees necessary to pursue this claim, which pursuit was characterized by staunch resistance. She did not receive that money to which she was entitled under her divorce decree, because Mr. Fou decamped to China.

The defense asserts that Mrs. Fou made misrepresentations about the history of her litigation to Judge Weisberg, who invalidated the economic components of the divorce decree, and to Judge Rafano, the judge who awarded her the amended judgment, and to the appellate court. This court rejects the claim that Mrs. Fou's statements were sufficient to bar recovery here. Ms. Fou presented a statement in her motion to enforce litigant's rights against Joe Fou containing the following language which is claimed to constitute a misrepresentation:

> The English Agreement did not reference any of the prior "Chinese" agreements executed between myself and [Mr. Fou] 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. Moreover [Mr. Fou] assured me that the 50/50 division of the family company's assets was scheduled and would

> occur in the future. The delay in that division of assets was to enable him to continue to earn income from the family company and pay my spousal support. [Mr. Fou] assured me the essentials of our Chinese Agreement were not altered by our American divorce or the English Agreement.

The Appellate Division opinion confirms that Judge Weisberg exercised appropriate discretion in granting Mrs. Fou relief from the financial aspects of the initial divorce decree, stating: "... [i]n addition, the court pointed out the critical differences between the Chinese Agreements and the [English agreement], which showed [that] [Mr. Fou] had deceived and manipulated the divorce proceedings to [Mrs. Fou's] disadvantage." That opinion noted that Judge Weisberg had found that Mrs. Fou lacked sophistication and general understanding. Nothing in those confirmations or notations and nothing else in the appellate opinion (or that of Judge Weisberg) suggests any misrepresentation. Mrs. Fou asserts that Mr. Tung did not "mention the Chinese Agreements previously executed between myself and [Joe Fou];" that assertion does not necessarily imply that Mrs. Fou showed the agreements to Mr. Tung. There was no misrepresentation here. Mr. Tung's alleged malpractice stems, in part, from his lack of investigation or basic questioning about the existence of these Chinese agreements. Mrs. Fou's claim that Mr. Tung did not question her about the prior Chinese agreements is not tantamount to a misrepresentation.

The issue of double recovery is irrelevant. The court can certainly address that issue should an

appropriate application be made to it. No authority suggests that Mrs. Fou must show that she cannot collect on her divorce judgment before she has the right to proceed with this suit.

The evidentiary decisions here followed considerable dialogue between court and counsel. The draft will is probative of the approximate quantum of the marital estate, just as the Appellate Division concluded. The $500,000 award is certainly not inconsistent with the proofs. Evidence which affords a basis for estimating damages with some reasonable degree of certainty is sufficient to support a damages award for breach of contract "Proof of damages need not be done with exactitude... It is ... sufficient that the plaintiff provide damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate." *Lane v. Oil Delivery*, 216 N.J. Super. 413, 420 (App. Div. 1987); *see also Tessmar v. Grosner*, 23 N.J. 193 (1957). The evidence must support a basis for estimating damage with some degree of certainty. *See Apex Metal Stamping Co. v. Alexander & Sawyer, Inc.*, 48 N.J. Super. 476 (A.D. 1958). Damages need not be computed with mathematical precision, but damages must be more than mere conjecture or speculation.

As to the written opinions of Judge Weisberg and the Appellate Division, the court endeavored to redact those opinions to avoid prejudice to Mr. Tung. It excluded language which characterized Mr. Tung's conduct negatively, as defense counsel asked. Nothing about the redactions is challenged as being prejudicial.

The court has no recollection of any application by counsel to incorporate R.P.C. 1.2 into the charge; in any event, as counsel for Mrs. Fou points out, Mr. Tung

bad not complied with R. 5:3-5(1)(2), which sets standards for limited representation. The jury heard that Mr. Tung received only a retainer of $1,000, paid by Mr. Fou, Mr. Tung himself testified to the limited nature of his representation, asking rhetorically, as the court recalls, how much time he should have to devote to Mrs. Fou's representation, considering that his retainer was as modest as it was.

The fiduciary obligation jury instruction was appropriate.

As to bifurcation, the court rejects the notion that a legal malpractice case requires bifurcation; liability and damage issues in this case are inextricably intertwined. Mr. Tung had originally demanded a jury; he waived that demand approximately six months ago. Thereafter, he decided that he wanted a jury trial. The court allowed him to have a jury trial.

Mr. Tung's motions for judgment notwithstanding the verdict, or alternatively, for a new trial, are denied. The court greatly appreciates the high quality of the argument of all counsel.

Very truly yours,

PHILLIP LEWIS PALEY, J.S.C.

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JANET YIJUAN FOU, Plaintiff v. KEVIN KERVENG TUNG, P.C. and KEVIN TUNG, ESQ. Defendants,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-6259-12 Civil Action FINAL JUDGMENT

THIS MATTER, having commenced trial on April 16, 2018 before the Honorable Phillip L. Paley, J.S.C. and a jury; James A. Plaisted, Esq. and Michael J. Zoller, Esq. appearing on behalf of plaintiff, Janet Yijuan Fou, and Mark K. Anesh, Esq. and Kurt H. Dzugsy, Esq. appearing on behalf of defendants Kevin Tung, Esq., and the law firm Kevin Kerveng Tung P.C.; and the jury having returned its verdict on April 25,

2018;

IT IS on this _____ of January 2019;

ORDERED that with the jury having found that: (1) Plaintiff proved by a preponderance of the evidence that defendants deviated from accepted standards of legal care while they represented her; (2) Plaintiff proved by a preponderance of the evidence that the deviation from accepted standards of legal care was a proximate cause of harm or loss to her; and (3) Plaintiff proved by a preponderance of the evidence that the deviation from adopted standards of legal care was a proximate cause of loss or harm to her; a final judgment in the amount of $1,547,063.31 is hereby entered in favor of plaintiff and against defendants jointly and severally calculated as follows:

1. $500,000.00 - Damages Awarded by the Jury;
2. $65,250.00 - Prejudgment interest on the jury verdict calculated in accordance with R. 4.42-11;
3. $702,000.00 - Awarded for fees and costs pursuant to the Court's January 3, 2019 opinion;
4. $279,813.31 - Prejudgment interest on the award for fees and costs calculated in accordance with the Court's January 3, 2019 opinion.

IT IS FURTHER ORDERED that Plaintiff is entitled to post judgment interest on the amount of $1,547,063.31 pursuant to R. 4:42-11(a)(iii) from the date this Judgement is entered until the date the Judgment is fully satisfied;

IT IS FURTHER ORDERED this Final Judgment shall replace the Interim Judgment that was entered by the Court on May 10, 2018; and

IT IS FURTHER ORDERED that a copy of this Final Judgment shall be served upon all parties within seven (7) days of its date of entry.

_____

Honorable Phillip L. Paley. J.S.C.

___ Unopposed
___Opposed

Phillip Lewis Paley, J.S.C.
New Jersey Superior Court
56 Paterson Street
New Brunswick, New Jersey 08901

JANET YIJUAN FOU, Plaintiff v. KEVIN KERVENG TUNG, P.C. and KEVIN TUNG, ESQ. Defendants,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-6259-12 Civil Action **ORDER**

THIS MATTER, having been opened to the Court by Defendants, Kevin Tung, Esq. and the law firm Kevin Kerveng Tung P.C., represented by Mark Anesh, Esquire, and James Strauss, Esquire, of Lewis Brisbois Bisgaard & Smith, LLP, against Janet Yijuan, Fou, represented by James Plaisted, Esquire, of Pashman Stein Walder Hayden, P.C., and the Court having considered the papers submitted in support thereof and oral argument, and for good cause shown:

IT IS on this 22nd of May, 2019:

ORDERED that Defendants' motion for reconsideration is **DENIED;** and it is further

ORDERED that Defendant's motion to show cause seeking a stay of the judgment pursuant to R. 2:9-5(a) is **DENIED;** and it is further

OREDERED that Plaintiff's Cross-Motion to

compel post-judgment discovery is **GRANTED;** and it is further

ORDERED that Defendants Kevin Tung and Kevin Kerveng Tung, P.C. shall each provide answers to the information subpoenas by June 15th, 2019 to James Plaisted; and it is further

ORDERED that Defendant Kevin Tung shall appear for a deposition by July 4th, 2019.

_____

Honorable Phillip L. Paley. J.S.C.

___ Unopposed
___Opposed

SUPERIOR COURT OF NEW JERSEY

CHAMBER OF
PHILLIP LEWIS PALEY
JUDGE

MIDDLESEX COUNTY COURT HOUSE
PO. BOX xxx
NEW xxxx, NEW JERSEY, xxxx

June 25, 2018

James A. Plaisted, Esquire
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Roseland, NJ 0768

James Strauss, Esquire
77 Water Street, Suite 2100
New York, NY 1005

Mark Anesh, Esquire
77 Water Street, Suite 2100
New York, NY 1005

RE: Fou v. Tung
Docket No. MID-L-6259-12

Dear counsel:

Janet Fou, plaintiff, a prevailing party, seeks legal fees following a jury verdict in to favor, against defendant Kevin Kerveng Tung, Esquire, her divorce lawyer, for his negligent representation of her.

FACTUAL BACKGROUND: Mr. Tung represented Mrs. Fou in her divorce from to husband, Joseph Fou,

to whom she had been married nearly 35 years. Mr. and Mrs. Fou had agreed informally to divide marital assets equally. They had prepared three agreements in Mandarin, their first language, reflecting their understanding as to support and the division of marital property, before Mr. Tung was retained. The Mandarin agreements provided for Mr. Fou to pay alimony and required him to pay approximately $1.1 million by way of property distribution. Thereafter, Mr. Fou asked Mr. Tung to represent Mrs. Fou in an uncontested divorce. The testimony it trial was that Mr. Thug was told only about one of the three agreements.

Mr. Tung prepared an agreement in English purporting to reflect what he understood to be the agreed-on division of support and property issues. That English agreement contained terms substantially different from the Mandarin agreements. The jury at the malpractice trial heard testimony that Mr. Fou hired Mr. Tung; that Mr. Fou directed Mr. Tung to follow his instructions; that Mrs. Fou met with Mr. Tung only briefly, only once without Mr. Fou being present. The parties were divorced, subject to the terms of the English agreement prepared by Mr. Tung, Years later, as will be seen, that English agreement was invalidated by Barry Weisberg, J.S.C.

In August, 2011, James Plaisted, Esquire, agreed to represent Mrs. Fou in her effort to set aside the English agreement. Mr. Plaisted had Mrs. Fou sign a retainer agreement requiring $20,000 as a retainer. Later, Mrs. Fou signed a second agreement, in which the legal fee was to be one-third fee of monies collected. That second arrangement was modified to a 50-50 split for the first $500,000. Mrs. Fou has paid $52,000 to Mr. Plaisted; she has no ability to make further payments.

In December, 2014, Christopher Rafano, J.S.C., was considering the effect of Judge Weisberg's invalidation of the English agreement. Judge Rafano later entered judgment awarding Mrs. Fou $1.1 million, consistent with the Mandarin agreements. Judge Rafano awarded Mrs. Fou nearly $230,000 in legal fees at that time. He had previously awarded her approximately $85,000 in fees additionally.

Mr. Fou appealed; the Appellate Division affirmed Judge Rafano's decision. Thereafter, this malpractice trial took place. Before that trial occurred, however, Mr. Fou decamped to China, his native country. He has paid virtually nothing - no alimony, no property distribution, no legal flaw - to Mrs. Fou for years. She receives only a portion of Mr. Fou's social security benefits.

The jury in the malpractice care awarded Mrs. Fou $500,000. It found that Mr. Tung had breached his duly of loyally to Mrs. Fou. The Jury clearly understood, as Mrs. Fou testified, that she had never told Mr. Tung about two of the three Mandarin agreements. Mr. Tung testified repeatedly and volubly that he had been retained to represent Mrs. Fou only in an uncontested divorce, for which Mr. Fou paid $1,000. The jury heard expert testimony that Mr. Tung's conduct in representing Mrs. Fou did not conform to the relevant standard of care; a defense presented an expert who testified to the converse.

The staunch resistance to Mrs. Fou's efforts to collect on the judgment entered by Judge Rafano unnecessarily prolonged the litigation, exponentially increasing Mrs. Fou's counsel fees. As noted, Mr. Fou appealed Judge Weisberg's order invalidating the English agreement, as well as Judge Rafano's judgment; the appeals were pending when Mr. Fou fled.

Mrs. Fou has heard little from Mr. Fou. Mr. Plaisted's papers indicate that Mr. Fou recently suggested to Mrs. Fou that she terminate the malpractice case, in light of the possibility of a malicious prosecution claim brought by Mr. Tung. Meanwhile, Mr. Fou has paid nothing.

This history produced litigation fairly described as "scorched earth". The defense attorneys for the malpractice trial were provided by Mr. Tung's malpractice insurer and represented him assiduously, in accordance with the highest professional standards. Mr. Plaisted asserts that his firm's professional staff spent 2,039.24 hours of billed time on the matter. He seeks legal fees of $1,041,076 plus costs, a 50% enhancement thereof, and prejudgment interest, based on common law and R. 4:58.

Defendants do not dispute that Mr. Plaisted is entitled to some fee, but oppose his application on several grounds: (1) the fee award must be limited to the contingency agreement rate, 50% of the $500,000 judgment; (2) the award should not be enhanced; (3) Mr. Plaisted's hours are exaggerated and his hourly rate excessive; his descriptions of week performed are insufficient, reflect unreasonable amounts of time for tasks performed, and show double-billing.

The defense also objects to the request for fees pursuant to R. 4:58, because Mr. Plaisted addressed that issue to a reply brief only. It relies on *Alpert, Goldberg v. Quinn*, 410 N.J. Super. 510 (App. Div. 2009), which states, in a footnote: "Technically, a new issue cannot be raised in a reply brief." Describing the Alpert briefs as "prolix and verbose", the Appellate Division, there considered all the issues raised by counsel, because of the importance of the underlying controversy. *Alpert* cited as authority for that footnote

N.J. Citizens Underwriting Reciprocal Exchange v. Kieran Collins, D.D., LLC., 399 N.J. Super. 40, 50 (App. Div), certif. den. 196 N.J. 344 (2008). There, the Appellate Division did not consider an issue raised for the first time in a reply brief, noting that the brief did not have a separate point heading for that issue and addressed the constitutionality of a statute without proper notice given. This is not firm authority for the defense's position.

This court rejects the argument of defense counsel and will consider the applicability of R. 4:58 substantively.

ANALYSIS: COMMON LAW AUTHORITY: A negligent attorney is responsible for paying "fees incurred" by the former client in prosecuting a malpractice claim *Saffer v. Willoughby*, 143 N.J. 255, 272 (1996)."... [A] client should be able to recover for losses proximately recused by the attorney's improper performance of legal services. That policy is intended to same that the client is placed in as good a position as if the attorney had performed properly." *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 443 (2001). "A plaintiff who is economically injured fay an attorney's legal deficiency should he made whole ... [T]he concept of 'wholeness' includes the attorney's fees and costs to pursue the 305 N.J. Super. 1, 20 (App, Div. 1997). *See also Innes v. Marzano-Lesnovich*, 224 N.J. 584, 592-593 (2016). *Saffer* is binding authority.

LODESTAR: Determining a reasonable fee requires tbs establishment of a "lodestar" [hours reasonably expended multiplied by a reasonable hourly rate], subject to certain adjustments. *Rendine v. Punter*, 141 N.J. 292, 334 (1995). The determination of a reasonable

fee here parallels the method employed in other fee-shifting scenarios, including those based on statute. First, Mrs. Fou must be a prevailing party. She is, having received a jury award of $500,000.

Second, Mrs. Fou has the burden of establishing a reasonable fee, *Blakov v. Continental Airlines*, 2 F. Supp. 2d 598, 603 (D.N.J. 1998). The "lodestar" used to establish this fee is derived through analysis, not merely through multiplication. A trial court must not blithely or passively accept counsel's submissions as to time expended; rather, it is expected to analyze to submissions carefully. Time actually spent is not necessarily time reasonably spent.

A reasonable hourly rate must be calculated according to prevailing market rates. The court must assess the experience and skill of the prevailing party's attorneys and compare counsel's rates to the rates prevailing in the community far similar services by lawyers of reasonably comparable skill, experience, and reputation, *Rendine*, at 337; *R.M. v. Supreme Court of New Jersey*, 190 N.J. 1, 10 (2007). The trial court may reduce hours for non-productive time and expenses that appear excessive, redundant or otherwise unnecessary. *Rendine* at 335. The court may, in its discretion, deduct hours inadequately documented. *Blakey*, at 604-605. In determining a reasonable fee, the court must assess the experience and skill of the prevailing party's counsel and compare rates sought to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Rendine*, at 337; R.M., at 10.

An award of attorneys' fees, even if a fee is determined by contract, is subject to the Court's review as to reasonableness. *Belfer v. Merling*, 322 N.J. Super. 124, 141 (App. Div. 1999), certif. denied, 162 N.J. 196

(1999). *See also Pressler & Verniero*, N.J. Court Rules, Comment 4:42-9[2.10] (2011) ("[W]here the agreement to pay counsel fees states a specific or easily ascertainable sum, the court is not bound thereby, but must make its own determination, upon appropriate proofs, of the amount to be allowed").

While Mrs. Fou did not win everything she claimed [punitive damages, for example], the "...failure of certain motions...is insufficient to warrant a fee reduction," *Rode v. Dellarciprete*, 892 F. 2d 117 (1990). *Kluczyk v. Tropicana Products*, 368 N.J. Super. 479, 499 (App. Div. 2004), requires a trial court to analyze whether unsuccessful arguments arose from a core of fact common to both successful and unsuccessful claims. One cannot argue that, because there was no finding for plaintiff on (say) one of three theories of recovery, a fee application must be reduced by one-third. Just as with the model charge given to juries on how to calculate damages for personal injuries, the law provides no formula, no schedule, no table, no chart, no calculation, and no specification on the issue. It is a matter of judgment. In this court's judgment, Mrs. Fou prevailed on the bulk of her claims. There will be no reduction, for theories proved unsuccessful. This is consistent with *Blakev*, at 607: "hours may be reasonably expended on a reasonable strategy that simply does not succeed...."

A fee award must conform to R.P.C. 1.5, providing:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.

The ultimate end is to award a reasonable fee. *Furat v. Einstein Moomjy Inc.*, 182 N.J. I (2004), not s "perfect" or an "ideal" fee, and is almost certainly not a "requested" fee. Reviewing each of the RFC 1.5 factors, this court, with nearly sixteen years of experience in the Civil Part, having handled numerous fee applications, concludes:

1. Time and Labor, Novelty and Difficulty, and Skill Renquired: Mr. Fou's singular attempts to avoid justice by obtaining a rapid divorce, refusing to meet his obligations to Mrs. Fou, transferring real estate in North Carolina from his name to that of a third party, and decamping to China males this case novel. Of course, a high level of skill is required to articulate and to litigate any professional malpractice claim successfully. Counsel for Mr. Tung at all times presented a staunch defense. Defense counsel

appearing before this court, particularly Mr. Anesh, a highly skilled and principled attorney, whose intellectual acuity is remarkable, represented Mr. Tung assiduously and ethically. The quality and vigor of opposing counsel is relevant in evaluating the quality of services rendered. *In re Lucent Tech. Sec. Litigation*, 327 F.Supp. 2d 426, 437 (D.N.J. 2004). See *Incollingo v. Canuao*, 297 N.J. Super. 57(App. Div. 1997).

2. Preclusion From Other Work: The extensive time spent an this matter required Mr. Plaisted and his affiliates to forego other work. Time needed for proper representation of Mrs. Fou was inordinate because of Mr. Fou's conduct, particularly in pre-trial activities, although the trial itself was not unusually lengthy; malpractice cases regularly consume seven (or so) days as happened here.

3. Fee Customarily Charged: Mr. Plaisted's offices are in New Jersey; therefore, current hourly rates for New Jersey apply. *In re Trust of Brown*, 213 N.J. Super. 489 (Law Div. 1986), holds that the location of one's law office is the appropriate location for assessing the reasonableness of hourly rates. Mr. Plaisted has presented affidavits of two attorneys [Mr. Mullin and Ms. Smith] as to the reasonableness of his fees.

Rendine does not require a minute analysis of which precise activity occurred in each respective hour of legal representation [at 337]. The submissions here are sufficient under *Rendine*. See *R.M. and Tanksley v. Cook*, 360 N.J. Super. 63 (App. Div. 2003).

4. Amount of Time Involved and Results Obtained: Mr. Plaisted obtained a substantial Judgment in Mrs. Fou's favor. The amount of time involved and the

reasonableness of that time are the core of this application and will be addressed in detail later.

5. Time Limitations Imposed by Clients/Circumstances: Inapplicable.

6. Nature/Length of Relationship with the Client: Inapplicable.

7. Experience/Reputation/Ability of plaintiff's counsel: Mr. Plaisted and his firm, Pashman Stein, Walder, and Hayden, enjoy the highest reputation. Several partners of that firm [Mr. Walder and Mr. Hayden, among others], and Melvyn Bergatein, Esquire, a former partner in a predecessor firm, have appeared before this court, as have several associates. All those attorneys are skilled, ethical advocates. Those practitioners, Ms. Smith and Mr. Mullin, attesting to Mr. Plaisted's reputation in the professional community and the reasonableness of his rates are known to, nod respected by, this court Mr. Plaisted is a forceful, well-prepared advocate.

8. Whether Fee was Fixed or Contingent: the fee arrangement transmogrifled into the contingent fee described earlier.

Mr. Plaisted's submissions meet fee requirements of R.P.C. 1.5. They include a recitation of other factors pertinent to the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. See R. 4:42-9 (b) and (c).

NON-STATUTORY AUTHORITY FOR FEE-SHIFTING: The defense here argues that, as

malpractice is based on common law, not statute, fee-shifting is not authorized. This position is unavailing. See *Litton Industries, Inc. v. IMO Industries. Inc.*, 200 N.J. 372 (2009), involving a fee awarded pursuant to a contract.

In *Litton*, fee Court considered the issue of counsel fees arising out of a claimed breach of a $52 million contract. A jury trial produced a verdict of $2.1 million dollars for plaintiff. The contract at issue contained an indemnification clause which included attorney's fees. A Special Master (former New Jersey Supreme Court Justice Stewart Pollock) concluded that, because one of these claims proved unsuccessful, the legal fee award should be reduced proportionally. The trial court accepted that general concept but disagreed wife the specific proportion. On appeal, the Appellate Division agreed with the trial court. In reaching its conclusions, the appellate court relied on "traditional" fee-shifting cases. See *Rendine: Furst;* R.P.C. 1.5(a). *Litton*, therefore, allows fee-shifting based on non-statutory authority.

RATES: *Chin v. Dalmier Chrysler Corp.*, 520 F.Supp. 2d 589 (D.N.J. 2007), rev'd on other grounds, 538 F. 3d 272 (3d Cir. 2008), set as reasonable hourly rates between $330 and $525 per hour for partners in a New Jersey firm ten to twelve years ago, before the recession of 2008-2009 and the subsequent economic recovery. The court holds that a reasonable hourly rate for Mr. Plaisted is $500 per hour and will approve the lesser rates for his associates requested. In light of this ruling, this court used not address the defense view that current rates must not apply to legal services rendered years ago, at lower hourly rates.

LIMITATION OF FEES BASED ON RETAINER: Here, defense counsel argue that any award of legal fees must be limited by the contingent fee agreed to. *Readine* itself featured a contingent retainer agreement. Despite that, *Rendine* held that the first step in the process is to determine the lodestar. Mr. Plaisted provided sufficient information to do this.

Further, the defense argument ignores the substantial risk of non-payment taken by counsel who agree to represent a client on a contingency basis, which was the *raison d'etre* for the *Rendine* paradigm. A reasonable fee is not limited by contingency agreement.

TIME: AS the defense emphasizes, a fee application must specifically describe the work performed. See, e.g., *Giarusso v. Giarusso*, 455 N.J. Super 42, 51 (App. Div. 2018). Additionally, "in evaluating a claim for attorney's' fees the court considers the reasonableness of the time billed by the attorney, since a party is not entitled to counsel fees for excessive and unnecessary hours." *Heyert v. Taddese*, 431 N.J. Super. 388, 444 (App. Div. 2013).

In *Walker v. Giuffre*, 209 N.J. 124 (2012) our Supreme Court described the determination of a reasonable time as "daunting." There, the Court reviewed time spent on obtaining summary judgment and appealing to both the Appellate Division and the Supreme Court. The Court insisted that the review of time records be done with care; this court has endeavored to comply with that standard. The issue here is complex and similarly daunting.

From 1995, our Supreme Court has made clear lint "...[t]he use of contemporaneously recorded time records is the preferred practice to verify hours

expended by counsel in connection with a counsel-fee application," *Szczepanski v. Newcomb Medical Center*, 141 N.J. 346, 367 (1995). That Court noted, however, that "fee applications for services rendered... may be supported by reconstructed time records"; "[w]e will not preclude an award of counsel fees based on reconstructed time records; however, the...court...will scrutinize with meticulous care counsel's calculation of hours expended to verify the reasonableness of the hours reflected by the reconstructed records. The trial court should exercise its discretion to exclude from the lodestar calculation hours for which counsel's documentary support is marginal," *Id.*, at 367.

The first part of the specific defense objections addresses the inadequacy of the description of the work performed. As noted above, *Rendine* does not require a minute analysis of which precise activity occurred to each respective hour of legal representation [at 337]. Yet, some of the descriptions are general. These hours, referred to by citing the relevant page of the defense brief will be reduced as follows:

Page 22: 2011: September 2: 1.0; 5: 1.0; 6: 0.5; 12: 0.5; 14: 0.5; 21: 2.0; 30: 2.5. Total Reductions: 8.0 hours.

Page 23: 2011-2012: for October 11: 1.0; 12: 0.5; 12: 0.5; January 18, 2012: 0.5; 31: .20; March 22: 1.0; May 25: 1.0; September 13: .50. Total Reductions: 5.2 hours.

Page 24: 2012: September 14: .50; October 22: 1.0 [here, a partner is doing legal research at a higher rate than an associate]; 23: .60; October 25: .50; November 26: .60; 27: 0.3; 28: 1.0 [same issue as to legal research]; December 3: .30. Total Reductions: 4.8 hours.

Page 25: 2013: March 18: 0.4; 20: 0.4. Total Reductions: 0.8 hours.

Page 26: The court notes several discussions between employees PGB and LAS. There is no reason

why the defense should he required to compensate intra- office conferences, even if only one attorney is billing for that time. The billing of the associates here will be reduced by 2.5 hours.

Page 27: 2014: February 7: 1.5 hours; February 11: 1.0 hours; April 1: .20 hours; April 11: .60 hours; May 2: .40 hours; 5: .20 hours. Total Reductions: 3.9 hours.

Page 28: 2014: May 8: .30 hours; 13: .50; 16; .30; 23: 1.5; June 2: 1.0; June 3: .80 hours. Total Reductions: 4.40 hours.

Page 29: 2014: June 5: 2.4 hours; 10: .50; 11: .60; 30: .20. Total Reductions: 3.50 hours.

Page 30: 2014: July 14: 20 hours; 16: 20; 28: .40; August 14: 20; 15: .30; 21: .80. Total Reductions: 2.10 hours.

Page 31: 2014: August 22: 2.5 hours; 24: .50; 25: .50; 26: 1.00; 28: .90. Total Reductions: 5.40 hours.

Page 32: 2014: September 9: 1.5 hours; 11: .20; 12: 20; 16: 1.0; 17: .80; 23: 20; 24: .30. Total Reductions: 4.20 hours.

Page 33: 2014: September 26: 1.0 hours; 29: .60; 30: 1.1; October 1: .60; 3: .40; 6: .60. Total Reductions: 4.30 hours.

Page 34; 2014: October 7: 20 hours; 9: .70 (again, legal research by a partner); 15:[Memoranda - .80; legal research- .60]; 16: 1.40. Total Reductions: 3.70 hours.

Page 35: 2014: November 8: .20 hours [legal research by a partner]. Total Reductions: .20 hours.

Page 36: 2014: November 20: 2.4 hours; 21: .50; 29: .30 [research by a partner]; December 2: 1.50 hours. Total Reductions: 4.70 hours.

Page 37: 2014 - 2015: December 22: .20 hours; October 28, 2015: 40; October 29: .20. Total Reductions: .80 hours.

Page 38: 2015 - 2017: October 30: .40 hours; June

12, 2017: .70 hours. Total Reductions: 1.10 hours.

Page 39: 2017: July20: .80 hours. Total Reductions: .80 hours.

These reductions aggregate 58.9 hours for Mr. Plaisted's time and 2.5 hours for associates' time.

Defense counsel also object to 11 other specific charges [see pp. 40-41 of the defense brief]. To this court, however, 12 minutes spent analyzing correspondence from a court is hardly inappropriate; a court notice must be placed in context with prior correspondence. 1.5 hours to review a pleading is hardly excessive or unreasonable.

The following charges require adjustment: November 6, 2014: setting up a meeting with client - reduced by .40 hours. October 20, 2017 - reduced by .40 hours. January 19, 2018 - reduced by .50 hours. January 25, 2018 - reduced by 1.0 hours. Total reductions for this category: 2.3 hours.

Defense counsel further object to other charges:

July 9, 2014: the court finds nothing objectionable in having an associate review billing records in the matrimonial matter for the brief time reflected.

August 25, 2007: Bringing an associate "up to speed" might be considered double billing. Two entries for that date are reduced by 5.0 hours.

September 11, 2017: this entry includes reviewing the file and preparing documents for filing with the court and is reduced by 1.7 hours.

The aggregate reductions for these charges are 6.7 hours.

Mr. Plaisted's billings total 1,209.64 hours. The reductions detailed above include 62.5 hours of his time. The net equals 1147.14. When multiplied by an hourly legal fee of $500, the total award for Mr. Plaisted is

$573,570.

Mr. Bergstein's billings total 65 hours; at $500 per hour, that equals $32,500.

Mr. Bracuti's billings total 151.6 hours; at $350 per hour, that equals $53,060.

Mr. Grossman's billings are 135.40 hours. The billing rat for Mr. Grossman is $350 per hour, the aggregate for his time is $47,390.

Mr. Hu's billings total 85.8 hours. He provided translation advice and advice regarding execution efforts in China. His hourly rate is established at $400; the aggregate for his time is $34,320.

Mr. Zoller's billings are 296.20 hours. His billing rate is $350 per hour. The aggregate for his time is $103,670.

Mr. Spies' billings are 13.6 hours. His billing rate is $350 per hour. The aggregate for his time is $4,760.

The court will award nothing for Ms. Corlett's minimal time.

This totals $849,270. From this must be subtracted 7.9 hours for associates' time addressed in the objections of defense counsel above. 7.9 hours multiplied by $350 equals $2,765, which, when subtracted from $849,270, leaves $846,505 [rounded off to $845,000]. That is the unadjusted lodestar.

OFFER FOR JUDGMENT RULE: On May 13, 2014, Mrs. Fou filed an Offer for Judgment [per R. 4:58-1] for $400,000. As to this, R. 4:58-1(a) states:

> ... any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judment in the offeror's favor, ...

> for a sum stated therein, (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.

Rule 4:58-2(a) sets forth the consequences of rejecting an Offer:

> [i]f the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prefudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred Mowing non-acceptance; (2) prefudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prefudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the nonacceptance.

While "[a] party who is awarded counsel fees, costs, or interests as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to cover duplicative fees, costs, or interests under this rule" [R. 4:58-6], that does not mean that a successful party cannot collect fees that are not duplicative. See *Best v.*

C&M Door Controls, 200 N.J; 348 (2009) (an Offer of Judgment triggers a recovery for the prevailing party who achieved a recovery higher than the offer, even in statutory fee-shifting cases.); *see also, Patock Const. Co. v. GVK Enterprises, LLC*, 372 N.J. Super, 380, 391 (App. Div. 2004), certif. den. 182 N.J. 629 (2005) (the court properly awarded fees pursuant to the construction lien law and pursuant to R. 4:58, provided the aggregate amount of attorney's fees awarded did not exceed the total amount claimed in fee certification of services.); *see also, Feliciano v. Faldetta*, 434 N.J. Super. 543, 548 (App. Div. 2014) ("attorneys are entitled to the fee awarded pursuant to Rule 4:58-2 for the work done after the offer of judgement was rejected and fair compensation from their client for the period prior to that.").

The jury verdict for $500,000 is more than 120% of $400,000. Plaintiff is entitled to relief under R. 4:58-1 et seq. As noted, the court rejects the defense argument that the omission of the legal argument on this subject in plaintiff's brief constitutes an abandonment of the issue.

PARAPROFESSIONAL TIME: R.4:49-2(b) provides:

> If the court is requested to consider the rendition of paraprofessional services in making a fee allowance; the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorney's

> services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client.

Here, Mr. Plaisted seeks 164.7 hours of paralegal time. In 2009, in a Middlesex County matter, a highly respected trial judge, Ann McCormick, J.S.C., now retired, held that $200 per hour was reasonable for paralegal work *xxxx v. Wal-Mart* (Docket No. MID-L-5498-02]. The court will award 150 hours of paralegal time at $250 per hour, or $37,500.

PROPORTIONALITY: The lodestar established above is $845,000. $37,500 additional was awarded for paralegal services, for an aggregate of $882,500. The jury verdict in this case is $500,000. Is this fairly proportional?

The *Rendine* paradigm does not require proportionality between damages recovered and attorney's fees awarded. There are important social reasons for that. Often, a plaintiff's recovery is nominal but that recovery may very well support the public interest strongly. That proportionality is not required does not mean that proportionality cannot be a factor in fee awards.

The Supreme Court stated in *Litton*:

> Beyond the lodestar amount, in cases in which the fee requested for exceeds the damages recovered. "The trial Court should consider the damage sought and the damages actually recovered". [citation omitted] ...In addition, to that preportionality analysis, the Court must

> evaluate the reasonableness of the total fee requested as compared to this amount of the jury award. That is, when the amount actually recovered is less than the attorney and fee requests, the Court must consider the fact in determining the overall reasonableness of the attorney's award... at 388.

The Court then noted that the *Litton* trial court had not considered "...the large distance between fee attorney's fee requested and the amount actually recovered." (at 389). The Court held: "The trial court should have separately considered whether to reduce even more that amount of the fee in light of the fee requests that exceeded the amount of the recovery." As noted earlier, *Litton* did not involve a statutory fee allowance, although the authority on which it is based is statutory.

Litton holds feat the analysis is necessarily fact-sensitive; there is no precise test or mathematical calculation for an adjustment. *Id.*, at 389. Clearly, New Jersey fee-shifting statutes address public policies of fee-highest importance. Counsel should not be deterred from representing litigants in cases where the prospective recovery is limited. In *Szczepsnski* the Court asserted: "The trial court's responsibility to review carefully the lodestar fee request is heightened in cases in which the fee requested is disproportionate to the damages recovered." At 366.

Here, the court fully recognizes the significant risks of nonpayment to Mr. Plaisted, and, as noted, the staunch nature of fee defenses interposed, de jure and de facto. Based on the authority cited, this court will adjust the lodestar to $650,000, plus paralegal expenses,

plus costs. Those charges constitute 140.5% of the jury verdict, without consideration of interest.

ENHANCEMENT: The remedy of enhancement arose out of a desire to compensate a prevailing party for substantial difficulty in finding counsel in the relevant market. *Rendine* itself cites an opinion by Judge [later Supreme Court Justice] Sarah Day O'Connor in the 9th Circuit, noting that plaintiffs had consulted with numerous attorneys unsuccessfully. *See Fadhy v. City & County of San Francisco*, 859 F. 2d 649 (9th Cir. 1988).

Rendine, however, notes that: "proof by a plaintiff of difficulty in hiring an attorney is not and should not be a prerequisite to a contingency enhancement." *Id.* at 341 (emphasis added). A prerequisite is different from a factor. There is no showing here that plaintiff had difficulty in obtaining counsel.

Mr. Plaisted seeks an enhancement of 50%, emphasizing the risk of non-payment, which remains high.

The concept of enhancement is intended to "reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Rendine* at 337. That decision held that the enhancement "ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id.* at 343. In determining and calculating an enhancement amount, trial courts are directed to consider "the result achieved, the risks involved, and his relative likelihood of success in the undertaking." *Furst.* A factor to consider when

deciding to enhance the lodestar is whether "the result achieved...is significant and of broad public interest." *Rendine* at 341.

Enhancement can be increased where the result achieved is significant, with broad public interest, or decreased where the likelihood of success is unusually strong. *Id.* at 340-41.

In re Prudential Ins. Co. of America Sales Practices Litig., 148 F. 3d 283, 341 (3d Cir. 1998), establishes a broad range of multipliers. Despite the range reflected in *Rendine*, other New Jersey courts have granted enhancements higher than 45%, some even exceeding 100%. See e.g., *Corbo v. Ford of Englewood*, 2006 WL 177586, *24 (Law Div. Jan. 26, 2006) (98% enhancement); *Wilson v. Antonation*, Docket No. MID-L-1319-04 (Law Div.) (210%) (a consumer protection case); *Romano v. Davion Auto Center*, Docket No. MID-L-5716-02 (Law Div.) (250% enhancement).

Notwithstanding, *Grubbs v. Knoll*, 376 N.J. Super. 420 (App. Div. 2005), a case cited by Mr. Plaisted on page 8 of his brief for another point, is binding on this court. *Grubbs*, clearly recognizing the limits of the authority of the Appellate Division regarding enhancement, examined the purpose behind *Rendine* and stated:

> The fee shifting provisions of statutes such as the LAD and the CFA express a legislative intent to encourage private plaintiffs to vindicate statutorily created rights and enable them to retain competent counsel in doing so...In contrast, *Saffer*'s judicially created fee-shifting was not based on a legislative policy of attracting

> competent counsel to vindicate express legislative or congressional policy. Nor was it based on a statutory entitlement to a 'reasonable fee'...Instead, the *Saffer* Court determined that an award of legal fees...was a necessary component of damages to make the plaintiff whole. *Id.*, at 449-50.

Grubbs held that an enhanced fee in a malpractice case "would go well beyond *Saffer*'s rationale of making legal malpractice plaintiff's whole" and, would "implicate important public policy questions" including the question of white a fee enhancement is necessary for a plaintiff to find competent counsel to prosecute a malpractice claim, *Grubbs*, at 450. In rejecting the argument that the trial court erred when it failed to award an enhanced fee. *Grubbs* stated:

> In the final analysis, the constitutional authority for the fee-shifting authorised by *Saffer* is derived from the Supreme Court's rule-making authority. A decision to expand *Saffer* by granting enhancement of attorney fee awards in legal malpractice cases would exceed the authority of this court.

Id. at 451; *see also Walker v. Giuffre* (enhancement fees under *Rendine* "are only available in those cases that our Legislature has selected for statutory fee-shifting so as to achieve...purposes of attracting counsel to socially beneficial litigation.").

Grubbs requires this court to deny the application for an enhanced fee. Were *Grubbs*

distinguishable, however, this court would have awarded an enhancement in the range of 40%, 30% for extraordinary services, 10% for advancing the public interest. See *Lockiev v. Turner*, 344 N.J. Super, 28-29 (affirmed as modified and remanded), 177 N.J. 413 (2003).

COSTS: Mrs. Fou, a prevailing party, may recover costs that "an attorney would normally bill a fee paying client." *Council Enterprises, Inc. v. Atlantic City*, 200 N.J. Super. 431, 443 (Law Div. 1984). Attorney overhead cannot form part of an award of costs, see *Blakey*, at 605; R. 1:21-7; *see also Batate of Viflades v. Sheppard Bus Service, Inc.*, 192 N.J. Super. 301, 314 (Law. Div. 1983); there is no showing that any of the costs reflected in Mr. Plaisted's submissions constitute attorney overhead. Mr. Plaisted seeks costs of $19,900, without opposition. The court will award costs of $15,000, in addition to the legal fee, paralegal fee, and Interest.

PREPARATION OF FEE APPUCATTON: Mr. Plaisted is entitled to a reasonable fee for services rendered in seeking and obtaining the fee established by this opinion. See *R.M.: Khoudary v. Salem County Board*, 281 N.J. Super. 571 (App. Div. 1995); *Council Enterprises. See also Robb v. Riogrwood Board of Education*, 269 N.J. Super. 394 (Ch. Div., 1993). However, Mr. Plaisted has incorporated the time spent on this function into his fee request. No additional fee is awarded for this effort beyond that established above.

INTEREST: R.4:58-2(b) allows prejudgment interest of 8% on "the amount of any money recovery from the date of the offer...but only to the extent that such

prejudgment interest exceeds the interest prescribed by R. 4:42-11 (b), which shall also be allowable." The award of counsel fees and costs, however, is part of "any money recovery." See R. 4:58-2. Therefore, that award is subject to 8% interest for the period from May 13, 2014, to November 15, 2018.

Such prejudgment interest applies here in this tort action, involving claims of unliquidated damages for legal negligence. It awards prejudgment interest to Mrs. Fou computed on her recovery, $500,000, plus legal fees of $650,000, paralegal fees of $37,500, and costs of $15,000, from the date of filing of the Offer of Judgment, until November 15, 2018.

SUMMARY: Mr. Plaisted is awarded $650,000 for legal services; $37,500 for paralegal services; $15,000 for costs of litigation; interest per the Rules of Court from the date of the filing of the complaint through May 15, 2014; 8% interest on the above from May 15, 2014, through November 15, 2018, when prejudgment interest will end. That occurs because of the court's delay in producing this opinion; its delay should not prejudice any party. November 15, 2018, accordingly will be the end date for prejudgment interest.

Because the time involved in determining the lodestar included time impended in Judge Rafano's court, Mr. Tung will be entitled to a credit for any funds to be paid by Mr. Fou against legal fees assessed by Judge Rafano against Mr. Fou pursuant to his order of August 26, 2012 [$7,929]; his judgment of October 14, 2014 [$229,389.69]; and his order of November 27, 2017 [$77,402.02].

Mr. Tung, defendant here, submitted an unsolicited brief to this court addressing the fee application. Exhibit C of that brief is a copy of an email

chain between Mr. Tung and Mr. Fou between February and April, 2018, in which Mr. Fou asks Mr. Tung to inform him of the results of the malpractice trial. The tone of the emails is cordial. Mr. Tung's brief strenuously objects to Mr. Plaisted's assertions that he and Mr. Tung "xxxx" to resist Mrs. Fou's various applications: notwithstanding, Mr. Tung volunteers, incredibly, that he and Mr. Fou have communicated during the past year! No part of Mr. Tung's analysis was considered in preparing this decision.

Within ten days, Mr. Plaisted will prepare a form of judgment incorporating the above and will submit it to the court in accordance with the Rules.

The court greatly appreciates the quality of the arguments posed by Mr. Plaisted, Mr. Anesh, and Mr. Strauss.

Very truly yours,

PHILLIP LEWIS PALEY, J.S.C.