HUDSON VICINAGE

CHAMBERS OF
PATRICK J. ARRE, J.S.C.

595 Newark Avenue
Jersey City, New Jersey 07306

July 8, 2015

NOT FOR PUBLICATION WITHOUT THE WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

Re: LANE BAJARDI and KIMBERLY CARDINAL BAJARDI v. NANCY PINCUS, et al.
Docket No. HUD-L-3723-12

BACKGROUND

The cause of action in the underlying case stems from alleged defamatory statements made by, *inter alia*, Defendants Nancy Pincus, Roman Brice, and Mark Heyer.

On July 26, 2012, Plaintiffs, Lane Bajardi and Kimberly Cardinal Bajardi, through their former Counsel, Amy D. Cox, Esq. and Whitney C. Gibson, Esq., filed a joint Complaint with 170 paragraphs against 17 defendants. The Complaint included 16 paragraphs setting forth the parties and background, 122 paragraphs dedicated to alleged "Defamatory Statements" and "Identification of Unnamed Defendants," and 32 paragraphs listing Plaintiffs' causes of action and relief requested.

The Complaint alleged defamation, defamation per se, intentional infliction of emotional distress, and tortious interference with business relations and prospective economic relations. Plaintiffs named Pincus, Brice, and fifteen anonymous screen name defendants, two of whom were later identified as Defendant Heyer. Plaintiffs alleged Defendants Pincus, Brice, and Heyer made various defamatory statements regarding Plaintiffs' involvement in Hoboken politics via

publication on several blogs including Hoboken.Patch.com, GrafixAvenger.blogspot.com, Galloway.Patch.com, and NJ.com.

On September 26, 2012, Defendant Pincus' former counsel, Michael Plumb, Esq., formerly of Carter Ledyard & Milburn, served a Rule 1:4-8 letter on Cox and Gibson.

On October 15, 2012, Mr. Flowers, on behalf of Defendant Heyer and eleven of the fifteen anonymous screen name Defendants, served a Rule 1:4-8 letter on Cox and Gibson.

On October 23, 2012, Gibson responded to Plumb's Rule 1:4-8 letter and stated that Plaintiffs' claims were not frivolous because they had "factual and legal bases for their claims." However, the specific facts upon which he relied were not indicated.

All Defendants moved for summary judgment. On March 22, 2013, The Honorable Lawrence M. Maron, J.S.C. heard the motions and dismissed five of the eight alleged defamatory statements holding they were not defamatory on their face as a matter of law. Judge Maron also dismissed the claims against eleven of the anonymous screen names finding there were no viable allegations against them within the Complaint. Judge Maron denied summary judgment on the remaining claims based on representations by Plaintiffs' counsel regarding outstanding discovery. This was supported by Gibson's proffer that evidence regarding damages, such as reprimands from Mr. Bajardi's employer and negative effects on his job, would be uncovered and would support Plaintiffs' claims.

On April 10, 2013, Plumb withdrew as counsel for Pincus and she began proceeding as a self-represented litigant.

On April 18, 2013, Pincus filed a motion for leave to appeal Judge Maron's March 22, 2013 Order which largely denied her motion for summary judgment.

On June 6, 2013, the Appellate Division denied Pincus' motion for leave to appeal.

On November 21, 2013, Cox and Gibson withdrew as counsel for Plaintiffs, and Jonathan Z. Cohen, Esq. entered an appearance.

On April 25, 2014, discovery ended. However, the parties continued to take depositions up until September 13, 2014.

Mr. Flowers certified that on August 22, 2014, he renewed his previous Rule 1:4-8 letter, this time to Cohen, on behalf of Defendant Heyer.[1]

On September 11, 2014, The Honorable Christine M. Vanek, J.S.C. issued an Order granting the second motion Summary Judgment in this case. Out of the 114 remaining allegations of defamatory statements, Judge Vanek dismissed all but six, with the exception of paragraphs 35, 56, 81, 87, 103 and 110. Out of Plaintiffs' five causes of action, Judge Vanek completely dismissed three. All claims by Kimberly Cardinal Bajardi were dismissed, as were all of Plaintiffs' tort claims.

The Court dismissed Plaintiffs' intentional infliction of emotional distress claims and held that Plaintiffs failed to demonstrate the "outrageousness" of the Defendants' conduct, and that no evidence was submitted with regard to physical illness or serious psychological distress. The Court dismissed Plaintiffs' claims for Tortious Interference with Business Relations and Prospective Economic Relations finding there was no evidence that either Plaintiff suffered an economic loss or stood to lose a prospective gain. Plaintiffs again represented that facts would be developed showing economic loss in the form of reprimands and warnings from Bajardi's employer.

The only claims to survive summary judgment were Plaintiff's defamation/defamation per se claims regarding the words "paid political operative" to describe Mr. Bajardi, and statements concerning his alleged involvement with a Hoboken e-mail scandal that resulted in an FBI investigation. The Court denied summary judgment as to those statements. Judge Vanek ruled, as

[1] A letter renewing the previous Rule 1:4-8 letter was not produced.

a matter of law, that Bajardi was a limited public figure. As such, the Court found that those two statements could be interpreted as defamatory if they were proven to be false and if actual malice could be demonstrated.

At this point in the case, 133 paragraphs of Plaintiffs' 170 paragraph Complaint had been dismissed, all claims by Kimberly Lane Bajardi had been dismissed, all tort claims had been dismissed, and all claims against eleven screen name Defendants had been dismissed. The only remaining claims and causes of action were defamation/defamation per se by Mr. Bajardi.

On October 31, 2014, Pincus filed a substitution of attorney and designation of Trial Counsel naming Stephen R. Katzman of Methfessel & Werbel, P.C.

On December 14, 2014, Mr. Booth served a Rule 1:4-8 letter on Cohen on behalf of Defendant Brice.

On December 19, 2014, Judge Vanek heard another motion for summary judgment filed by Defendants. This motion was denied. The Court recognized that Plaintiff failed to satisfy his burden of establishing actual malice, but accepted Cohen's representation to the Court that circumstantial evidence existed to prove actual malice and actual damages.

Trial began before this Court on January 28, 2015. After opening statements, Defendants moved for nonsuit, or dismissal after openings, pursuant to Rule 1:7-1. The motion was denied, and Plaintiff presented his case.

On February 5, 2015, Plaintiff rested. Defendants moved for dismissal under Rule 4:40-1. The Court granted this motion and found that even with all reasonable inferences and without consideration to the weight, worth, nature or extent of evidence, Plaintiff presented no proofs to support his claims for defamation/defamation per se. Consequently, Plaintiff's case was dismissed. Plaintiff presented insufficient evidence to satisfy the actual malice standard and had offered no

proof of reputational or pecuniary harm.

I. DEFENDANTS' MOTIONS FOR ATTORNEY'S FEES & SANCTIONS PURSUANT TO RULE 1:4-8 AND N.J.S.A. 2A:15-59.1

Defendants move for Attorney's Fees & Sanctions pursuant to N.J.S.A. 2A:15-59.1 and Rule 1:4-8. The Court has received opposition briefs from (1) Mr. Zacharias on behalf of Plaintiffs' counsel, Mr. Cohen, (2) Mr. Reilly on behalf of Plaintiffs' initial counsel Mr. Gibson (3) Mr. Cohen on behalf of Plaintiffs Lane Bajardi and Kimberly Cardinal Bajardi, and (4) Ms. Cox, representing herself. The Court has received reply briefs from Defendants Brice, Heyer, and Pincus, and supplemental certifications from the attorneys for Defendants Brice and Heyer, and responses from Cohen's counsel, and Gibson's counsel. Unidentified screen name Defendant "khoboken" withdrew its motion for fee application altogether. Pincus also withdrew her fee and sanction application as to Cohen only. Oral argument was heard on April 8, 2015.

A. Allegations Against Defendant Nancy Pincus

Allegations of defamation in paragraphs 35, 56, 87, and 103 of the Complaint were the only claims to survive against Pincus, and were all eventually dismissed at trial.

Defendant Pincus moves to collect reasonable attorney's fees and/or sanctions against: (1) Kimberly Cardinal Bajardi because her entire pleading failed to survive summary judgment, (2) both Kimberly and Lane Bajardi based on inclusion of frivolous supplemental tort claims within the defamation Complaint that were dismissed based on lack of evidentiary support, and (3) against Lane Bajardi because his claims that survived summary judgment were based upon Plaintiffs' evidentiary misrepresentations – evidence that has since been shown to be non-existent. Pincus seeks a total of $26,033.27.

B. Allegations Against Defendant Roman Brice

Plaintiffs' Complaint alleged defamation, intentional infliction of emotional distress, and tortious interference based on two political comments by Brice in the political blog "Hoboken Patch," and one email stating two frequently posting screen names reportedly moved to "Edgewater, NJ on the Gold Coast of NJ." Judge Vanek dismissed all the tort claims by Mr. & Mrs. Bajardi against Brice on summary judgment on September 11, 2014. Only two allegations in the Complaint against Brice survived summary judgment, found in paragraphs 35 and 110. Both were dismissed at the close of Plaintiff's case at trial.

Defendant Brice seeks an award of attorney's fees and sanctions for defending frivolous litigation with regard to: (1) the allegations of Mr. & Mrs. Bajardi in (paragraph 117 of the Complaint) prior to the April 11, 2014 motion to dismiss; (2) the intentional infliction of emotional distress and tortious interference claims that were dismissed at summary judgment due to lack of proof; and (3) Mr. Bajardi's two allegations against Brice for defamation that proceeded to trial but were dismissed for failure to prove actual malice or reputational and/or pecuniary damages. Brice seeks an award of $102, 643.75.

Brice's counsel served a Rule 1:4-8 letter on December 14, 2014. Therefore, any recovery of sanctions and attorney's fees would be limited to those accrued twenty-eight days after that date, pursuant to Rule 1:4-8.

C. Allegations Against Defendant Mark Heyer

Mr. Flowers seeks an award of attorney's fees and/or sanctions against Plaintiffs and their Counsel for defending frivolous litigation with regard to Plaintiffs' claims against fifteen anonymous bloggers, including Defendant Heyer. Because Plaintiffs did not attribute defamatory statements to eleven of the fifteen names alleged in the Complaint, those eleven unidentified screen

name Defendants were dismissed by Judge Maron in February 2014. Plaintiffs alleged eight defamatory statements to the remaining screen names. Judge Vanek's September 11, 2014 decision left one screen name Defendant Heyer, and the words "paid operative." Allegations against Heyer were included in paragraphs 44, 81 and 106 of the Complaint. Only the allegations in paragraph 81 survived to trial and were dismissed. Attorney's fees and sanctions in the amount of $240, 212.08 are sought, representing the fees Flowers accumulated defending Heyer and the previously dismissed John Doe Screen Names.

ANALYSIS

Defendants Pincus, Heyer, and Brice move for attorney's fees and sanctions contending Plaintiffs and their counsel initiated, pursued, and refused to withdraw frivolous litigation, even after it became evident that Plaintiffs had insufficient proofs to support their claims. Defendants argue Plaintiffs' lawsuit was a Strategic Lawsuit Against Public Participation ("SLAPP-suit") and that the purpose of the lawsuit has always been to harass, cause unnecessary delay, and needlessly increase the cost of litigation with the goal of silencing Defendants' constitutionally protected speech. Defendants also argue that Gibson, Cox, and Cohen knew or should have known that Plaintiffs' claims lacked a reasonable basis in fact, which should have been apparent, *ab initio*, based on a cursory review of the evidence, and immediately prompted withdrawal. Defendants argue that Plaintiffs never had a reasonable basis in law or fact to support their claims, that Plaintiffs' acted in bad faith in pursuing their claims, and attorney's fees and sanctions must be awarded pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1.

Rule 4:42-9(a) provides that no fee for legal services shall be awarded unless certain special circumstances enumerated in the rule exist, or when such fees are specifically authorized by statute. The structure of the rule provides that parties pay their own legal fees unless the matter comes

within specific fee shifting exceptions, including rule authorization, or statutory authorization. *Pressler*, Current N.J. Court Rules, comment 2 on Rule 4:42-9 (2015). New Jersey has a strong public policy against the shifting of counsel fees. In re Niles Trust, 176 N.J. 282, 293 (2003). Consideration of an award of counsel fees "must start from the proposition that New Jersey has a strong public policy against the shifting of costs and that this Court has embraced that policy by adopting the 'American Rule,' which prohibits recovery of counsel fees by the prevailing party against the losing party." Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 385, 404 (2009) (quoting In re Estate of Vayda, 184 N.J. 115, 120 (2005)). The purposes behind the American Rule are threefold: (1) to provide unrestricted access to the courts for all persons, (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience. Estate of Vayda, 184 N.J. at 120-21. Notwithstanding the strong public policy supporting the American Rule, counsel fees may be awarded in circumstances contemplated under the rule and when appropriate. Occhifinto v. Olivo Const. Co., 221 N.J. 443 (2015).

The current motions require the Court to balance the principles of the American Rule against the special circumstances contemplated by Rule 4:42-9(a) (7) and (8), which the Court finds to exist in this case. The Court recognizes the competing interests of the Defendants' First Amendment rights and Plaintiffs' right to unrestricted access to the courts.

Rule 1:4-8 permits an attorney to be sanctioned for asserting frivolous claims on behalf of a client, and provides in pertinent part, that:

> (a) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and

(4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.

If the pleading, written motion or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the document had not been served. Any adverse party may also seek sanctions in accordance with the provisions of paragraph (b) of this rule.

(b) Motions for Sanctions:

(1) An application for sanctions under this rule shall be by motion made separately from other applications and shall describe the specific conduct alleged to have violated this rule. No such motion shall be filed unless it includes a certification that the applicant served written notice and demand pursuant to Rule 1:5-2 to the attorney or pro se party who signed or filed the paper objected to. The certification shall have annexed a copy of that notice and demand, which shall (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand. If, however, the subject of the application for sanctions is a motion whose return date precedes the expiration of the 28-day period, the demand shall give the movant the option of either consenting to an adjournment of the return date or waiving the balance of the 28-day period then remaining. A movant who does not request an adjournment of the return date as provided herein shall be deemed to have elected the waiver. The certification shall also certify that the paper objected to has not been withdrawn or corrected within the appropriate time period provided herein following service of the written notice and demand.

No motion shall be filed if the paper objected to has been withdrawn or corrected within 28 days of service of the notice and demand or within such other time period as provided herein.

(2) A motion for sanctions shall be filed with the court no later than 20 days following the entry of final judgment. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion. For purposes of this rule, the term "final judgment" shall include any order deciding a post-judgment motion whether or not that order is directly appealable.

(3) Except in extraordinary circumstances, a law firm shall be jointly responsible for violations committed by its partners, shareholders, associates and employees.

(Emphasis added).

Likewise, N.J.S.A. 2A:15-59.1 provides statutory authorization for an award of attorney's fees, and provides: "[a] party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the Judge finds **at any time during the proceedings or upon judgment** that a complaint, counterclaim or defense of the non-prevailing person was frivolous." (Emphasis added). In order to determine that a complaint is frivolous, a Judge must find on the basis of the pleadings, discovery, or evidence presented that either the complaint was (1) commenced and/or continued in bad faith solely for the purpose of harassment, delay or malicious injury; or (2) the non-prevailing party knew or should have known that the complaint was without any reasonable basis in law or equity and simply could not be supported by a good faith argument for an extension, modification or reversal of existing law. N.J.S.A. 2A:15-59.1(b).

I. DEFENDANTS' COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF RULE 1:4-8 AND N.J.S.A. 2A:15-59.1

The Bajardis, Cohen, Gibson, and Cox (hereinafter the "opposing parties") argue that Defendants' procedural deficiencies and failure to comply with Rule 1:4-8 necessitate denial of their motions for sanctions and fees.

Strict compliance with Rule 1:4-8 is a prerequisite to recovery. State v. Franklin Sav. Account No. 2067, 389 N.J. Super. 272, 281 (App. Div. 2006). If the movant has not certified that the "safe harbor" letter has been provided, Rule 1:4-8 sanctions are prohibited. Cmty. Hosp. Grp., Inc. v. Blume Goldfaden Berkowitz Connelly Fried & Forte P.C., 344 N.J. Super. 119, 127-29 (App. Div. 2005). Likewise, a failure to warn in the safe harbor letter of the allegedly frivolous conduct with specificity as required by the rule will preclude recovery. Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. 401, 409 (App. Div. 2009). "A prevailing party's obligation to give proper notice as a condition of recovering an award of fees and costs is not fulfilled by a notice that alerts a party to the frivolous nature of a different claim." Id. For example, in Ferolito v. Park Hill, sanctions pursuant to Rule 1:4-8 were denied because defendants' notice did not warn plaintiff about the frivolous nature of the specific complaint on which they prevailed.

Additionally, claims against parties pursuant to N.J.S.A. 2A:15-59.1 must be brought, "to the extent practicable, in accordance with the procedural requirements" of Rule 1:4-8(f). Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 408 (App. Div. 2009).

A. Defendant Pincus' Procedural Compliance With Rule 1:4-8

With regard to Defendant Pincus, the opposing parties argue Plumb's Rule 1:4-8 letter was not served on Cohen and lacks specificity because it did not state Pincus would seek sanctions due to Bajardi's failure to prove actual malice or reputational or pecuniary harm.

On September 26, 2012, Defendant Pincus' former counsel, Plumb, served a Rule 1:4-8 letter

on Cox. A copy of this letter was annexed to Pincus' current motion for fees, as well as Certification from her current attorney, Katzman, and a Certification from Plumb himself. The letter served by Plumb spanned five single-spaced pages, provided detailed background information, exposed material false statements in pleadings, discussed all counts in the Complaint, and explained the improper purpose of Plaintiffs' suit to harass Pincus, cause her to incur legal expenses, and silence her constitutionally protected free speech. Throughout the letter Plumb cited to controlling law.

In the first paragraph Plumb stated, "if you fail to withdraw the complaint within 28 days of service of this written demand, an application for sanctions will be made within a reasonable time thereafter." In the second paragraph of page two, Plumb referred to several emails in Cox's possession and stated,

> [Y]our Complaint is laden with material false statements of fact. For example, you repeatedly, falsely state that plaintiffs are not political operatives. You and your colleagues have emails written by Lane Bajardi which state that Mr. Bajardi and Mrs. Cardinal Bajardi "have been working for Beth for a lot longer than the last few weeks... Kim and I have gotten things done... we've been at City Council meetings fighting the good fight and covering Beth's flank for years... we were working to get Beth elected to the 2nd Ward seat in the first place so she could be in this position today... without Kim and I there would be NO effort to reach the yuppie voters." It would be difficult to imagine a more concise description of two political operatives. Yet your Complaint falsely states that they are not political operatives.

Importantly, Plumb noted that the Bajardis' status as public figures and the nature of Pincus' political speech present a high burden for the Plaintiffs that they are unable to overcome because of their lack of evidence.

Plumb provided that Plaintiffs' allegations regarding threats to their children were equally unfounded, and that the non-defamation causes of action are not warranted by existing law. Plumb explained that Cox has insufficient evidence to sustain the elements of intentional infliction of

emotional distress because it requires intentional outrageous conduct of which Cox has no evidence. Plumb advised that the tortious interference with business relations claim cannot survive without breach of contract or some economic right, which Plaintiffs do not have. Plumb also noted that Bajardi's involvement, endorsement and counsel of former Hoboken Mayor and current convicted felon Peter Cammarano was publicly displayed editorially and in Council Meetings. In closing, Plumb repeated that Cox's clients did not have a legitimate legal claim against Pincus, and that sanctions will be sought against her personally for all the substantial fees incurred for initiating the litigation.

The opposing parties have failed to support their argument that "specificity" required Plumb to divine ultimate issues and the very cause of dismissal. Plumb's letter extensively outlined the deficiencies of Plaintiffs' Complaint upon which they were unsuccessful. Plumb cited several emails, internet comments, and official reports, and commented on most of Plaintiffs' substantive insufficiencies. Plumb specifically noted the deficiencies with regard to Plaintiffs' defamation and tort claims. At the early stage of litigation when Plumb drafted and served his letter, it was impossible for him to be aware of Plaintiffs' evidentiary misrepresentations made at a later time regarding the damages Mr. Bajardi allegedly suffered. The Court is satisfied and finds that Plumb's letter fulfilled the requirements for specificity required by Rule 1:4-8, and there is no procedural deficiency in this regard.

Additionally, Cohen's argument that he should have been served with Plumb's letter is equally untenable. Rule 1:4-8 provides that a Rule 1:4-8 letter need not be served on anyone other than "the attorney or *pro se* party who signed or filed the paper objected to." Plumb's Rule 1:4-8 letter objected to the Plaintiffs' Complaint, signed by Cox – therefore it was served upon Cox. Plumb was long out of the case by the time Cohen joined, and Katzman made no procedural

deficiencies by failing to serve a Rule 1:4-8 letter upon Cohen because Cohen did not sign the Complaint, but advocated for it.

The Court further finds that the remaining Defendants procedurally complied with the Rule 1:4-8 "specificity" requirement. On October 15, 2012, Flowers served a Rule 1:4-8 letter on Cox on behalf of Heyer and eleven of the fifteen anonymous screen name Defendants. Flowers certified that on August 22, 2014, he renewed his Rule 1:4-8 letter and served it upon Cohen. Booth also served a Rule 1:4-8 letter upon Cohen demanding withdrawal of Plaintiffs' frivolous claims on December 12, 2014, and upon Cox and Gibson on December 14, 2014. Both Booth and Flowers annexed a copy of their Rule 1:4-8 letters to their certification, and upon review the Court finds each of these letters are sufficiently "specific" and comply to the extent practicable with the Rule 1:4-8 requirements.

Next, Cohen argues Pincus' motion for attorney's fees is untimely because it was not made within a "reasonable time" following Judge Vanek's dismissal on September 11, 2014. Pincus acted as a self-represented litigant from April 2013 to October 2014. The attorney's fee award component of the rule has been held inapplicable to self-represented parties. Alpert Goldberg v. Quinn, 410 N.J. Super. 510, 545-546 (App. Div. 2009); Pressler & Verniero, Current N.J. Court Rules, comment 1 on Rule 1:4-8 (2015). The statute, N.J.S.A. 2A:15-59.1, allows for the award of counsel fees at any time during the proceedings, and "nothing in the statute, however, divests the trial court of its discretion to determine the appropriate time to impose sanctions." McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 562 (1993). Generally, the preferable practice is to wait until the end of the proceedings. Id.

Rule 1:4-8 directs the court to consider the timeliness of a motion for sanctions as a factor in whether attorneys' fees should be awarded. Katzman assumed representation on October 31, 2014.

Motions ensued and trial commenced on January 28, 2015. A motion for fees and sanctions was filed by Katzman on March 11, 2015, promptly after judgment was entered dismissing the remainder of Plaintiff's claims. Therefore, the Court finds that Pincus' motion was timely.

The opposing parties additionally argue that Defendants' motions are deficient for failure to comply with the New Jersey Rules of Professional Conduct in that they fail to address the factors enumerated in R.P.C. 1.5(a), such as the novelty and difficulty of the questions involved, the skill required, whether it precluded the attorney from accepting other cases, the fees customarily charged, the nature and length of the professional relationship, or the attorneys experience, reputation and ability.

Rule 4:42-9(b) provides that all applications for allowance of fees shall be supported by an affidavit of services addressing the factors enumerated in R.P.C. 1.5(a), and other factors pertinent to evaluation of the services. In Scullion v. State Farm Ins. Co., 345 N.J. Super. 431, 439 (App. Div. 2001) the Appellate Division noted that counsel failed to comply with Rule 4:42-9(b), which requires an affidavit of service addressing the factors enumerated by R.P.C. 1.5(a) and merely provided a copy of her bill, which was uncertified. The Court remanded the case, which gave counsel the opportunity to comply with the rules governing fee applications.

Katzman's reply notes that Pincus is not seeking attorney's fees for the services rendered by Methfessel & Werbel, and for that reason he did not include the R.P.C. 1.5(a) factors in his certification. Rather, Plumb provided a Certification in which he stated he provided legal services for Pincus while an attorney in the State of New Jersey, that he reviewed the pending motion for attorney's fees and the attached exhibits, and that they include true and accurate copies of his Rule 1:4-8 letter and invoices for services performed by Carter Ledyard & Milburn. Plumb also stated that the fees charged to Pincus accurately reflect the work he performed and were based on the

hourly rate that was the standard rate charged by his firm, and that he provided Pincus legal services until April 2013 when she acted *pro se* until Katzman was retained. Accordingly, the Court finds Plumb's certification addresses the R.P.C. factors of the customary fee rate charged at his firm, and the nature and length of his professional relationship with Pincus in compliance with the Rule 1:4-8 requirements.

B. Defendant Brice's Procedural Compliance With Rule 1:4-8

With regard to Defendant Brice's motion, Booth's certification outlines legal services rendered in the amount of $102,643.75. Services included preparation and drafting of motions to dismiss, summary judgment motions, rules for admissions, pretrial and trial, related discovery, and the Rule 1:4-8 letters that Booth served on Plaintiffs' former and current counsel on December 14, 2014. Booth attached true copies of the billing to Brice. Therefore, the Court finds Brice complied with the requirements of Rule 1:4-8.

C. Defendant Heyer's Procedural Compliance With Rule 1:4-8

With regard to Heyer's motion for fees, Flowers certified that this action spanned two and half years, was prosecuted in five states, involved "mountains of discovery" including approximately 70,000 emails produced by Plaintiffs, was the subject of 68 motions, and all resulted from a 170 paragraph complaint. Flowers certified to "nearly two years of work-intensive, document intensive, costly and otherwise laborious and contentious litigation involving tens of thousands of documents, out of state discovery, depositions and innumerable motions," with the end result being "three successive judges determined that Plaintiffs' defamation and derivative tort claims were baseless in law and in fact." (Flowers Cert. at p. 2 par. 8). Flowers certified that his firm incurred $240,212.08 in attorney's fees defending this action on behalf of Defendant Heyer and the previously dismissed screen name Defendants. Annexed to Flowers' certification is a "fee

summary" demonstrating the work performed, time spent and fees incurred from the inception of this action.

The Court finds that Booth's and Flowers' initial certification accompanying this motion failed to address some of the R.P.C. 1.5(a) factors. However, pursuant to Scullion v. State Farm Inc. Co, 345 N.J. Super. 431 (2001) (where the case was remanded and counsel was given the opportunity to comply with the R.P.C. requirements), this will not defeat an award of attorney's fees and sanctions. Certifications received by Heyer at oral argument, and by Booth shortly after oral argument have been considered, and each satisfy the R.P.C. requirements.

Accordingly, the Court finds that all Defendants have complied with the procedural requirements of Rule 1:4-8.

II. DEFENDANTS' COMPLIANCE WITH THE SUBSTANTIVE REQUIREMENTS AND COMMON LAW SUPPORTING AN AWARD OF ATTORNEY'S FEES AND SANCTIONS

A court may impose sanctions upon an attorney if the attorney files a paper that does not conform to the requirements of Rule 1:4-8 and fails to withdraw that paper within twenty-eight days of service of demand for its withdrawal. Rule 1:4-8(b) (1).

For purposes of imposing sanctions under Rule 1:4-8, an assertion is deemed frivolous when "no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable." Perez, 391 N.J. Super. at 432. In order to determine that a complaint is frivolous under N.J.S.A. 2A:15-59.1(b) a Judge shall find on the basis of the pleadings, discovery, or evidence presented that either the complaint was (1) commenced and/or continued in bad faith solely for the purpose of harassment, delay or malicious injury; or (2) the non-prevailing party knew or should have known that the complaint was without any reasonable basis in law or equity and simply could not be supported by a good faith argument for an extension, modification or reversal of existing law.

A pleading will not be considered frivolous for purposes of imposing sanctions unless the pleading as a whole is frivolous. United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 394 (App. Div. 2009). Sanctions are not warranted if an attorney has a reasonable and good faith belief in the claims being asserted. Id. In United Hearts, the Appellate Division found that, "[a] pleading cannot be deemed frivolous as a whole nor can an attorney be deemed to have litigated a matter in bad faith where... the trial court denies summary judgment on at least one count in the complaint and allows the matter to proceed to trial." 407 N.J. Super. at 394. Additionally, Rule 1:4-8 makes clear that an attorney need not withdraw a pleading if it is likely that the allegations will have evidentiary support or will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support. Id. at 392.

Defendants Heyer and Brice argue the entirety of Plaintiffs' claims were frivolous because they were completely unsupported by credible evidence and therefore Plaintiffs and their Counsel knew or should have known no rational argument could be advanced in their support. Pincus argues the same, only with regard to Mrs. Bajardi's claims, and both Plaintiffs' tort claims.

The opposing parties argue that United Hearts, LLC v. Zahabian, 407 N.J. Super. 379 (App. Div. 2009), is controlling and mandates the court not impose an award of attorney's fees or sanctions because summary judgment was denied on at least one count in the Complaint and the matter was permitted to proceed to trial, albeit not to verdict. They submit that Plaintiffs had reasonable basis in law and fact to support their claims, and that they relied in good faith on the advice of counsel, and therefore they should not be responsible for attorney's fees. The facts, if they existed, were never introduced at trial.

Defendants argue the case of Partington v. Panariello, A-3020-08T3 2010 N.J. Super. Unpub. LEXIS 335 (Feb. 22, 2010) presented a similar procedural background as the present case and

allows this Court to award fees despite one of Plaintiff's claims surviving summary judgment and proceeding to trial. In Partington one of plaintiff's claims survived two summary judgment motions heard by two separate judges. The Judge who handled the first summary judgment motion ordered dismissal of seven of the eight claims in the complaint, and found that plaintiff's intent in bringing those seven claims was to harass defendant and act in bad faith. The motion Judge noted that "plaintiffs knew or should have known that their allegations were without basis in law or equity." Partington, A-3020-08T3 2010 at 10. At the same time, the Judge awarded defendants' attorneys' fees and costs pursuant to N.J.S.A. 2A:15-59.1, but reduced the amount by one eighth to reflect the fact that summary judgment had been denied on one of the eight claims in the complaint. A second Judge handled a second motion for summary judgment entertained at the close of discovery, and denied it based on a significant question of fact that existed as to plaintiff's single remaining claim. Id. at 8.

The Appellate Division affirmed in part and reversed in part, noting the motion Judge's decision to award attorneys' fees and costs was rendered before the Appellate Division had decided United Hearts v. Zahabian, 407 N.J. Super. 379 (App. Div. 2008). The Court found that the holding of United Hearts applied, and because two motion Judges had denied defendants' motions for summary judgment on one count, plaintiff could not be deemed to have pursued a particular claim in bad faith. Therefore, the Appellate Division reversed the award of attorney's fees from the filing of defendant's first motion for summary judgment to the trial.

However, the Appellate Division upheld the motion Judge's award of attorney's fees pursuant to N.J.S.A. 2A:15-59.1 from the commencement of the litigation to the filing of defendants' first summary judgment motion. The Court noted that plaintiff's complaint had contained eight claims, but the seven dismissed claims were separate and distinct from the claim

that was tried, and were found by the motion Judge to be motivated by the intent to harass the defendants. Partington, at 15. Thus, the Court found it was proper to award attorney's fees and costs for the filing and pursuit of the seven dismissed claims in accordance with N.J.S.A. 2A:15-59.1. Id.

As set forth in Rule 1:36-3, "[n]o unpublished opinion shall constitute precedent to be binding upon any court." An unreported decision serves no precedential value and cannot reliably be considered part of common law. In re Estate of Roccamonte, 346 N.J. Super. 107, 117 (App. Div. 2001). Thus, without relying on Partington for its precedential value, it may still be instructive with regard to the holding imparted in United Hearts upon courts considering motions for attorney's fees and sanctions.

The opposing parties essentially argue that United Hearts stands for the proposition that an attorney may include multiple frivolous claims in a complaint, and if one survives summary judgment based on misrepresentations to the court as to outstanding discovery, than the attorney and the clients are shielded from sanctions and attorney's fees. Defendants argue the opposing parties should not be immunized for pursuing, and continuing to pursue frivolous litigation simply because one of 170 claims may be non-frivolous.

United Hearts is distinctly different from this case in numerous critical ways. Here, Plaintiffs filed a 170 paragraph Complaint. The entirety of Kimberly Cardinal Bajardi's claims were dismissed at the summary judgment stage, and all of both Plaintiffs' tort claims were dismissed. The opposing parties argue that because two motion Judges denied summary judgment on one count of Plaintiffs' Complaint and allowed it to proceed to trial this Court cannot now find that any part of the Complaint was frivolous for purposes of sanctions.

The remaining claims in Plaintiffs' Complaint were for defamation and defamation per se. Those claims only narrowly survived Judge Vanek's and Judge Maron's summary judgment rulings based on representations by Plaintiffs' counsel, Gibson and Cohen, that discovery would lead to evidence demonstrating Mr. Bajardi's damages and the Defendants' actual malice. For example, at the March 22, 2013 oral argument, Gibson represented, "[t]here was a warning. He was going to lose his job....This is having irreparable damage to their careers... And that's where we brought on to stop it." (March 22, 2013 Summary Judgment Oral Argument at 26:21—27:24). From the date of this oral argument on March 22, 2013, to the date the Court dismissed Plaintiff's case at trial, no evidence of this warning or damage was ever produced.

In United Hearts, the trial court declined to grant attorney's fees pursuant to N.J.S.A. 2A:15-59.1 and found the case inappropriate because it involved the "type of litigation where the client is normally advised by the attorney how and when and where and under what circumstances to file the complaint and prosecute the complaint." United Hearts, 407 N.J. Super. at 387(internal citations omitted). The trial court found litigation regarding the fraudulent execution of a deed, the Uniform Fraudulent Transfer Act, and *lis pendis* was a course heavily dictated by the attorney. Thus, the Court found the attorney violated Rule 1:4-8 by pursuing the matter on plaintiff's behalf, when there was clear documentary evidence to show no actionable claim existed.

Counsel for Defendant Heyer argues United Hearts is distinct because, unlike here, the plaintiff in that case withdrew his single remaining claim prior to a trial decision on the merits because he was, "astute enough to know when to quit." (Flowers Reply Brief at pg. 2 fn. 3). Thus, Counsel argues the United Hearts Court never had the opportunity to determine whether the pleading "as a whole" was frivolous. Bajardi's Complaint was dismissed after he presented his case. Counsel argues the "pleading as a whole" standard has been met, because all of Plaintiffs'

claims have been dismissed as a matter of law, none were withdrawn, and none proceeded to verdict because they were dismissed on Defendants' motion at trial. Thus, Heyer submits this demonstrates that Plaintiffs' Complaint as a whole was frivolous.

The Court in United Hearts acknowledged that "[c]ontinued prosecution of a claim or defense may, based on facts coming to be known to the party after the filing of the initial pleading, be sanctionable as baseless or frivolous even if the initial assertion of the claim was not." United Hearts, at 390 (quoting Iannone v. McHale, 245 N.J. Super. 17, 31 (App. Div. 1990)). "The requisite bad faith or knowledge of lack of well-groundedness may arise during the conduct of the litigation." Id. Defendants argue that this occurred here, and that a thorough review of discovery, and "the tens of thousands of documents produced after the frivolous litigation letter," would have demonstrated the falsity of Plaintiffs' allegations, and prompt counsel to withdraw them. (Flowers Reply Brief dated May 4, 2015 at p. 3).

Defendants also argue the underlying facts and procedural history of United Hearts differ greatly from the facts at hand. United Hearts involved only one plaintiff and revolved around defendant's ownership of real property with respect to collecting and enforcing a default judgment. The basis of plaintiff's claims was that defendants had fraudulently tried to transfer ownership of real property in order to hinder, delay, and defraud collection of the default judgment. Plaintiff sought a judgment setting aside the conveyance. Defense counsel sent a Rule 1:4-8 letter indicating "the uncontroverted documentary evidence... demonstrates that there is no factual or legal basis for your claim." United Hearts, at 379. Plaintiff eventually survived summary judgment on Count One only, based on a question of fact with regard to proof that defendants acted with the actual intent to hinder, delay, or defraud. Sometime after two witnesses testified for the plaintiff, the trial court granted defendant's motion to vacate the default judgment in the underlying action. Plaintiff

thereafter withdrew the complaint. Based on these facts the United Hearts Court found attorney's fees were not warranted because it was the type of case where the client relied on the attorney for prosecuting the complaint.

The Bajardis had the burden of proving their defamation and tort claims. A statement is defamatory if it is false, communicated to a third person, and tends to lower the subject's reputation in the estimation of the community or to deter third persons from associating with him. Lynch v. N.J. Educ. Ass'n, 161 N.J. 152 (1999) (citing Restatement (Second) of Torts §§ 558, 559 (1977)); Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009). "Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court," and requires consideration of three factors: content, verifiability, and context. Ward v. Zelikovsky, 136 N.J. 516, 529 (1994). When a public figure is the plaintiff in a defamation case, the plaintiff must establish actual malice by clear and convincing evidence. New York Times v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); DeAngelis v. Hill, 180 N.J. 1 (2004).

The plaintiff must prove that the defamatory statement caused "actual harm to reputation through the production of concrete proof." Ward v. Zelikovsky, 136 N.J. 516, 540 (1994). This damage element of a prima facie case of defamation is waived if the statement is slander or defamation per se, because damage to reputation is presumed to flow from such statements. Id.; McLaughlin v. Rosanio, Bailets & Talamo, 331 N.J. Super. 303, 308-309 (App. Div. 2000). The term defamation per se relates to statements that clearly denigrate a person's reputation so much that a court could decide that the statements are defamatory without submitting the issue to the jury. Biondi v. Nassimos, 300 N.J. Super. 148, 152 (App. Div. 1997). Without proof of actual damages or pecuniary harm, a plaintiff's claims are maintainable only if statements constituted

slander per se. Id. The slander per se doctrine is limited to defamatory statements which falsely impute to another person (1) a criminal offense; (2) a loathsome disease; (3) conduct, characteristics or a condition that is incompatible with his business, trade or office; or (4) serious sexual misconduct. Biondi, 300 N.J. at 152; Restatement (Second) of Torts §§ 570-574 (1977); see also Gnapinsky v. Goldyn, 23 N.J. 243, 250 (1957).

In this case, Plaintiffs filed a joint Complaint against multiple Defendants involving a multitude of allegations based on several different occurrences and legal theories. Unlike United Hearts, the Plaintiffs' claims here were not based on a single action, were not premised on a common legal theory, and were not derivative of each other. The Bajardis filed a joint Complaint, initially naming Brice, Pincus, and John Doe Defendants, and included 170 paragraphs of allegations. The volume of these allegations are based on separate factual instances, actions by separate defendants, and statements made on several different forums. The Complaint also attributed defamatory statements and tortious acts to thirteen unidentified screen-name Defendants, of which only one claim survived to trial (Count 81 involving Defendant Heyer). Furthermore, Plaintiffs' Complaint was pled without specificity, colloquially known as "the shotgun approach." Following 128 paragraphs of "factual background" each of the five causes of action in the Complaint provided allegations of "Plaintiffs" against "Defendants" generally. Plaintiffs made only vague and conclusory assertions that the statements made by the Defendants were tortious, and based these claims on "reputational damage," though no evidence of such was ever produced.

The distinction from the circumstances of United Hearts is plain. The Bajardis did not simply rely on their attorney's review of the documentation and interpretation of the law when pursuing their claim to collect on a judgment. Rather, this Court finds that Plaintiffs were limited public figures who manipulated their attorney to perpetrate and perpetuate a SLAPP-suit disguised as a

defamation case involving weighty issues of constitutionally protected First Amendment political free speech. Plaintiffs produced no evidence of actual malice or reputational or pecuniary injury. There was evidence introduced at trial that the Bajardis remained politically involved as limited public figures. In the end, Plaintiffs had no evidence that expressions constituting opinion and satire about limited public figures and matters of public concern were defamatory. Plaintiffs were never able to support any of their allegations regarding reputation and pecuniary damages, none were withdrawn, and all were dismissed by the Court.

A. Sanctions Pursuant to Rule 1:4-8 Against Ms. Cox & Mr. Gibson

Defendants move for sanctions against Cox and Gibson due to the allegedly frivolous nature of the claims asserted in Plaintiffs' complaint, specifically all the claims by Kimberly Cardinal Bajardi (none of which survived summary judgment on the merits), and the couple's joint tort claims (which also did not survive summary judgment).

Gibson responded to Plumb's Rule 1:4-8 letter on October 23, 2012. In that letter, Gibson stated "we believe there are strong legal and factual arguments showing that Plaintiffs are not, in fact public figures," without identifying what those legal or factual arguments were. (Gibson's Letter at p. 3). Gibson continued that even if Plaintiffs were public figures "they could recover on their defamation claims where 'defendant knowingly or with reckless disregard for the truth published false statements.'" (Gibson's Letter at p. 3). Clearly, Gibson was aware of the evidentiary hurtle Plaintiffs faced when it came to proving actual malice. Gibson wrote that he believed the evidence would show Pincus acted with no "legitimate basis" and with reckless disregard for the truth. However, evidence in the form of emails and comments was never produced to support Plaintiffs' claims. Gibson concluded that "we are confident that discovery will show that your assumptions and speculation are without foundation." (Gibson Letter at p. 5).

On the contrary, it was Plaintiffs' claims that lacked foundation and were based on speculation. Gibson argued there were facts to support Plaintiffs' claims, but never identified what those facts were, and how they would be supported at trial. Discovery yielded no information to support Plaintiffs' claims, and the entirety of Plaintiffs' claims were eventually dismissed without being submitted to a jury.

The Court dismissed Plaintiffs' tortious interference with business relations and prospective economic relations claims after ruling that "plaintiffs have offered no evidence that either plaintiff suffered a loss of prospective gain." (Findings of Fact and Conclusions of Law, The Honorable Christine M. Vanek Sept. 9, 2014 at 29). The Court likewise dismissed all claims of Kimberly Cardinal Bajardi finding them completely unsupported by a basis in law or fact. The Court also previously dismissed the majority of Plaintiffs' defamation claims finding the mere utterance of words was insufficient to support a claim.

Gibson and Cox prosecuted claims which they knew or should have known had no factual or legal basis. The Bajardis failed to demonstrate any decrease in income, loss of employment, demotion, transfer or any other negative impact to reputation or otherwise. To the extent any evidence of economic or pecuniary harm existed, that information was distinctly within the Bajardis' own ability to produce. It was not information discovery would yield from the Defendants or third parties. This marks the first, but not the last time in this litigation, that Plaintiffs' counsel could have and should have learned of Plaintiffs' crucial lack of evidence as to economic harm or reputational harm, which should have been apparent if counsel undertook a reasonable inquiry under the circumstances. Gibson and Cox could have and should have been aware that Bajardi inserted himself in the public discourse and in public forums. At trial, Defendants confronted Mr. Bajardi on cross-examination using of a video depicting Bajardi

speaking at a July 15, 2011 City Council meeting and advocating for the political position of Councilwoman Mason. (Feb. 3, 2015 Trail Transcript at 132:19-133:11).

Rule 1:4-8(a) provides that an attorney filing, signing or advocating a pleading certify to "his or her knowledge information and belief, formed after a reasonable inquiry under the circumstances." Rule 1:4-8(a)(3) requires factual allegations have evidentiary support, or "will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support."

The Court finds Gibson and Cox violated Rule 1:4-8, failed to conduct a reasonable inquiry under the circumstances, and failed to withdraw or correct Plaintiffs' claims when a reasonable inquiry would have required them to do so. Gibson and Cox knew or should have known that Plaintiffs' Complaint was without any reasonable basis in law or fact and could not be supported.

B. Sanctions Pursuant to Rule 1:4-8 Against Mr. Cohen

The analysis of Cohen's exposure for sanctions is limited to the time he entered an appearance for Plaintiff on November 21, 2013 through the time Plaintiff's claims were dismissed at trial, and only for the allegations against Defendants Brice and Heyer. Defendant Pincus limits her motion for sanctions to Plaintiffs' tort claims, handled only by Plaintiffs' first counsel, Gibson and Cox. Before oral argument, Pincus withdrew her motion as to Cohen.

Cohen argues he reasonably believed that investigation and discovery would uncover factual support for Plaintiffs' claims and that this precludes an award of sanctions or fees. Cohen and his Counsel argue that because the facts needed to support Plaintiffs' claims were never uncovered is not a basis to award attorney's fees and costs.

At trial no evidence was presented to support a finding of actual malice or reputational or pecuniary damages. Cohen presented no expert with regard to the claims of damage to Bajardi's

career as a journalist, and no proof regarding any negative effects on Bajardi's employment.[2] To the contrary, it was adduced at trial that Bajardi received an increase in salary during the relevant time period.

The Court finds Cohen violated Rule 1:4-8 and failed to conduct a reasonable investigation under the circumstances. Plaintiffs' economic damages, if any, were known and should have been known to Cohen. Plaintiffs were obligated to provide proof of economic harm or pecuniary injury, such as salary decreases or loss of income. Verification required minimal effort by Cohen, and could have been accomplished by a single discussion with his clients and a cursory review of their financial records. This was not information in Defendants' possession but rather information in the Plaintiffs' possession from the outset.

Not until the court heard oral argument on these motions for sanctions and attorney's fees did Cohen, for the first time, argue that he intended only to pursue the defamation per se claims. This was a belated attempt to explain why he possessed no facts regarding pecuniary or reputational damages, and why none were ever presented. This was also contrary to the prior representations and conduct of Cohen up until this point in time. Cohen and Gibson both argued to the Court that actual damages existed and would be proven. In cases where only defamation per se is pursued, attorneys generally indicate as much to the Court and the other parties. For example, in W.J.A. v. D.A., 210 N.J. 229, 236 (2012), there was a record of plaintiff's counsel indicating to the court that:

> There will be no testimony as to actual damages made. There will be no testimony because there is none as to economic loss my client might have had because of the statement or business loss they might have had. What will be requested, much like the last trial, is that the jury be presented the evidence and be presented the law on slander per se.

[2] The Court entertained a motion for Cohen to qualify Mr. Bajardi as an expert in the field of journalistic ethics. The Court held a Rule 104 hearing and found Bajardi did not qualify as an expert.

No similar record was made in this case. In fact there is evidence of the opposite in Gibson's oral argument before Judge Maron, as discussed above.

Notably, Cohen argues that he had a reasonable basis on which to believe actual malice could be proven. This despite his representations in opposition to Pincus' motion to deem her responses to requests for admission as timely filed. There, Cohen recognized the high burden of establishing actual malice by clear and convincing evidence, and the Plaintiffs' lack of evidence by stating that he has no evidence of actual malice.

> If this Court permits Ms. Pincus to now "deny" Request Nos. 14-21, Mr. Bajardi will face great difficulty in finding substitute evidence to prove these matters. These admissions are powerful evidence of Ms. Pincus' fault in publishing defamatory statements about Mr. Bajardi... Mr. Bajardi is not aware of any other evidence showing that Ms. Pincus "made no effort to investigate" whether her defamatory statements were true before investigating them.

(Pl. Opp. Brief. at 9).

At trial, this was confirmed, and it became clear that at no time did there exist any evidence of actual damages suffered on the part of Plaintiffs, or actual malice on the part of Defendants. Rule 1:4-8 requires that a party withdraw a pleading or allegation "if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support."

Reinforcing the constraints of the actual-malice test is the necessity that actual malice be found by the court as a matter of law. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 685 (1989). Supporting the actual malice standard is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government or public officials." New York Times v. Sullivan, 276 U.S. at 270. Defamation law principles must achieve the proper balance between protecting reputation and protecting free speech. Rocci v. Ecole Secondaire Macdonald- Cartier, 165 N.J. 149 (2000); Ward v. Zelikovsky, 136 N.J. 516, 528

(1994). In that regard, speech on matters of public concern is at the heart of First Amendment protection. Rocci, at 149. Courts have noted that readers recognize statements by one side in a political contest are often exaggerated, emotional, and even misleading. Milkovich v. Lorain Journal Co., 497 U.S. 1, 32 (1990). To satisfy the actual malice standard, a plaintiff must establish by clear and convincing evidence that the defendant published the statement with knowledge that it was false or with reckless disregard of whether it was false. DeAngelis, 180 N.J. at 16-17. In order to demonstrate reckless disregard, the plaintiff must show that the statements were published with a high degree of awareness of their probable falsity or with serious doubts as to the truth of publication. Id.

The standard is a subjective one. Id. Negligent publishing does not satisfy the actual malice test. Lynch, 161 N.J. at 165. Even a publisher's hostility or ill will is not dispositive of malice. DeAngelis, 180 N.J. at 16-17. Spite, hostility, hatred or the deliberate intent to harm demonstrate possible motives for making a statement, but do not demonstrate publication for a reckless disregard for truth. Lynch, 161 N.J. at 166-167. Mere failure to investigate all sources does not prove actual malice. Lynch, at 172 (citing Costello v. Ocean County Observer, 136 N.J. 594, 615 (1994)).

This Court recognized that a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 668 (U.S. 1989) (where testimony proved that a newspaper purposely avoided the truth when it published the story based on the allegations of a single source without verifying claims of another key source, and that it intentionally ignored plaintiff's denials, actual malice was found). This Court held that the case here is distinguishable because Plaintiff presented no proof that there was an available dispositive source to Defendants, and there was no evidence that Defendants were

aware of Plaintiffs' denial of these statements or purposefully disregarded contrary evidence that was placed in their lap, as was the case in Harte-Hanks. Rather, this Court found the evidence clearly established Plaintiff was heavily politically involved and there was significant evidence to support the truth of Defendants' statements. The Court dismissed Plaintiff's claims for defamation and defamation per se because Plaintiff's case lacked a clear and convincing showing that Defendants knew what they posted was false, or that they posted with reckless disregard of whether they were false. Durando, supra, at 458. The Court further found there was no evidence of reputational or pecuniary damages.

It is difficult to imagine how Cohen maintained a good faith and reasonable belief in the merits of this case when he admitted to having no evidence of actual malice after the discovery period had expired. Cohen argues that the law does not require direct evidence of actual malice, and that he maintained a belief that actual malice could be proven through circumstantial evidence. However, he failed to present any direct or circumstantial evidence to that effect when given the opportunity to do so at trial.

C. Attorney's Fee Pursuant to N.J.S.A. 2A:15-59.1 Against Lane Bajardi and Kimberly Cardinal Bajardi

N.J.S.A. 2A:15-59.1 serves a dual purpose. Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407, (App. Div. 2009). First, the statute serves a punitive purpose, seeking to deter frivolous litigation. Id. Second, "the statute serves a compensatory purpose, seeking to reimburse the party that has been victimized by the party bringing the frivolous litigation." Id. (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 67 (2007). The remedial sanction is a payment of "reasonable counsel fees and litigation costs." Id. Only a party who prevails in a civil action is entitled to that relief, and any imposition of sanctions under the statute is confined to the parties. N.J.S.A. 2A:15-59.1(a) (1); McKeown Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 560 (1993).

In the context of this analysis, a claim is frivolous if pursued in bad faith, solely for the purpose of harassment, delay or malicious injury, or if "[t]he nonprevailing party knew, or should have known, that the [claim or defense] was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b). When a defendant's allegation is based on the absence of "a reasonable basis in law or equity" for the plaintiff's claim and the plaintiff is represented by an attorney, an award cannot be sustained if the "plaintiff did not act in bad faith in asserting" or pursuing the claim. Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407-408 (App. Div. 2009) (citing McKeown-Brand, 132 N.J. at 549). The Ferolito court reasoned that proof of bad faith is necessary because clients generally rely on their attorneys to evaluate the basis in law of a claim, and a client who relies in good faith on the advice of counsel cannot be found to have known that his or her claim or defense was baseless. Ferolito, 408 N.J. Super. at 408. However, reliance on the advice of counsel will not insulate a party who acts in bad faith, although it may be indicative of a lack of bad faith. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 563 (1993).

In this case, the heart of Plaintiffs' claims were economic and reputational damage. Plaintiffs' here did not simply rely on advice of counsel when bringing their claims. This is not a case where the attorney evaluated a basis for a claim in the law. Rather, it is a situation where the clients represented to the attorney that they suffered reputational and pecuniary damage – something that is particularly within their own purview to assess. Plaintiffs represented to their counsel that damages existed as a result of the alleged defamatory conduct. No proof of damages was ever presented. Allegations regarding intentional infliction of emotional distress, tortious interference, and defamation from eleven anonymous screen names went completely unsupported and were dismissed. Plaintiffs' tort claims rested on Defendants allegedly "damaging Plaintiffs' reputations,"

no evidence of which was ever presented.

Additionally, Plaintiffs were not forthcoming as to the extent of their political involvement both on the internet and in person. Gibson's response to Plumb's Rule 1:4-8 letter confirms as much. Plaintiffs remained publicly and actively involved in Hoboken's political discourse. For example, Bajardi presented himself at various public gatherings advocating for the political position of Councilwoman Mason, and remained deeply involved in particular controversies, specifically the ones that were the subject of Defendants alleged defamatory statements. Not only were the Bajardis acting as limited public figures, but the issues upon which they predicated their claims were matters of public concern. Therefore, the Court finds the Bajardis' claims were frivolous, were pursued in bad faith, and with the purpose of harassment, delay, and malicious injury, in violation of N.J.S.A. 2A:15-59.1.

This lawsuit was prosecuted for a period of two and a half years across five states, and resulted in voluminous discovery including nearly 70,000 emails produced by Plaintiffs, and 68 motions which continued despite receipt of numerous Rule 1:4-8 letters. The Court finds Plaintiffs' must reimburse Defendants "for the litigation costs of suing first and thinking later." McKeown-Brand, 132 N.J. at 553. Plaintiffs' conduct does not "bespeak an honest attempt to press a perceived, if ill-founded, claim," as the Court held in McKeown-Brand, at 563. Rather, Plaintiffs acted in bad faith and continually pursued claims with no basis in fact, while misrepresenting the facts to their counsel and to the Court. Plaintiffs' conduct throughout this case at a minimum demonstrates bad faith, and approaches a fraud upon the Court. Therefore, the Court finds attorney's fees and costs are awarded to Defendants pursuant to N.J.S.A. 2A:15-59.1(b).

CONCLUSION

I. SANCTIONS AGAINST MR. GIBSON AND MS. COX

The Court finds that attorneys Gibson and Cox asserted frivolous claims on behalf of the Bajardis in violation of Rule 1:4-8(a) sections (1), (2) and (3) by certifying pursuant to section (1) that the complaint was not presented for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation; pursuant to section (2) that the claims were supported by existing law or non-frivolous argument; and pursuant to section (3) that the factual allegations have evidentiary support or will be withdrawn or corrected upon investigation or discovery that indicates there is insufficient support. Therefore, the Court finds the motions for sanctions against Gibson and Cox by Defendants Pincus, Brice, Heyer, and the unidentified screen name defendants are GRANTED.

II. SANCTIONS AGAINST MR. COHEN

The Court finds that attorney Cohen advocated for frivolous claims on behalf of the Bajardis in violation of Rule 1:4-8(a) subsections (1), (2) and (3). Cohen violated subsection (1) by advocating for a pleading and thereby certifying that after a reasonable inquiry was undertaken under the circumstances the pleading was not being presented for any improper purpose, such as to harass, delay, or needlessly increase litigation costs. Cohen violated subsection (2) by advocating for a pleading and thereby certifying the claims were warranted by existing law or non-frivolous argument. Cohen violated subsection (3) by advocating for a pleading and thereby certifying the factual allegations have evidentiary support, or will be withdrawn when reasonable opportunity for investigation indicates there is insufficient support. It should have been apparent to Cohen, exercising minimal skill and diligence, that his clients did not have and would not have any proof of economic damages, reputational harm, or actual malice. Cohen continued to pursue

these claims without obtaining proof, or reviewing discovery and his clients' records to see if it existed. This evidence would have established a requisite element of the lawsuit, and counsel was aware that without this evidence, the lawsuit would fail as a matter of law. Therefore, the Court finds the motions for sanctions by Defendants Heyer and Brice against Cohen are GRANTED.

III. ATTORNEY'S FEES AGAINST LANE BAJARDI AND KIMBERLY CARDINAL BAJARDI

The Court finds that despite the glaring lack of evidence to prove actual malice or actual damages, the Bajardis continued to pursue as many claims as they could against as many defendants as they could. Plaintiffs participated by misrepresenting that the requisite evidence existed and would be uncovered.

The Court finds that Plaintiffs' violated N.J.S.A. 2A:15-59.1(b) subsections (1) and (2) based on: (1) the commencement and continuation of their claims in bad faith, and solely for the purpose of harassment, delay and malicious injury, and (2) when they acted in bad faith and knew or should have known that their Complaint was without any reasonable basis in law or equity and could not be supported by a factual basis and existing law. Therefore, the Court finds the motions for attorney's fees and costs by Defendants Pincus, Brice, Heyer, and the unidentified screen name Defendants are GRANTED.

Based on the foregoing, the Court imposes sanctions pursuant to Rule 1:4-8 in the following amounts:

1. Gibson in the amount of $1,000.
2. Cox in the amount of $1,000.
3. Cohen in the amount of $2,000.

The opposing parties have not presented any arguments challenging the reasonableness of Defendants' legal fees. Upon review the Court finds Defendants' fees reasonable. Therefore,

attorney's fees are awarded to Defendants in following amounts:

1. Pincus in the amount of $26,033, representing the reasonable fees paid to Plumb for all of Kimberly Cardinal Bajardi's claims, and all of Plaintiffs' tort claims.
2. Brice in the amount of $22,687, for fees incurred after January 11, 2015, twenty-eight days after Booth served the Rule 1:4-8 letter on December 14, 2014.
3. Fees are awarded in the total amount of $2,200 to twelve of the screen name defendants, including the two screen names attributed to Heyer, from November 12, 2012 (twenty-eight days after Flowers' Rule 1:4-8 letter dated October 15, 2012) to March 22, 2013. Flowers represented thirteen of the fifteen unidentified screen name Defendants. His application for fees and sanctions was withdrawn as to one screen name, two screen names were attributed to Heyer, and eleven screen names were dismissed by Judge Maron on March 22, 2013. Fees are awarded on a pro rata basis for that time period, reduced by 1/13th for the withdrawn application.
4. Fees are awarded in the amount of $225,757 to Heyer, additionally and individually, for services rendered in his defense after March 22, 2013.

Patrick J. Arre, J.S.C.