SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No.: A-002867-23

LYSHRON STATTEN, AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF KENNETH L. DANTZLER, DECEASED,	:	CIVIL ACTION
	:	ON APPEAL FROM
Plaintiff/Appellant,	:	Superior Court of New Jersey Law Division Cumberland County Docket No. : CUM-L-445-23
V.	:	
PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION; CUMBERLAND OPERATOR, LLC; JOHN DOE #1–10 AND ABC CORP. #1–10,	:	*SAT BELOW*
	:	The Honorable James R. Swift, J.S.C.
Defendant/Respondent.	:	

BRIEF AND APPENDIX FOR LYSHRON STATTEN, AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF KENNETH L. DANTZLER, DECEASED, PLAINTIFF/APPELLANT

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Date of Submission: August 15, 2023

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PROCEDURAL HISTORY

On August 8, 2023, Plaintiff, Lyshron Statten, as Administrator Ad Prosequendum of the Estate of Kenneth L. Dantzler, deceased, filed a Complaint sounding in negligence in Cumberland County against Preferred Care at Cumberland Nursing and Rehabilitation and Cumberland Operator, LLC. (2a). Both Defendants were served on August 18, 2023; however, neither Defendant filed an Answer within the requisite period of time. (47a and 49a). Thus, on September 29, 2023, Plaintiff requested that default be entered against both Defendants and on October 11, 2023, the Trial Court entered default and scheduled a Proof Hearing for November 9, 2023. (52a and 53a).

On November 7, 2023, Defendants' Counsel requested that Plaintiff enter into a Consent Order to vacate the default against Defendants. Plaintiff's Counsel agreed to vacate the default and on November 8, 2023, the Trial Court granted the Consent Order approving same. (55a). Thereafter, on November 17, 2023, Defendants responded to Plaintiff's Complaint. (16a).

On February 5, 2024, Plaintiff responded to all of Defendants' discovery requests. (57a). To date, Defendants have failed to respond to any of Plaintiff's discovery requests. Then, on April 12, 2024, Defendants filed a Motion to Dismiss Plaintiff's Complaint with prejudice for failure to submit an Affidavit of Merit. (27a). On April 15, 2024, Plaintiff filed a Motion to Dismiss Plaintiff's Answer for

Failure to Answer Discovery. (36a). On April 16, 2024, Plaintiff's Counsel filed a sworn statement excusing the Affidavit of Merit requirement for Defendant's failure to send requisite medical records. (59a). On April 18, 2024, Plaintiff submitted an Affidavit of Merit and Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint. (61a and 63a). Defendants' Counsel failed to timely file opposition and reply papers to Plaintiff's Motion and opposition, which led to them requesting an adjournment of the May 10th Motion Hearing. Nevertheless, on May 10, 2024, the Trial Court heard oral argument on Defendants' and Plaintiff's Motions.

At the aforementioned Motion Hearing, the Honorable James R. Swift, J.S.C., granted Defendants' Motion to Dismiss Plaintiff's Complaint with prejudice and further, Judge Swift found Plaintiff's Motion to Dismiss Defendant's Answer to be moot. (84a and 86a). The transcript of oral argument and decision on the Motions to Dismiss were filed separately with this Court on June 24, 2024. (91a).

A Notice of Appeal was filed on behalf of Plaintiff, Lyshron Statten, as Administrator Ad Prosequendum of the Estate of Kenneth L. Dantzler, deceased, on May 20, 2024. (87a).

STATEMENT OF FACTS

Kenneth L. Dantzler was long-term resident of Defendant, Preferred Care at Cumberland Nursing and Rehabilitation. Preferred Care at Cumberland Nursing and Rehabilitation is a Nursing Home facility located at 154 Sunny Slope Drive, Bridgeton, New Jersey 08302. Preferred Care at Cumberland Nursing and Rehabilitation is owned and operated by Defendant, Cumberland Operator, LLC.

Kenneth L. Dantzler was placed in the care of Preferred Care at Cumberland for a number of medical issues, but most importantly, for treatment and care related to end-stage renal disease. Due to the fact that Defendants never responded to Plaintiff's discovery requests, the exact dates that he became a resident at Preferred Care is unknown. See (61a). However, from the medical records that were obtained by Plaintiff's Counsel from Mr. Dantzler's other treating facilities, namely, Inspira Medical Center Vineland and Pulse Vascular, it is clear that while under the care of Defendant, Preferred Care at Cumberland, Mr. Dantzler developed a serious infection in his right foot. Id.

In June of 2022, Mr. Dantzler presented to Inspira Medical Center Vineland with an infection in his right foot. Id. Due to the progression of this infection, it was required that he undergo a toe amputation. Id. Then on August 1, 2022, due to improper care of the amputation site, Mr. Dantzler presented back to the emergency room with dehiscence of the surgical site and further infection, which

required a Lisfranc amputation due to osteomyelitis. Id. Due to being a long-term resident of Preferred Care at Cumberland, this facility was tasked with wound care following both amputations. Id. On October 6, 2022, after being seen by a podiatrist, Preferred Care at Cumberland was instructed to take Mr. Dantzler to the Emergency Room due to further infection and pain in his right foot. Id. Despite this instruction, Preferred Care at Cumberland did not take Mr. Dantzler to the Emergency Room until October 27, 2022, where it was noted that the surgical site was dehisced, ulcerated and infected. Id. Thus, Mr. Dantzler had to undergo another procedure to debride the ulceration on his right foot. Id.

On March 3, 2023, Mr. Dantzler passed away intestate due to atherosclerotic and hypertensive cardiovascular disease to which diabetes mellitus and end-stage renal disease also contributed, per the State of New Jersey's Autopsy Report. (C1a and C8a). After Mr. Dantzler's passing, his daughter, Lyshron Statten, applied and was granted Administration Ad Prosequendum of Mr. Dantzler's estate by the Honorable Douglas M. Rainear of Cumberland County's Surrogate Court on March 21, 2023. (C2a–C7a).

LEGAL ARGUMENT

I. The Trial Court erred in granting Defendants' Motion to Dismiss because doing so was contrary to notions of justice and was antithetical to the purpose of the Affidavit of Merit Statute. (Transcript, 25:3–17).

> The Affidavit of Merit statute was intended to flush out insubstantial and meritless claims that have created a burden on innocent litigants and detracted from the many legitimate claims that require the resources of our civil justice system. The Statute was not intended to encourage gamesmanship or a slavish adherence to form over substance. **The statute was not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the Affidavit of Merit.**

Ferreira v. Rancocas Orthopedic, 178 N.J. 144, 154 (2003) (emphasis added). In 1995, the Affidavit of Merit Statute was passed as part of a tort reform package, which was designed to strike a fair balance between preserving a plaintiff's right to sue and controlling nuisance lawsuits. Id. at 149 (quoting Palanque v. Lambert-Woolley, 168 N.J. 389, 404 (2001) (quoting Office of the Governor, News Release 1 (June 29, 1995))). The purpose is to weed out frivolous lawsuits early in the litigation while, at the same time, ensuring plaintiffs with meritorious claims will have their day in court. Ferreira at 150–51 (quoting Hubbard v. Reed, 168 N.J. 387, 395 (2001) (also citing Palanque at 404, stating that the legislature intended "to curtail frivolous litigation without preventing access to the courts for meritorious claims") (also citing Galik v. Clara Maass Medical Center, 167 N.J.

341, 359 (2001), stating "there is no legislative interest in barring meritorious claims brought in good faith"). The Legislative purpose was not to "create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims." Ferreira at 151 (quoting Mayfield v. Community Med. Assocs., P.A., 335 N.J. Super. 198, 209 (App. Div. 2000).

Having provided this Court with the New Jersey Legislature's purpose for enacting the Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, Plaintiff now turns to the pertinent text of the statute as it applies to these circumstances. Per N.J.S.A. 2A:53A-27, Plaintiff is required to show that her complaint is meritorious by submitting an affidavit from an appropriate medical expert attesting to the "reasonable probability" of professional negligence. Ferreira at 150 (quoting Palanque at 404). The Affidavit of Merit is required to be submitted within sixty (60) days of the filing of defendant's answer or, for good cause shown, within an additional sixty-day period, for a total of 120 days from the date of defendant's answer. See Douglass v. Obade, 359 N.J. Super. 159, 160–61 (App. Div.), cert. den. 177 N.J. 575 (2003). Despite, the text of the Affidavit of Merit Statute, New Jersey Courts "have recognized—consistent with our understanding of its legislative intent—two equitable remedies that temper the draconian results of an inflexible application of the statute." See Ferreira at 151. The first equitable remedy is known as substantial compliance, "plaintiff's complaint will not be

dismissed if the plaintiff can show that he has substantially complied with the statute." Id. The second equitable remedy is extraordinary circumstances, for which Plaintiff's Complaint will dismissed without prejudice. Id. at 151. Here, in consideration of the Affidavit of Merit statute's legislative purpose, Plaintiff's substantial compliance and extraordinary circumstances, both of which will be more fully set forth in forthcoming sub-parts of Plaintiff's Legal Argument, it would be contrary to the legislative intent of the Affidavit of Merit Statute to uphold the Trial Court's dismissal of Plaintiff's Complaint for a procedural violation when an Affidavit of Merit has been produced evidencing the meritorious nature of her claim, albeit after the timeframe to submit the Affidavit had lapsed. See e.g., Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 11 (App. Div. 2017) (stating that the sanction of dismissal with prejudice for a procedural violation must be a recourse of last resort).

a. The Trial Court did not consider the fact that Defendant's Motion to Dismiss should have been a recourse of last resort and should only be granted in the rarest of instances. (Transcript, 25:3–17).

A motion to dismiss should be approached with great caution and should only be granted in the rarest of instances. See Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). Furthermore, a dismissal with prejudice is considered the ultimate sanction and will normally be ordered only when no lesser

sanction will suffice to erase the prejudice suffered by the non-delinquent party. See Zaccardi v. Becker, 88 N.J. 245, 253 (1982). Ultimately, in disputes over procedural questions, there are competing policy concerns; defendants are entitled to have plaintiff comply with procedural rules, while plaintiffs have the right to an adjudication of the controversy on the merits. Id. at 252 (citing Crews v. Garmoney, 141 N.J. Super. 93, 96 (App. Div. 1976)).

The Affidavit of Merit Statute imposes an arguably procedural requirement on plaintiffs that requires the submission of an appropriate affidavit of merit within the timeframe prescribed by N.J.S.A. 2A:53A-27, within sixty (60) days of the filing of defendant's answer or, for good cause shown, within an additional sixty-day period, for a total of 120 days from the date of defendant's answer. Although prescribed by statute, the affidavit of merit requirement is akin to discovery in the sense that its purpose is to attest to the reasonable probability of professional negligence. By its very nature, the affidavit of merit can be likened to a permanency certification, which attests to the permanent nature of a plaintiff's injuries. Failure to submit either one could result in the dismissal of plaintiff's complaint. However, due to the fact that dismissal of a plaintiff's complaint is considered the "ultimate sanction," competing policy concerns must be balanced. As such, courts should consider the prejudice that was suffered by the defendant in comparison to the draconian punishment of the dismissal of plaintiff's complaint.

Here, the Trial Court failed to engage in the balancing of these competing policy concerns. When reaching the question of prejudice suffered by Defendants for Plaintiff's failure to submit a timely Affidavit of Merit, Defendants' Counsel offered no explanation as to the type or kind of prejudice that they have suffered. Additionally, not even the Trial Court Judge could articulate the prejudice that Defendant suffered by Plaintiff's failure to submit a timely affidavit of Merit. (Transcript, 15:2–16:3). In fact, when Plaintiff's Counsel explained that Defendants have suffered no prejudice and that they are in the same position as if Plaintiff had filed a timely affidavit of merit, the Trial Court Judge said, "Well, that's true, but you – but you didn't." (Transcript, 16:2, 3). The fact of the matter is that Defendants have suffered no cognizable prejudice. Additionally, even if Plaintiff did submit a timely affidavit of merit, Defendants would have filed the same motion arguing that the submitted affidavit of merit was insufficient, which is a result of the fact that Defendants failed to produce the same medical records that Plaintiff required to submit a timely and sufficient affidavit of merit. The entire issue in this appeal stems from two errors: (1) Defendants' failure to respond to Plaintiff's requests for discovery, which would have provided Plaintiff with the medical records needed to obtain an affidavit of merit; and (2) the Trial Court's failure to hold a Ferreira Conference.

In a case recently decided by the New Jersey Supreme Court, Justice Solomon reiterated the importance of a Ferreira Conference, "the conference is designed to identify and resolve issues regarding the AOM that has been served or is to be served. Failing to hold such a conference in this case gave rise to issues that could have been resolved." Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., No. A-7-23, at *26 (N.J. Jul. 11, 2024). (citing Meehan v. Antonellis, 226 N.J. 216, 241 (2016)). Similarly, if Defendants had complied with Plaintiff's Discovery Requests, Plaintiff would have been able to submit a timely and sufficient Affidavit of Merit. Also, if the Trial Court had held the Ferreira Conference that it is mandated to, Defendants would have been instructed to send their records to Plaintiff, so that Plaintiff could comply with her duty under the Affidavit of Merit statute. Alas, Defendants chose to eschew their discovery responsibilities, preventing Plaintiff from being able to submit a timely and sufficient affidavit of merit, the Court failed to hold a Ferreira Conference—and even more egregious—the Trial Court chose to impose the draconian punishment of dismissing Plaintiff's Complaint without even considering the prejudice, or lack thereof, that Defendants had suffered. Now, in this appeal, Plaintiff must fight for her right to have her day in court, a right that is supposedly among the most important rights in the eyes of New Jersey's courts.

b. The Trial Court's ruling to dismiss Plaintiff's Complaint with prejudice was in error because Plaintiff substantially complied with the Affidavit of Merit Statute. (Transcript, 18:23–25, 19:1–9).

"A complaint will not be dismissed with prejudice if the plaintiff can show that he substantially complied with the [affidavit of merit] statute." Ferreira, supra 178 N.J. at 151. "The [substantial compliance] doctrine is invoked so that technical defects will not defeat a valid claim." Id. "The doctrine requires the moving party to show: '(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claims; and (5) a reasonable explanation why there was not strict compliance with the statute.'" Id. at 151–52 (quoting Galik, supra 167 N.J. at 353, 347–48).

Here, Plaintiff substantially complied with the affidavit of merit statute because (1) Defendants have failed to show that they have suffered any prejudice. In fact, Defendants Certification and Legal Memorandum appended to their Motion to Dismiss provide no evidence that any prejudice has resulted from Plaintiff's failure to provide a timely affidavit of merit (31a), see also (Transcript, 15:2–16:3); (2) despite not having received any of the medical records requested from Defendants, which are required by statute and by Plaintiff's Expert to prepare

a comprehensive and sufficient affidavit of merit, Plaintiff has still submitted an Affidavit of Merit with the records in Plaintiff's possession that evidence Plaintiff's meritorious claim (61a); (3) the purpose of the Affidavit of Merit statute, as explained in Section I, is to weed out frivolous lawsuits that lack merit. Here, Plaintiff's untimely affidavit of merit demonstrates that Plaintiff's claim is in fact meritorious. As such, dismissal of Plaintiff's Complaint would be contrary to the purpose of the affidavit of merit statute; (4) Plaintiff notified Defendants of this lawsuit long before Plaintiff's Complaint was filed. On October 26, 2022, Defendants were sent notice that Defendants were responsible for Plaintiff's injury. (102a). Additionally, on February 5, 2024, Plaintiff complied with all of Defendants' Discovery Requests, including all of the medical records that Plaintiff had in her possession, which did not include the medical records that were requested from Defendants. (57a). Defendants have failed to respond to any of Plaintiff's requests for medical records. Furthermore, the medical records supplied by Plaintiff to Defendant included notes from a number of Plaintiff's doctors that indicated Defendants were not taking Plaintiff to his medical appointments and were not taking proper care of the infections that developed in his foot, which later required a Lisfranc amputation (61a); and (5) Strict compliance was not made with the Affidavit of Merit statute because (a) due to Plaintiff having to consent to vacate Defendants' default, Plaintiff's Counsel lost track of the timeline for

submitting a timely affidavit of merit; (b) Defendant failed to provide Plaintiff with requested medical records per N.J.S.A. 2A:53A-28; and (c) a Ferreira Conference for this matter was not held and was required to be held per New Jersey Court Rule 4:5B-4 and Ferreira v. Rancocas Orthopedic, 178 N.J. 144, 154 (2003).

Plaintiff has substantially complied with the purpose of the affidavit of merit statute by submitting an untimely Affidavit, which asserts that Plaintiff's claims are meritorious. (61a). Furthermore, Defendants have suffered no prejudice, were on notice of Plaintiff's claims prior to litigation being instituted, were provided with any medical records that Plaintiff had in her possession and Defendants have not responded to any of Plaintiff's discovery requests, including requests for medical records. Lastly, a Ferreira Conference was never held as is mandated by New Jersey Court Rule 4:5B-4 and Ferreira v. Rancocas Orthopedic, 178 N.J. 144, 154 (2003). In consideration of these facts, it would be entirely antithetical to the purpose of the Affidavit of Merit statute, which was solely promulgated to weed out frivolous claims, to allow the Trial Court to dismiss Plaintiff's claims which have been proven to have merit by Plaintiff's untimely submitted Affidavit of Merit. Per Justice Long in Ferreira, "mandatory dismissal with prejudice should be limited to those cases in which a plaintiff cannot or will not produce an affidavit of merit at all." Ferreira, supra 178 N.J. at 157 (Long, J., concurring and dissenting). Plaintiff's lawsuit is not lacking merit and therefore, an untimely submitted

affidavit in light of substantial compliance should have prevented dismissal of her Complaint with prejudice, which would have been a just and equitable result that is in line with the Affidavit of Merit statute's purpose and the progeny of cases that followed Ferreira.

c. The Trial Court's ruling to dismiss Plaintiff's Complaint was in error because extraordinary circumstances exist. (Transcript, 25:3–17).

"The Ferreira Conference was designed to be the Judiciary's key tool to promote satisfaction of the AMS's salutary policy goals. We mandated the conference and imposed requirement on both courts and defendants to discover and address issues as to the sufficiency of a plaintiff's AOM." A.T. v. Cohen, 231 N.J. 337 (2017) (citing Ferreira, supra 178 N.J. at 155); See also Saunders ex rel. Saunders v. Capital Health Sys. At Mercer, 398 N.J. Super. 500, 510, 942. A.2d 142 (App. Div. 2008) (finding that "[c]ontrary to defendants' contention and the motion judge's decision, Ferreira mandates a case management conference within ninety days of the filing of an answer in a professional malpractice case.") On September 1, 2018, New Jersey Court Rule 4:5B-4 was enacted, which required courts to hold Ferreira Conferences in relation to Affidavit of Merit production. See Rule 4:5B-4. Further bolstering Plaintiff's claim that exceptional circumstances exist in this case, the Supreme Court of New Jersey in Moschella,

reasoned that: "[i]f we were to reach the question of extraordinary circumstances, however, **the trial court's failure to hold a Ferreira Conference would weigh heavily in favor of such a finding.**" Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., No. A-7-23, at *26–27 (N.J. Jul. 11, 2024) (citing A.T. v. Cohen, 231 N.J. at 346) (emphasis added).

Plaintiff concedes that failure of a court to hold a Ferreira Conference, in and of itself, does not constitute extraordinary circumstances. See Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415 (2010). However, in A.T. v. Cohen, the Supreme Court of New Jersey found that failure to hold a Ferreira Conference and a confluence of other factors would render a case sufficiently extraordinary to allow an untimely affidavit of merit to be accepted and to require that the matter proceed on its merits. 231 N.J. at 348. In A.T. v. Cohen, an inexperienced practitioner became confused by timelines and failed to submit a timely affidavit of merit. Id. at 349. Nevertheless, counsel in that case filed the affidavit of merit after the motion to dismiss was filed. Id. The Supreme Court of New Jersey held that:

> [w]e made the conference mandatory to underscore its importance. We imposed the burden of complying with the conference requirement on both attorneys and the Judiciary. We created the failsafe mechanism within our system of case management envisioning that **the required conference would be held unless it were knowingly waived**. But systems can be imperfect, as this case reflects. **The failure of the Judiciary's current mechanisms to**

> **ensure the scheduling of the required Ferreira Conference will not be permitted to work an injustice in this matter.**

Id. at 353 (emphasis added). Plaintiff's case is sufficiently analogous to A.T. v. Cohen, as a confluence of factors contributed to sufficiently extraordinary circumstances that compel this Court not to uphold the dismissal of Plaintiff's meritorious claim, as to do so would be an injustice and contrary to the purpose of the Affidavit of Merit statute.

Here, the extraordinary circumstances of this case began when Defendants were originally in default for failing to answer within the statutory time period. Despite dedicating time and resources in preparation for the scheduled Proof Hearing, Plaintiff's Counsel, in a showing of good faith and professional courtesy, agreed to sign a consent order vacating the default just two days prior to the Proof Hearing. (55a). Then, on February 5, 2024, Plaintiff's Counsel responded to all of Defendants' Discovery Requests including production of documents. (57a). To date, Defendants have failed to respond to any of Plaintiff's Discovery Requests, including production of medical documents that are necessary and that Plaintiff is entitled to for preparation of their Affidavit of Merit. A Ferreira Conference was never scheduled by the Trial Court and the Conference was never waived by either party. Defendants, who are currently delinquent on all discovery and medical document requests, never reached out to Plaintiff's Counsel for an affidavit of

merit. In fact, Defendants did nothing for sixty (60) days after filing their answer, never reaching out to Plaintiff's Counsel for the Affidavit of Merit, and then did nothing again for an additional sixty (60) days, totaling 120 days from the filing of Defendants' Answer. Defendants have intentionally been unresponsive and uncooperative in an attempt to game the Affidavit of Merit statute. Due to the timeline of the Defendants' default and the aforementioned vacation of said default, Plaintiff's Counsel lost track of the timeline required by the affidavit of merit statute. Yet, despite not having access to all of the required medical records due to Defendants' failure to respond to Plaintiff's requests for same, immediately upon Defendant's submission of their Motion to Dismiss, Plaintiff's Expert provided an Affidavit of Merit, but noted she does not have all of the required medical records to determine any additional acts of negligence by Defendants (61a). Nevertheless, Plaintiff's expert, despite not having all the medical records to which she was entitled, reached her expert opinion that Plaintiff's malpractice claim is meritorious. Id. In consideration of these extraordinary circumstances, it would be an unjust result for Plaintiff's Complaint to be dismissed when there is a confluence of factors attributable to the untimely Affidavit of Merit, most importantly, the lack of a Ferreira Conference and Defendants' bad faith.

Although the Trial Court Judge placed the blame on Plaintiff for the fact that a Ferreira Conference was not held, the onus to hold such a Conference is on the

Court, not on the Plaintiff. (Transcript, 13:11–14:2), see also A.T. v. Cohen, 231 N.J. at 353. As the Supreme Court made clear in AT v. Cohen, "[t]he failure of the Judiciary's current mechanisms to ensure the scheduling of the required Ferreira Conference will not be permitted to work an injustice in this matter." Id. The Supreme Court's notion in AT v. Cohen should apply to this instance as well because at the end of the day, Plaintiff would not be on the brink of having an injustice work against her in this matter if not for Defendants choosing to game the Affidavit of Merit statute by not responding to discovery, which prevented Plaintiff from acquiring a sufficient Affidavit of Merit, and if not for the Court failing to schedule a Ferreira Conference.

II. The Trial Court's dismissal of Plaintiff's Complaint with prejudice must be reversed because it promotes gamesmanship of the Affidavit of Merit Statute. (Transcript, 19:11–25).

"The [Affidavit of Merit] Statute **was not intended to reward defendants who wait for a default** before requesting that the plaintiff turn over the affidavit of merit." Ferreira, supra 178 N.J. at 154. Mandatory dismissal of a plaintiff's complaint "thwarts the stated aim of allowing meritorious cases to go forward[,] [t]hat was never the intention of the Legislature when it enacted the Affidavit of Merit statute." Ferreira, supra 178 N.J. at 157 (Long, J., concurring and dissenting).

Here, it is evident that Defendants are attempting to game the Affidavit of Merit statute, using it as both a sword and shield to unjustly have Plaintiff's meritorious claim be dismissed. Despite, Defendants contention in their Certification that "a good faith effort was made to attempt to resolve the instant matter prior to filing this motion," not once did Defendant's Counsel reach out to Plaintiff's counsel in an attempt to receive an Affidavit of Merit. In direct contention to Defendants' Certification, Plaintiff's Counsel has combed through all correspondence sent to and received by Plaintiff's Counsel from Defendants' Counsel. All of Plaintiff's Counsel's emails to Defendants' Counsel are attached hereto. (75a). As this Court can see from the cited portions of the Appendix, there is not a single instance where Defendant, in good faith and professional courtesy, attempted to procure Plaintiff's Affidavit of Merit. Therefore, per Defendants' Certification, Plaintiff requests that this Court demand Defendants' Counsel to submit proofs that any attempt to procure Plaintiff's Affidavit of Merit was sent to Plaintiff's Counsel.

Defendants have been unresponsive to requests for discovery, The record indicates that Defendants made no attempt to procure the Affidavit of Merit from Plaintiff until Plaintiff was time barred from submitting the Affidavit of Merit. More specifically, and as attested to in Defendants' Certification and Legal Memorandum appended to their Motion to Dismiss, Defendants did nothing for

sixty (60) days after filing their answer, never reaching out to Plaintiff's Counsel for the Affidavit of Merit, and then did nothing again for an additional sixty (60) days, totaling 120 days from the filing of Defendants' Answer. Defendants' conduct in this matter exemplifies that they were doing nothing other than resting on their laurels until Plaintiff defaulted on the Affidavit of Merit requirement. Such conduct was admonished by the Supreme Court of New Jersey in Ferreira because it exhibits gamesmanship, which was never the purpose of the Affidavit of Merit Statute. 178 N.J. at 154. Due to the facts of this matter, notions of justice and equity demand that the Trial Court's granting of Defendant's Motion to Dismiss be reversed. Defendant's refusal to provide Plaintiff with the very medical records that Plaintiff required to obtain an Affidavit of Merit encapsulates the entire controversy of this appeal. It is unconscionable that Defendants can assert the protections offered to it by the Affidavit of Merit statute when Defendants themselves are responsible for Plaintiff's inability to produce a sufficient Affidavit of Merit.

III. The Trial Court erred in its dismissal of Plaintiff's Complaint because Plaintiff was excused from the Affidavit of Merit Requirement as a result of Defendants' failure to provide Plaintiff with requested medical records. (Transcript, 28:20–29:1).

"A licensed professional should not be permitted to wrongfully withhold records and then also assert that the plaintiff has not stated a cause of action because the plaintiff has failed to produce an affidavit where the records are a necessary component in procuring such an affidavit. Aster v. Shoreline Behavioral Health, 346 N.J. Super. 536, 543 (App. Div. 2002). Pursuant to N.J.S.A. 2A:53A-28, the affidavit of merit requirement is excused if, for a period of 45 days, defendant fails to provide plaintiff with requested medical records and plaintiff submits a certification attesting to such refusal.

In Aster, the defendant failed to produce medical records that had a substantial bearing on the preparation of an affidavit of merit. See 346 N.J. Super. at 549–50. As a result, the Appellate Division found that defendant, a medical professional, was attempting to use the affidavit of merit statute as a "sword and shield," and that by doing so defendant had prevented plaintiff from producing an affidavit of merit in a timely fashion. Thus, the Appellate Division held that the medical records had a "substantial bearing on the preparation of the affidavit of merit" and that failure of the defendant to produce the requisite medical records precluded dismissal of plaintiff's complaint with prejudice. Id.

Here, similar to Aster, Plaintiff's Counsel submitted an Affidavit pursuant to N.J.S.A. 2A:53A-28, which excuses the affidavit of merit requirement because Defendant **has failed to provide Plaintiff with any medical records, and any**

records at all for that matter, for a period much longer than 45 days as prescribed by the Statute. See (59a). Specifically, On August 8, 2023, Plaintiff filed a Complaint against Defendants, which sounded in negligence. Along with Plaintiff's Complaint, a demand for Answers to Interrogatories and a Request for Documents, including medical records, were filed with the Trial Court. On September 26, 2023, the Complaint and the accompanying discovery requests were served on Defendants, Preferred Care at Cumberland Nursing and Rehabilitation and Cumberland Operators, LLC. Defendants failed to file an answer within the statutory timeframe. As a result, both Defendants were defaulted. A Proof Hearing was scheduled for November 9, 2023. Two days prior to the proof hearing, Defendants' Counsel reached out to Plaintiff's Counsel via email and requested that he sign a Consent Order to Vacate Default. In a showing of good faith and professional courtesy, Plaintiff's Counsel signed the Consent Order and default was vacated as to both Defendants on November 8, 2023. On November 17, 2023, Defendants filed their Answer. On April 12, 2024, Defendants filed a Motion to Dismiss Plaintiff's Complaint for failure to submit an Affidavit of Merit, pursuant to N.J.S.A. 2A:53A-27. However, per N.J.S.A. 2A:53A-28, Plaintiff is not required to submit an affidavit of merit when defendants have failed to provide requested medical records for 45 days from the date the records were requested. From the date that Defendants filed their Answer, November 17, 2023, their

timeframe to provide Plaintiff with the requisite medical records per N.J.S.A. 2A:53A-28 began to run. Thus, Defendants had until January 1, 2024, to provide the requisite medical records and have failed to do so. At the time Plaintiff's Counsel filed their Opposition to Defendants' Motion to Dismiss, one-hundred-fifty (150) days had elapsed since Plaintiff requested medical records and Defendant has still failed to provide any medical records or answers to interrogatories. Thus, pursuant to N.J.S.A. 2A:53A-28, the Affidavit of Merit requirement is excused.

As stated by the Appellate Division, "[t]he legislature did not intend to give medical malpractice defendants the power to destroy a meritorious malpractice action by refusing to provide the very records the expert would need to prepare the affidavit." Barreiro v. Morais, 318 N.J. Super. 461, 470 (App. Div. 1999). In this lawsuit, Defendants have completely eschewed their responsibilities in all manners. First, Defendants failed to timely respond to Plaintiff's Complaint. As such, Plaintiff consented to vacating the default and allowing Defendants to Answer Plaintiff's Complaint, despite the fact that Defendants were out of time to do so. Second, Defendants have failed and continue to be in default regarding Plaintiff's outstanding discovery requests, most importantly of which, are the medical records that Plaintiff's expert professional requires and is entitled to in preparing her affidavit of merit. Despite lacking the required medical records from

Defendants, Plaintiff and Plaintiff's expert have made a good faith attempt to submit an affidavit of merit. See (61a). However, the Affidavit of Merit submitted by Plaintiff's expert is lacking the medical records from Defendants that would further bolster and support Plaintiff's meritorious claims for malpractice against Defendants. It would be an entirely unjust and inequitable result if Defendants are allowed to be completely unresponsive and uncooperative with Plaintiff and still be entitled to a dismissal of Plaintiff's Complaint with prejudice when it is entirely the result of Defendants' conduct that Plaintiff was unable to submit a comprehensive and timely affidavit of merit. Ultimately, the circumstance of this case requires that Defendants not be rewarded for eschewing their responsibilities and destroying Plaintiff's meritorious case. The Trial Court's dismissal of Plaintiff's Complaint must be reversed.

The Trial Court Judge was mistaken when he said that N.J.S.A. 2A:53A-28 requires that the sworn statement excusing the Affidavit of Merit be filed within the timeframe that the Plaintiff has for producing the Affidavit of Merit. (Transcript, 28:20–29:1). The text of N.J.S.A. 2A:53A-28 reads as follows:

> [a]n affidavit shall not be required pursuant to section 2 of this act if the plaintiff provides a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been

> made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request.

Nowhere within the text of N.J.S.A. 2A:53A-28 is it stated that the sworn statement must be filed within the same timeframe as the affidavit of merit itself. The Trial Court Judge relied on the words "in lieu of an affidavit" to read into the statute a requirement that is not explicitly set forth by the clear text of N.J.S.A. 2A:53A-28. In doing so, the Trial Court Judge ran aground of a crucial rule of statutory interpretation, the rule that requires the Court to apply the plain language of the statute. See Dept. of Law Public Safety v. Bigham, 119 N.J. 646, 651 (1990) (quoting Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 556 (1979) (explaining that when the language of a statute is clear, the court's sole function is to enforce the statute in accordance with those terms). As stated in Burns v. Belafsky, "when a statute is susceptible of an interpretation true to its purpose and that permits plaintiffs to proceed with meritorious claims, we will not add requirements not explicitly set forth that deny plaintiffs their day in court." Burns, 166 N.J. 466, 470 (2001). In this case, the Trial Court Judge added a requirement to N.J.S.A. 2A:53A-28, which was contrary to the statute's purpose, was not included in the plain language of the statute and ultimately, resulted in Plaintiff being denied her day in court on the merits of her case. Plaintiff's Request for Production of Documents to Defendants made a clear request for records that were created by Defendants relating to Mr. Dantzler. The Trial Court Judge and Defendants made

arguments as to the specificity of the records requested. (Transcript, 29:1–12). However, a request was made alongside Plaintiff's Complaint, which was personally served on Defendants. See (15a). Furthermore, despite the fact that Defendants' Counsel has conveniently forgotten a phone conversation that occurred between her and an employee at Plaintiff's Counsel's Firm, an Affidavit was submitted attesting to the fact that a phone conversation did occur, during which Defendants' production of documents was again requested and also clarified that Plaintiff only needed Defendants' answers to Form C Interrogatories. See (44a). Defendants were aware that Plaintiff needed the records that were in Defendants' possession in order for Plaintiff to obtain an Affidavit of Merit. Defendants' argument that Mr. Dantzler's medical records were never specifically requested and therefore were not required to be produced is illogical and underscores the gamesmanship and legal gymnastics that they are willing to go through to escape Plaintiff's meritorious claim against them. If the Trial Court had held a Ferreira Conference, as it was required to, Defendants would never have been allowed to make a similar argument; Defendants would have been ordered to produce the medical records or suffer sanctions. However, just because the Trial Court failed to hold a Ferreira Conference, Defendants are now able to escape their duty and responsibility to produce the very records that Plaintiff needed to assert her claim and also claim that because Defendants did not produce the medical

records they are entitled to dismissal of Plaintiff's Complaint. The logic asserted by Defendants and accepted by the Trial Court is beyond comprehension, contrary to all notions of justice and equity and most importantly, is the antithesis of what the Affidavit of Merit statute was enacted to accomplish. If this Court upholds the Trial Court's granting of Defendants' Motion to Dismiss Plaintiff's Complaint, then all defendants protected by the Affidavit of Merit statute would have free reign to withhold the very medical records that are needed by plaintiffs to obtain an affidavit of merit, which would allow these defendants to escape potentially meritorious claims. As Justice Long wrote in his concurring and dissenting opinion in Ferreira regarding the dismissal of a plaintiff's complaint for failure to submit an affidavit of merit, "it thwarts the stated aim of allowing meritorious cases to go forward. That was never the intention of the Legislature when it enacted the Affidavit of Merit statute." Ferreira, supra 178 N.J. at 157 (Long, J., concurring and dissenting). Here, Justice Long's notion rings more true than ever, it would be an entirely unjust result if Defendants, who gamed the Affidavit of Merit statute by failing to respond to Plaintiff's request for medical records, are now allowed to assert that Plaintiff's claim lacks merit.

CONCLUSION

Plaintiff's Counsel concedes that when the Complaint was filed, it was filed as a negligence action, rather than a professional malpractice action. This oversight

initially caused a Ferreira Conference not to be scheduled. However, when this was brought to the Trial Court's attention by way of Defendants' Motion to Dismiss the Trial Court chose to not schedule the conference and instead dismiss Plaintiff's Complaint with prejudice. The Trial Court did not consider the fact that Defendants failed to provide Plaintiff with the records necessary to procure a sufficient Affidavit of Merit. At that time, the Trial Court could have scheduled a Ferreira Conference to avoid an unjust outcome. However, despite the case law and stated purpose of the Affidavit of Merit statute, the Trial Court chose to impose the draconian sanction of dismissal of Plaintiff's Complaint. Defendants' conduct exhibits gamesmanship of the Affidavit of Merit statute, which the Courts of New Jersey and the New Jersey Legislature have reprehended. As such, Defendants should not be rewarded for their gamesmanship and the Trial Court's dismissal of Plaintiff's Complaint must be reversed, as justice and equity demand such a result.

Respectfully submitted,

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BY: _____
CRAIG A. ALTMAN, ESQUIRE

DATE: August 15, 2024

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LYSHRON STATTEN, as Administrator Ad Prosequendum of the Estate of Kenneth L. Dantzler, deceased, Plaintiff, vs. PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION, et al.: Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002867-23 **PROOF OF SERVICE**

Craig A. Altman, Esquire, of full age, on his oath deposes and says:

1. I am the attorney for Lyshron Statten in the above matter.

2. On August 8, 2024, copies of Appellant's Brief and Appendix was forward by regular, United States Mail to the following:

   Superior Court of New Jersey
   Appellate Division, Clerk's Office
   P.O. Box 006
   Trenton, NJ 08625

3. On August 8, 2024, copies of Appellant's Brief and Appendix was forward by regular, United States Mail to the following:

   Marshall Dennehey
   Jessica D. Wachstein, Esq.
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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment

LAW OFFICES OF CRAIG A. ALTMAN, P.C.

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LYSHRON STATTEN, as Administrator Ad Prosequendum of the Estate of Kenneth L. Dantzler, deceased, Plaintiff, vs. PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION, et al. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002867-23 **CERTIFICATE OF MAILING**

I hereby certify that on August 8, 2024, I mailed/electronically filed with the Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, Trenton, New Jersey, an original Notice of Appeal, Certification, and Case Management Information Statement on behalf of Plaintiff/Appellant, Lyshron Statten, and also by regular first class mail, a copy of same to:

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Cumberland County Courthouse
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LYSHRON STATTEN, as Administrator Ad Prosequendum of the Estate of Kenneth L. Dantzler, deceased, Plaintiff, vs. PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION, et al. Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002867-23 **CERTIFICATE OF COMPLIANCE**

I hereby certify that the following provision of Rule 2:5-1(f) have been complied with by this Notice of Appeal. I further certify that the transcript request provision of Rule 2:5-3(a) and Rule 2:5-3(d) have been satisfied by virtue of my ordering the transcripts of the proceeding below necessary for the review by the Court on appeal and paying the transcript deposit (a copy of the transcript request form is attached).

I further certify that all filing fees have been paid pursuant to N.J.S.A. 22A:2. I further certify compliance with Rule 2:5-1(f)(2) (filing of case information statement) and that a copy of the Case Information Statement is attached to the within Notice of Appeal.

LAW OFFICES OF CRAIG A. ALTMAN, P.C.

BY: _____
CRAIG A. ALTMAN, ESQUIRE

DATE: August 15, 2024

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Amended and Filed: September 18, 2024
DOCKET No: A-002867-23

LYSHRON STATTEN, AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF KENNETH L. DANTZLER, DECEASED, *Plaintiff/Appellant,* v. PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION; CUMBERLAND OPERATOR, LLC; JOHN DOE #1-10 AND ABC CORP. #1-10,, *Defendants/Respondents*	On appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION CUMBERLAND COUNTY Docket No. CUM-L-445-23 Sat Below: Hon. James R. Swift, J.S.C.

BRIEF AND APPENDIX OF RESPONDENTS, PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION AND CUMBERLAND OPERATOR, LLC

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A. Preliminary Statement

In this malpractice action, Plaintiff's complaint was dismissed for failure to state a cause of action, because she failed to provide a timely Affidavit of Merit. She conceded in her brief that the reason the affidavit was not provided was that her counsel "lost track of the timeline for submitting a timely affidavit of merit," and "lost track of the timeline required by the affidavit of merit statute." (Pb12, 17)

On appeal, Plaintiff raised a number of arguments as to why the dismissal was improper, including blaming the Law Division for not holding a Ferreira conference. However, the conference was not held because when filing the complaint, Plaintiff indicated on the case information statement that this was a regular personal injury matter, and not a malpractice claim. Plaintiff further failed to correct that error when she was notified that case was assigned to Track II, which is for non-malpractice cases. It was thus Plaintiff's mistake which caused no conference to be scheduled.

Further, Plaintiff seeks to take advantage of N.J.S.A. 2A:53A-28, which permits, under certain conditions, an attorney certification in lieu of the Affidavit of Merit. However, Plaintiff's counsel did not file the certification in a timely manner. Also, N.J.S.A. 2A:53A-28 requires a plaintiff to have demanded from the defendant, ***with specificity***, the medical records or other information which he or

she believes are needed to prepare an affidavit of merit. Here, Plaintiff merely claims to have asked Defendants for Form C Interrogatory answers, which does not suffice to satisfy N.J.S.A. 2A:53A-28.

Finally, Plaintiff failed to demonstrate that either the substantial compliance doctrine is satisfied or that extraordinary circumstances are present, such to excuse the missing affidavit. As such, dismissal was proper and should be affirmed.

B. Statement of Procedural History

Plaintiff filed her complaint on August 8, 2023, asserting a nursing home negligence claim against Defendants, Preferred Care at Cumberland Nursing and Rehabilitation and Cumberland Operator, LLC. (Pa2-10) The Case Information Statement which accompanied the Complaint, however, wrongly indicated that the case was not a malpractice action. (Pa1) Plaintiff indicated the case was Case Type 605, which is a general negligence case, and not 607, which is a malpractice claim. (Id; 1T13:15-21)[1]

On August 9, 2023, the Law Division issued its Track Assignment notice. (Da1) Consistent with Plaintiff's misdesignation of the complaint as not sounding in malpractice, the case was assigned to Track II, with 300 days of discovery. (Id.) A malpractice action, by contrast, should be assigned Track III, with 450 days of discovery.

[1] 1T=May 10, 2024 hearing transcript.

On September 26, 2023, applications for default judgment against each Defendant was made by Plaintiffs. (Da2-4; Da5-7) The applications were granted by the Hon. James R. Swift, J.S.C., on October 11, 2023. (Da8-10; Da11-13) On November 7, 2023, a consent order signed by counsel for both Plaintiff and Defendants and requesting that the default be vacated was filed. (Da14-16) Judge Swift granted the order on November 8, 2023 and specifically gave Defendants twenty days to file an Answer to the Complaint. (Da17-18)

On November 17, 2023, Defendants filed their answer, which specifically included a demand for an Affidavit of Merit. (Pa16-25)

On April 12, 2024, after one-hundred forty seven days (147) had passed from the filing of Defendants' Answer, Defendants filed a motion to dismiss Plaintiff's complaint, as Plaintiffs had not filed an Affidavit of Merit. (Pa27-35)

On April 18, 2024, Plaintiff filed an opposition to the motion to dismiss, including a certification from counsel claiming the exemption from filing the Affidavit under N.J.S.A. 2A:53A-28, and an out-of-time Affidavit of Merit. (Pa59-60) Defendants filed their reply brief on May 8, 2024.

The motion was heard before Judge Swift on May 10, 2024. (1T) On that same date, Judge Swift granted the motion to dismiss and dismissed Plaintiff's complaint for failure to file a timely Affidavit of Merit. (Pa84-85)

C. Statement of Facts

Plaintiff filed a complaint against Defendants, Preferred Care at Cumberland Nursing and Rehabilitation, and Cumberland Operator, LLC, on August 14, 2023, alleging nursing home malpractice. (Pa2-10) Defendants answered the Complaint on November 17, 2023 and, in that Answer, made a demand for an Affidavit of Merit, pursuant to N.J.S.A. 2A:53A-26, *et seq*., as Defendants are parties covered by the statute. (Pa16-25)

After Defendants filed their Answer, Plaintiff took no action for over one-hundred twenty days, at which point, Defendants filed a motion to dismiss the complaint for failure to state a claim. (Pa27-35)

At the hearing on the motion to dismiss, Judge Swift addressed each of Plaintiff's points.

First, he rejected Plaintiff's argument that the complaint contained a specific request for medical records. He correctly pointed out that the demand in the Complaint asked merely for Form C and Form C-1 Interrogatories, and did not even request Form C-3 Interrogatories, which would be correct in a medical negligence case. Judge Swift further pointed out that although Plaintiff made a general request for Form C interrogatories, there was never any specific request made for medical records in this case. (1T8:17-9:8)

Next, Judge Swift addressed the Plaintiff's arguments concerning the lack of a conference under Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), and noted that the lack of the conference was solely the result of Plaintiff incorrectly indicating that the case type was 605, a general personal injury case, and not 607, a malpractice claim. (1T13:11-14:2)

Judge Swift then rebutted Plaintiff's claim that there was no prejudice to Defendants by recognizing that defendant in potentially suffering liability, in a case in which Plaintiff failed to properly follow the Affidavit of Merit statute is, itself, prejudice. (1T15:12-19)

He further reasoned that Plaintiff failed to provide any exceptional circumstances or that the substantial compliance doctrine applied. He recognized that Plaintiff failed to act within the sixty days set out by the statute—and, indeed, did not even request the additional sixty days the statute permits—and took no action until ***after*** Defendants filed their motion:

> During the 60-day period there was never a request for another 60 days. So really, you had 60 days because there was never a motion or a request for an additional 60 days. So you really only had until January to file the Affidavit of Merit, January 16th of this year, because that's the 60 days.
>
> Now, if we stretch it and say you could have had 120 days, all right, well, that's till March 16th. But during that period of time, you're required to file this statement saying that I don't have the medical record. That wasn't done either. So you didn't request a

> Ferrera Conference. You didn't request an additional 60 days. You didn't request that the medical records be filed within the time period that you were required to do so and the only time Plaintiff did anything to prosecute this case is after this motion was filed.
>
> [1T17:16-18:7]

Judge Swift then demonstrated why certain passages from Ferreira that Plaintiff relied upon did not apply under the facts of this case, and distinguished A.T. v. Cohen, 231 N.J. 337 (2017). (1T23:2-24:16)

Finally, Judge Swift, in granting the motion, put his reasoning on the record at length. (1T26:11-31:20) The Plaintiff's complaint was therefore dismissed. (Pa84-85) This appeal followed.

D. Legal Argument

ISSUE I: THERE WAS NO ERROR IN DISMISSING PLAINTIFF'S COMPLAINT, AS SHE FAILED TO COMPLY WITH THE AFFIDAVIT OF MERIT STATUTE AND, SO, FAILED TO ASSERT A VIABLE CAUSE OF ACTION.

For nearly thirty years—since 1995—New Jersey has required that in order to assert a viable professional negligence claims against certain licensed parties, a plaintiff has been required to produce an appropriate and timely Affidavit of Merit. Since the statute's inception, that requirement has applied to heath care facilities like Defendants in this case. See, 1995 NJ Sess. Law Serv. Ch. 139, §§ 1-2, codified at N.J.S.A. 2A:53A-26 and 27.

The core purpose of the Affidavit of Merit is "to require plaintiffs... to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation." Ryan v. Renny, 203 N.J. 37, 51 (2010) (internal quote and cite omitted.) The statute requires a plaintiff to provide an expert's opinion "stating the action has merit" although the statute is "not concerned with the plaintiff's ability to prove the allegation in the complaint." Cowley v. Virtua Health Sys., 242 N.J. 1, 11 (2020).

In this case, Judge Swift did not err in dismissing Plaintiff's complaint. The Affidavit of Merit statute's requirements are well established, clear, and mandatory. Since Plaintiff did not produce an appropriate Affidavit of Merit in the appropriate time, nor did she otherwise comply with the statute, dismissal of the complaint was proper.

a) It Was Not Error To Dismiss Plaintiff's Complaint.

The Affidavit of Merit statute applies to all actions for damages resulting from an alleged act of malpractice or negligence by a "licensed person" in his or her profession or occupation. N.J.S.A. 2A:53A-26 and -27. A plaintiff in such an action must, within sixty days of the answer's filing date,

> ...provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill, or

> knowledge exercised or exhibited in the treatment, practice or work that is the subject matter of the Complaint, fell outside acceptable professional or occupational standards or treatment practices.
>
> N.J.S.A. 2A:53A-27.

A "licensed person" is defined to include a "health care facility", N.J.S.A. 2A:53A-26(j), which, in turn, is defined as a "facility or institution... engaged principally in providing services for health maintenance organizations, diagnosis, or treatment of human disease, pain, injury, deformity, or physical condition, including,... [a] skilled nursing home [or] nursing home." N.J.S.A. 26:2H-2. This includes Defendants. Failure to comply with the statutory mandate "shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29 (Emphasis added.)

The Law Division may grant a single, sixty-day extension in which to file an appropriate Affidavit of Merit, upon a finding of good cause. N.J.S.A. 2A:53A-27. The Court had no further discretion to extend the time to file other than the single sixty-day extension, set out in the statute. Id. "Consequently, the statute allows a plaintiff a maximum of 120 days in which to file the affidavit." Barrerio v. Morais, 318 N.J. Super. 461, 470 (App. Div. 1999)

It is clear that the purpose of the Statute is to require Plaintiff to make a threshold showing that their claim is meritorious. In re Petition of Hall, 147 N.J. 379, 391 (1997). The Supreme Court has cautioned that "the court's sole

function is to enforce the statute in accordance with those terms." Phillips v. Curiale, 128 N.J. 608, 618 (1992).

An Affidavit of Merit is still required in cases of vicarious liability, such as Plaintiff's complaint, when liability "hinges upon allegations of deviation from professional standards of care by licensed individuals who worked for the named defendant." Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 250 N.J. 368, 380 (2022) (quoting McCormick v. State, 446 N.J. Super. 603, 615 (App. Div. 2016)).

Here, Defendants filed their answer on November 17, 2023. Under N.J.S.A. 2A:53A-27, an Affidavit of Merit was due within 60 days, or January 16, 2024. Although Plaintiff did not file for the permitted 60 day extension, the maximum one-hundred twenty day time ran on March 16, 2024. Plaintiff failed to serve an Affidavit of Merit within that time.

Consequently, Plaintiff's Complaint was properly dismissed by Judge Swift.

Citing to Sickles v. Cabot Corp., 379 N.J. Super. 100 (App. Div. 2005) and Zaccardi v. Becker, 88 N.J. 245 (1982), Plaintiff first argues that a motion to dismiss should only be granted in the "rarest of instances" and that it is the "ultimate sanction" which should be granted when "no lesser sanction will suffice." (Pb7-8)

However, both Sickles and Zaccardi are distinguishable, because neither case addressed the failure to provide an Affidavit of Merit. Sickles addressed whether an indirect purchaser of a price-fixed product has a cause of action under either the New Jersey Antitrust Act ("ATA"), N.J.S.A. 56:9-1 to -19, or the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20. Sickles, 379 N.J. Super. at 104. Zaccardi considered the effect that a dismissal for failure to answer discovery had on a defendant's statute of limitations defense to a subsequently filed suit. Zaccardi, 88 N.J. at 249. Neither case addressed the Affidavit of Merit statute and, indeed, Zaccardi predated the passage of that statute by more than a decade.

Plaintiff argues that Sickles and Zaccardi apply because the Affidavit of Merit statute's requirements are "arguably procedural" and requires a balancing of various concerns prior to dismissal. (Pb8-9) This argument is misguided. While, clearly, there are procedures mandated by the Affidavit of Merit statute, its requirements are substantive, as the failure to comply with the statute constitutes a failure to assert a cause of action. Cowley, 242 N.J. at 16 ("The failure to provide an affidavit or its legal equivalent is 'deemed a failure to state a cause of action,' N.J.S.A. 2A:53A-29, and this Court has 'construed the statute to require dismissal with prejudice for noncompliance.'" quoting A.T., 231 N.J. at 346.) It is not a mere procedural failure; the failure "goes to

the heart of the cause of action as defined by the Legislature." Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 244 (1998).

Thus, unlike the situations addressed in Sickles and Zaccardi, dismissal for failure to timely provide the appropriate Affidavit of Merit is a statutory mandate.

Plaintiff next blames Defendant and Judge Swift for her failure to comply with the statute. (Pb9) While this brief will demonstrate that these arguments are without merit, it is most important to recognize that Plaintiff conceded that the reason she failed to comply with the Affidavit of Merit statute was that her counsel "lost track of the timeline for submitting a timely affidavit of merit," and "lost track of the timeline required by the affidavit of merit statute." (Pb12, 17) Consequently, Plaintiff's arguments should be correctly seen as little more than a post-hoc attempt to avoid the consequences of that inadvertence.

Plaintiff notes that the Law Division did not schedule a Ferreira conference, and cites to Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., 258 N.J. 110 (2024) and Meehan v. Antonellis, 226 N.J. 216 (2016) for the proposition that a Ferreira conference may have resulted in her complying with the Affidavit of Merit requirement. Moschella and Meehan both concerned Affidavits of Merit which was were timely produced by the

plaintiffs but which were substantively defective and addressed whether a Ferreira conference might have corrected the substantive issues. In this case, by contrast, no timely affidavit was produced due to Plaintiff's counsel somehow losing track of the timeline for fulfilling the statute's requirements. In that respect, the cases are distinguishable.

Also, the fact that a Ferreira conference was not held in this case is not a reason to find that Judge Swift erred in dismissing Plaintiff's complaint because no Ferreira conference was scheduled because, in the Case Information Statement accompanying her complaint, Plaintiff indicated that this case was not a professional malpractice claim. (See, Pa1) No Ferreira conference was scheduled by the Law Division clerk because Plaintiff had not indicated that one was appropriate.

Plaintiff had a ***second*** opportunity to correct this error when, on August 8, the Law Division issued the Track Assignment Notice. Because Plaintiff's counsel had not properly identified the case type, the case was assigned as a Track II case with 300 days of discovery. (Da1) Counsel reviewing that notice should have instantly recognized that it should have been assigned as a Track III case with 450 days of discovery, as is appropriate for malpractice claims.

Plaintiff was therefore on notice that the Law Division did not treat the complaint as a malpractice matter, and was on constructive notice that the Court

would not be scheduling a Ferreira conference due to Plaintiff's uncorrected error, and did not, thereafter, request a Ferreira conference when it became clear that the court had not scheduled one.

More importantly, the law is clear that the fact that the Ferreira conference was not scheduled does not extend the time a plaintiff has to file the Affidavit of Merit. The New Jersey Supreme Court has held that the lack of a Ferreira conference does not excuse the non-production of a valid Affidavit of Merit:

> At issue here is what effect the failure to hold a Ferreira conference will have on the time limits prescribed in the statute. ***The answer is none.***...
>
> ...***[P]arties are presumed to know the law and are obliged to follow it***. See Emanuel v. McNell, 87 N.J.L. 499, 504, 94 A. 616 (E. & A.1915) ("Everyone is presumed to know the law. Ignorance standing alone can never be the basis of a legal right.") (internal quotation marks and citations omitted); State v. Moran, 408 N.J. Super. 412, 425, 975 A.2d 480 (App.Div.2009) (reiterating legal maxim that "every person is conclusively presumed to know the law, statutory and otherwise" (quoting Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138, 524 A.2d 1321 (App.Div.1987))).
>
> Further, our creation of a tickler system [i.e., the Ferreira conference] to remind attorneys and their clients about critical filing dates plainly cannot trump the statute. In other words, ***the absence of a Ferreira conference cannot toll the legislatively prescribed time frames.***
>
> [Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 424–25 (2010) (emphasis added.)]

Therefore, there was no error in the dismissal of Plaintiff's complaint. The law requiring the production of an Affidavit of Merit is clear and Plaintiff did not abide by its terms. As such, she failed to assert a viable cause of action, and the dismissal after the appropriate time to have done so had passed was mandated by the terms of the statute.

This Court should affirm Judge Swift's decision.

b) Plaintiff Cannot Establish Substantial Compliance

Next, Plaintiff asserts that the substantial compliance doctrine should excuse her failure to comply with the statute. The substantial compliance doctrine applies when a party meets the spirit of a law but falls short of full compliance due to a technical misstep. See Sroczynski v. Milek, 197 N.J. 36, 44 (2008). That is not what happened here. In this case, Plaintiff's counsel lost track of the timing for filing the Affidavit of Merit and therefore did not file one.

The substantial compliance doctrine has five elements, all of which must be met for the doctrine to apply. A plaintiff seeking to invoke the doctrine must demonstrate:

(1) a lack of prejudice to the defendant;

(2) a series of steps taken by the plaintiff to comply with the statute at issue;

(3) a general compliance with the purpose of the statute at issue;

(4) a reasonable notice of the plaintiff's claim; and

(5) a reasonable explanation why there was not a strict compliance with the statute at issue.

[Negron v. Llarena, 156 N.J. 296, 305 (1998).]

The failure to meet any of the requirements precludes application of the doctrine. See Cornblatt, 153 N.J. at 239.

1) THE FIRST ELEMENT: LACK OF PREJUDICE TO THE DEFENDANT

The first requirement is a lack of prejudice to Defendants. Plaintiff argues that she meets this element, because Defendants have not pointed to any particular prejudice. (Pb11) However, it is the Plaintiff who has the burden of proving each of the elements, so Defendants' arguments on the point, or lack thereof, are irrelevant.[2] A plaintiff does fulfill her burden to establish a lack of prejudice simply because the defendant did not address the point.

However, as Judge Swift found, there is prejudice, if for no other reason that Defendants would be otherwise forced to defend, and potentially suffer liability, in a case where Plaintiff was unable to meet the statutorily mandated

[2] Furthermore, since the law does not make prejudice to the defendant a relevant issue in a motion to dismiss for failure to file an Affidavit of Merit, it is both foreseeable and wholly immaterial that Defendants did not address it is their motion to dismiss.

showing. In that way, the potential liability is analogous to a party being prejudiced by being potentially liable in a claim after the statute of limitations has run. See, Fox v. Passaic Gen. Hosp., 71 N.J. 122, 127–28 (1976)[3] (in the context of the discovery rule, recognizing "the inherent capacity for prejudice to a defendant since the principle of repose inherent in the statute of limitations is necessarily diluted when an action is instituted beyond the statutory period after the defendant's actionable conduct"); Mears v. Sandoz Pharms., Inc., 300 N.J. Super. 622, 631 (App. Div.1997) (recognizing that "[t]here cannot be any doubt that a defendant suffers some prejudice merely by the fact that it is exposed to potential liability for a lawsuit after the statute of limitations has run").

Thus, the first prong favors finding no substantial compliance.

2) The Second Element: A Series of Steps Taken to Comply With the Affidavit of Merit Statute.

The second element requires Plaintiffs to have taken a series of steps to comply with the Affidavit of Merit statute. Plaintiff asserts that the out-of-time Affidavit of Merit authored by Nurse Nicole Wall constitute such a series of steps. (Pa61-62)

[3] Abrogated on other grounds by The Palisades At Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427 (2017).

However, Plaintiff did not demonstrate that Ms. Wall's opinion was solicited during the sixty-day period following the filing of Defendants' answer, as the first indication that the affidavit existed was the April 18, 2024 submission date. Thus, this affidavit cannot constitute the series of steps that the substantial compliance rule requires.

Furthermore, it is uncontested that the Wall affidavit was not provided to Defendants during the time period set out in the Affidavit of Merit statute, which precludes a finding that Plaintiff met the series-of-steps requirement. Ferreira, 178 N.J. at 152–53 (series-of-steps requirement not met when plaintiff did not forward Affidavit of Merit to opposing counsel within statutory time frame.)

Furthermore, while Plaintiff now argues that she was unable to provide the affidavit due to alleged lack of medical records, she specifically asserted that the reason why the Affidavit of Merit was not timely filed was her counsel's error in keeping track of the statutory requirement. She neither requested a Ferreira conference nor mentioned any issue with producing an affidavit during the statutory period. These militate against the fulfillment of this element. See, Est. of Yearby v. Middlesex Cnty., 453 N.J. Super. 388, 402 (App. Div. 2018) (series of steps not established when plaintiff's counsel "did not request the trial court to conduct a Ferreira conference or inform

defendants' counsel or the trial court that he was having difficulty securing the AOM.")

The second element cannot be met and, as a result, the substantial compliance doctrine does not apply.

3) The Third Element: A General Compliance with the Purpose of the Affidavit of Merit Statute

Third, there was no general compliance with the purpose of the Affidavit of Merit statute.

As previously noted, the purpose of the Affidavit of Merit statute is to identify meritorious claims *in a timely manner*, which the Legislature has determined to be sixty days from the filing of the Answer. Ryan, 203 N.J. at 51. Because Plaintiff did not file within that sixty day period, the third element was not be met. Est. of Yearby, 453 N.J. Super. at 403 (Affidavit of Merit filed well after the time allowed "does not satisfy the 'early in the litigation' part of the Court's analytical paradigm.")

Defendants ask this Court to find that the doctrine of substantial compliance does not apply in this case.

4) The Fourth Element: A Reasonable Notice of Plaintiff's Claim

The fourth element requires Plaintiff to have given Defendants reasonable notice of Plaintiff's claim. In this case, the only notice which

Defendants had was the Complaint, which amounted to little more than a bare-bones recitation of the conclusory facts which were perhaps sufficient to survive a motion to dismiss, given New Jersey's status as a notice-pleading state. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 56 (App. Div. 1997).

However, the fourth element of the substantial compliance doctrine requires more. This Court in Est. of Yearby found that "generic, non-descriptive allegations," free from any identification of "the [applicable] standard of care" nor any description of "actions defendants took or failed to take that deviated from the relevant standard care," were insufficient to meet the fourth element of the substantial compliance test. Est. of Yearby, 453 N.J. Super. at 403–04.

In this case, Plaintiff's complaint is the same kind of minimal notice which this Est. of Yearby Court rejected. As such, the fourth element was not met.

5) The Fifth Element: A Reasonable Explanation Why There Was Not a Strict Compliance With the Affidavit of Merit Statute

Fifth, and finally, Plaintiffs presented no reasonable explanation for their failure to timely file the Affidavit of Merit. By Plaintiff's own admission, her counsel somehow simply lost track of the timing for filing the Affidavit of

Merit. (Pb12, 17) However, "a good faith mistake does not satisfy the 'reasonable explanation' requirement of the substantial compliance doctrine." State Dep't of Envtl. Prot., Bureau of Cty. Envtl. & Waste Compliance Enf't v. Mazza & Sons, Inc., 406 N.J. Super. 13, 27-28 (App. Div. 2009). See, also, Ferreira, 178 N.J. at 153 (attorney inadvertence or counsel's carelessness do not satisfy the reasonable explanation requirement.)

Plaintiff attempts to excuse this failure, but none of her arguments constitute a reasonable explanation.

First, she argues that counsel's confusion as to the due date for the Affidavit of Merit was somehow connected to the fact there was an initial default judgment which was vacated by consent. (Pb12-13, "Strict compliance was not made with the Affidavit of Merit statute because (a) due to Plaintiff having to consent to vacate Defendants' default, Plaintiff's Counsel lost track of the timeline for submitting a timely affidavit of merit...")

This argument defies logic. The order vacating the default was entered by the Court on November 8, 2023. It specifically gave Defendants twenty days to file their Answer. At that point in time, the default judgment was no longer of any relevant concern.

Nine days later, on November 17, 2023, Defendants filed their Answer. New Jersey law has ***always*** premised the commencement of the time to file a

valid Affidavit of Merit on the filing of the defendant's answer. Every reasonable New Jersey lawyer would therefore know that the filing of the answer—regardless of whether it followed the vacating of a default judgment or otherwise—triggers the statutory obligation to obtain and file the required Affidavit of Merit.

Therefore, the vacatur of the default simply has no bearing on the Plaintiff's counsel's failure to timely obtain and serve the Affidavit of Merit and does not demonstrate the reasonable-explanation prong.

The second argument Plaintiff asserts as a reason or the failure to comply with the statute is the claim that "Defendant failed to provide Plaintiff with requested medical records per N.J.S.A. 2A:53A-28." (Pb13) However, as will be discussed in detail in Issue III of this brief, N.J.S.A. 2A:53A-28 requires the plaintiff to "identify with specificity" the medical records he or she believes are required in order to obtain the affidavit of merit. In this case, Plaintiff never made any such specific request, but merely requested Form C Interrogatories.

Moreover, N.J.S.A. 2A:53A-28 requires that a timely filing of a certification by counsel, attesting to this supposed failure to provide records which had been specifically identified. Plaintiff's counsel made no such timely filing.

Therefore, there is no merit to the argument that the discovery issues concerning Form C Interrogatories had any bearing on the compliance with the Affidavit of Merit statute.

The third reason given by Plaintiff centers on the fact that the Law Division clerk did not schedule a Ferreira conference. (Pb13) However, as previously noted, the reason for that failure was Plaintiff's own error in not identifying the case as a malpractice action in her case information statement, and in not recognizing the error when the improper Track Assignment Notice was issued.

Consequently, the fifth element has not been established. Because Plaintiffs cannot establish all five of the elements needed to invoke the doctrine of substantial compliance, dismissal of Plaintiff's complaint is appropriate.

c) Plaintiff Cannot Establish Extraordinary Circumstances

Next, Plaintiff asserts that "extraordinary circumstances" exist in this case to excuse the non-compliance with the statute, citing to the same arguments that she asserted under the fifth element of the substantial compliance test, including the vacated default judgment, the issues with the Form C Interrogatories, and the lack of a Ferreira conference. For the same reasons these reasons did not amount to a reasonable explanation under the

substantial compliance doctrine, these same arguments do not establish extraordinary circumstances.

Further, Plaintiff's concession that her counsel failed to comply with the statute because he lost track of the timing for filing the affidavit is key, because it is well-established law that "extraordinary circumstances" is not present when attorney neglect or inattentiveness is the cause of the failure to comply with the statute. Ferreira, 178 N.J. at 153 ("[C]ounsel's carelessness in misfiling defendant's answer and failing to calendar this matter does not constitute an extraordinary circumstance"); Palanque v. Lambert-Woolley, 168 N.J. 398, 405 (2001) ("[A]ttorney inadvertence will not support the extraordinary circumstances standard..."); Medina v. Pitta, 442 N.J. Super. 1, 21–22 (App. Div. 2015) ("[C]arelessness, lack of circumspection, or lack of diligence on the part of counsel are not extraordinary circumstances which will excuse missing a filing deadline."); Burns v. Belafsky, 326 N.J. Super. 462, 470 (App. Div. 1999), aff'd, 166 N.J. 466 (2001) ("Given the fact that the failure here to comply with the statutory requirements was the result of lack of diligence on the part of counsel, plaintiffs cannot rely on the existence of extraordinary circumstances to avoid the statutory requirements."); Hyman Zamft & Manard, L.L.C. v. Cornell, 309 N.J. Super. 586, 593 (App. Div. 1998).

Since the failure to produce an Affidavit of Merit was the result of the kind of carelessness, lack of diligence and/or inadvertence which the court of New Jersey have routinely rejected as comprising extraordinary circumstances, Plaintiff's argument should be rejected.

Moreover, in making this argument, Plaintiff relies on the Supreme Court's decision in A.T., *supra*, to argue that extraordinary circumstances exist. However, in A.T., an "inexperienced practitioner became confused by timelines," failed to file a timely affidavit, and the Judiciary failed to schedule a Ferreira conference. A.T., 231 N.J. at 349. The A.T. Court found that those circumstances, combined, justified a finding of extraordinary circumstances. Id.

This case differs on both of the key factors relied upon by the A.T. Court. First, Plaintiff's attorney is not an "inexperienced practitioner." Id. Rather, Mr. Altman has been a member of the New Jersey bar since 1987, which obviously includes the entirety of the time the Affidvait of Merit statute has been the law of New Jersey.

Further, the failure to schedule a Ferreira conference in this case was not the fault of the Judiciary, but of the Plaintiff for wrongfully indicating that this was not a malpractice case, and by not following up when notified that the case was set down as a Track II case with 300 days of discovery.

As such, there is no extraordinary circumstances present here, and Judge Swift's decision should be affirmed.

ISSUE II: THERE WAS NO "GAMESMANSHIP" WHICH MIGHT EXCUSE PLAINTIFF'S FAILURE TO COMPLY WITH THE AFFIDAVIT OF MERIT STATUTE.

Next, Plaintiff argues that the Affidavit of Merit Statute condemns "gamesmanship" and was not intended to reward "defendants who wait for a default before requesting that the plaintiff turn over the affidavit of merit..." (Pb18) Plaintiff further argues that Defendants are engaging in such gamesmanship and asserts that "not once did Defendant's Counsel reach out to Plaintiff's counsel in an attempt to receive an Affidavit of Merit," attached some correspondence between the parties, and, finally, "demand[s] Defendants' Counsel to submit proofs that any attempt to procure Plaintiff's Affidavit of Merit was sent to Plaintiff's Counsel." (Pb19)

The unspoken assertion in Plaintiff's argument appears to be that Defendant has some kind of obligation under the statute to reach out and request an Affidavit of Merit, or that the failure to provide one is excused if a request is not made by a defendant. That is not the case, as providing the Affidavit of Merit is the plaintiff's statutory obligation alone. N.J.S.A. 2A:53A-27 (noting that in all malpractice actions for personal injury, wrongful

death or property damage, "***the plaintiff shall***,... provide each defendant with an affidavit of an appropriate licensed person..." Emphasis supplied.)

Nevertheless, Plaintiff's argument that Defendants did not request an Affidavit of Merit is simply false. Defendants' Answer, itself, clearly and unequivocally demanded an Affidavit of Merit. (Pa25) Under a heading which read, "**DEMAND FOR AFFIDAVIT OF MERIT**," Defendants stated, "[p]ursuant to N.J.S.A. 2A:53A-26, et seq., answering defendants hereby demand plaintiff to produce an Affidavit of Merit within the time allotted therein." (Pa25, emphasis in original.)

Furthermore, as for Plaintiff's argument that "gamesmanship" occurred in connection with the discovery of the medical chart, that argument is false. As the following section of the brief will discuss in more detail, Plaintiff's discovery request was too broad and non-specific for N.J.S.A. 2A:53A-28 to apply.

Also, the fact that Plaintiff procured an untimely affidavit, after the motion to dismiss was filed, demonstrates that Plaintiff not obtaining the affidavit in a timely manner had nothing to do with medical records, but was the result of counsel's lack of diligence and losing track of the timeline required by the statute.

As such, there is no basis to find reversible error for the alleged "gamesmanship."

ISSUE III: PLAINTIFF WAS NOT EXCUSED FROM THE AFFIDAVIT OF MERIT REQUIREMENT.

Next, Plaintiff argued that the trial judge erred because Plaintiff is allegedly excused from the Affidavit of Merit requirement, under N.J.S.A. 2A:53A-28, due to the alleged failure to supply medical records.

First, Plaintiff could not take advantage of the benefit of N.J.S.A. 2A:53A-28, because her counsel did not file the certification envisioned by N.J.S.A. 2A:53A-28 during the time set out in the statute for filing the Affidavit of Merit.

Plaintiff argues that the statute does not require that the certification under N.J.S.A. 2A:53A-28 must be filed within the time frame set out for providing an Affidavit of Merit, but Judge Swift concluded that it must be timely filed. That is in keeping with the language in N.J.S.A. 2A:53A-28 that the attorney certification is "in lieu of" the affidavit. N.J.S.A. 2A:53A-28. A sworn statement which is not filed under the same time requirements is not a replacement for the Affidavit of Merit.

This must be so, otherwise a party can sidestep the failure to file an Affidavit of Merit after the filing of a motion to dismiss by merely filing a N.J.S.A. 2A:53A-28 certification. Since an affidavit filed after a motion to dismiss is filed cannot prevent the dismissal of the complaint, so, too, should a sworn

statement filed be ineffective to preclude such a dismissal. See, Ferreira, 178 N.J. at 154 (When plaintiff "serves the affidavit on defense counsel outside [the 120-day] time frame but before defense counsel files a motion to dismiss, the defendant shall not be permitted to file such a motion... If defense counsel files a motion to dismiss after the 120–day deadline and before plaintiff has forwarded the affidavit, the plaintiff should expect that the complaint will be dismissed...")

Moreover, even if it were true that the N.J.S.A. 2A:53A-28 sworn statement need not be filed within the sixty days required to provide an Affidavit of Merit, it is not any failure to provide discovery from which a plaintiff may evoke the provision of N.J.S.A. 2A:53A-28. Rather, it is only relevant when a defendant withholds "medical records or other records or information having a substantial bearing on preparation of the affidavit[.]" N.J.S.A. 2A:53A-28.

This is an important distinction. This Court in Scaffidi v. Horvitz, 343 N.J. Super. 552, 559 (App. Div. 2001) specifically construed N.J.S.A. 2A:53A-28 "to require a plaintiff to identify ***with specificity*** any medical records or other information he believes are needed to prepare an affidavit of merit, in order to trigger the running of the forty-five day period for a response." Scaffidi, 343 N.J. Super. at 559, (emphasis added.)

The reason for that requirement is that Plaintiff "may request a great variety of documents to assist in the preparation of a case that are not essential for the

preparation of an affidavit of merit" and that it would "generally would be difficult, if not impossible, for a defendant to distinguish between documents that have a substantial bearing on preparation of the affidavit of merit and documents that may simply aid the plaintiff in the eventual proof of a case at trial." Id., at 558-559 (internal cites, quotes and bracketing omitted.)

That reasoning is demonstrated in this case. Here, Plaintiff did not identify with specificity the medical records or other information she believed to be needed to prepare an Affidavit of Merit, as required by Scaffidi. Rather, by his own affidavit, Plaintiff's counsel merely stated that in a phone call to Defendants' counsel, he "require[d] Defendants' Answers to Form C Interrogatories." (Pa44)[4] Furthermore, there was absolutely no indication in Plaintiffs' counsel's affidavit that this supposed discussion with Defense counsel discussed or mentioned the Affidavit of Merit in any way. Thus, Plaintiff's suggestion that Defendants "were aware that Plaintiff needed the records... to obtain an Affidavit of Merit" (pb26) is unsupported speculation.

Furthermore, the request for Form C Interrogatories cannot stand in place of the specific request required by Scaffidi. Form C Interrogatories go well beyond requesting specific "medical records or other records or information having a

[4] Defense counsel denied that the conversation occurred.

substantial bearing on preparation of the affidavit" and requests all manner of information and evidence, from the identities of witnesses, and details concerning the defendant's theory in the case, to insurance information, and "all documents that may relate to this action...." (See, Form C Interrogatories, at ¶14) The breadth of that request specifies exactly why Scaffidi places the onus on the plaintiff to identify the specific documents they need.

Consequently, because Plaintiffs did not specifically identify the documents needed to prepare the Affidavit of Merit, N.J.S.A. 2A:53A-28 is inapplicable.

Furthermore, N.J.S.A. 2A:53A-28 is also inapplicable in this case, because for that statute to apply, Plaintiff must demonstrate that the documents allegedly withheld were "medical records or other records or information ***having a substantial bearing on preparation of the affidavit***..." N.J.S.A. 2A:53A-28, (emphasis added.) Here, however, Plaintiff cannot establish that any supposedly withheld records had a substantial bearing on the production of the affidavit, because even in the absence of those alleged documents, Plaintiff was still able to produce an Affidavit of Merit authored by Nurse Nicole Wall on April 18, 2023.

The fact that Plaintiff was eventually able to produce an affidavit of merit—albeit one which was out of time and therefore incapable of satisfying the statute—even in the absence of the Defendants' medical chart, indicates that the chart did not have a substantial bearing on the preparation of the affidavit, as

Plaintiff argues. Plaintiff, however, did not explain why the Wall affidavit could not have been produced within the 60-day time frame set out in the Affidavit of Merit statute, even without Defendant's medical chart. The obvious conclusion given the contents in her brief is that the Wall affidavit was not produced during the statutory period because her counsel simply lost track of the time mandated by the statute to comply. (Pb12, 17)

Therefore, there is no merit to Plaintiff's argument that N.J.S.A. 2A:53A-28 applies to excuse her non-production of the Affidavit of Merit.

E. Conclusion

For all the foregoing reasons, Defendants Preferred Care At Cumberland Nursing And Rehabilitation And Cumberland Operator, LLC respectfully requests that this Court affirm the dismissal of the Complaint.

Respectfully Submitted,
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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No.: A-002867-23

LYSHRON STATTEN, AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF KENNETH L. DANTZLER, DECEASED,	:	CIVIL ACTION
	:	ON APPEAL FROM
Plaintiff/Appellant,	:	Superior Court of New Jersey
	:	Law Division
V.	:	Cumberland County
	:	Docket No. : CUM-L-445-23
PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION; CUMBERLAND OPERATOR, LLC; JOHN DOE #1–10 AND ABC CORP. #1–10,	:	*SAT BELOW*
	:	The Honorable
	:	James R. Swift, J.S.C.
Defendant/Respondent.	:	

REPLY BRIEF FOR LYSHRON STATTEN, AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF KENNETH L. DANTZLER, DECEASED, PLAINTIFF/APPELLANT

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Date of Submission: October 1, 2024

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I. Plaintiff's Failure to Comply With the Affidavit of Merit Statute Does Not Go to the Heart of the Matter and Dismissal of Plaintiff's Complaint on That Basis Is an Unjust Result.

There are two distinct classes of cases arising out of N.J.S.A. 2A:53A-27. Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144, 157 (2003) (Long, J., concurring and dissenting). The first class of cases involves cases in which a Plaintiff is unable to provide an affidavit at all. Id. In that class of cases, the omission should be considered substantive, resulting in a dismal with prejudice on the merits. Id. However, the more common class of cases does not involve the inability of a Plaintiff to produce an affidavit of merit at all, but rather "procedural slip-ups in filing or service or out of curable technical deficiencies." Id. "**Such defects do not go to the heart of the cause of action. Indeed, because they do not reflect negatively on the merits of a plaintiff's malpractice claim**..." Id.

> Accordingly, Cornblatt's mandatory dismissal with prejudice rule should be limited to those cases in which a plaintiff cannot or will not produce an affidavit of merit at all. Concomitantly, trial judges should have available to them a full panoply of discretionary remedies for procedural deficiencies in complying with the Affidavit of Merit Statute, including dismissal with or without prejudice and discovery-type sanctions such as reasonable expenses incurred in obtaining the affidavit along with counsel fees.

Id. (citing Alan J. Cornblatt, P.A. v. Barrow, 153 N.J. 218 (1998)) (also citing R. 4:23-1 et. seq.). "The heartland of Affidavit of Merit cases involves nothing more than procedural mistakes that are entirely irrelevant to the legitimacy of the cause of action. That reality not only justifies but requires a modification of Cornblatt. Id. at 158.

Defendants contend that the trial court did not err because the Affidavit of Merit Statute's requirements are substantive, rather than procedural. However, Defendants' classification of what constitutes procedural law and substantive law is entirely arbitrary. As Justice Long explained, the vast majority of Affidavit of Merit cases are the result of procedural defects. Here, there is no question that Plaintiff's failure to submit a timely affidavit of merit falls into these class of cases because Plaintiff submitted an untimely affidavit of merit, which was the result of Defendants' gamesmanship and failure to provide Plaintiff with the requisite medical records to sufficiently comply with the Affidavit of Merit Statute. Under these circumstances, the trial judge should have assessed the facts, including the willfulness of the violation, the proximity of trial and any prejudice that would have accrued to the Defendants by the filing deviation, and applied the appropriate remedy. See Ferreira, 178 N.J. at 157–58. Nevertheless, here, the trial judge decided not to act in the above

mentioned manner and instead decided to impose the most draconian punishment available, dismissal with prejudice.

Defendants' attempt to distinguish Zaccardi and Sickles is of no moment because regardless of the causes of action in those cases, the reason they were cited was to analogize the procedural defects in those cases to the one at bar. See Zacardi v. Becker, 88 N.J. 245 (1982); Sickles v. Cabot Corp., 379 N.J. Super. 100 (App. Div. 2005). The issue is that failure to submit a timely affidavit of merit is more akin to a procedural defect, it does not take a trained legal eye to make that observation. Thus, similar to other procedural defects, the draconian punishment of dismissal without prejudice should be a recourse of last resort and only imposed in the rarest of circumstances. Under the facts of this case, it would be an unjust result for Plaintiff's Complaint to be dismissed with prejudice.

II. Defendants' Gamesmanship of the Affidavit of Merit Statute Is Accentuated by Their Conduct of Waiting One-Hundred and Twenty (120) Days Before Filing Their Motion to Dismiss, Rather Than Filing Said Motion after Sixty (60) Days.

To briefly summarize, The Affidavit of Merit is required to be submitted within sixty (60) days of the filing of defendant's answer or, for good cause shown, within an additional sixty-day period, for a total of 120 days from the date of

defendant's answer. See Douglass v. Obade, 359 N.J. Super. 159, 160–61 (App. Div.), cert. den. 177 N.J. 575 (2003). "The [Affidavit of Merit] Statute **was not intended to reward defendants who wait for a default** before requesting that the plaintiff turn over the affidavit of merit." Ferreira, supra 178 N.J. at 154. Mandatory dismissal of a plaintiff's complaint "thwarts the stated aim of allowing meritorious cases to go forward[,] [t]hat was never the intention of the Legislature when it enacted the Affidavit of Merit statute." Ferreira, supra 178 N.J. at 157 (Long, J., concurring and dissenting).

Unsurprisingly, Defendants argue that their conduct was that of an upstanding party and that they did nothing in an attempt to stymie litigation of this matter. However, this Court should consider the logic, reasoning and purpose behind Defendants' decision not to file their Motion to Dismiss immediately when Plaintiff's initial sixty (60) days to submit the affidavit of merit lapsed. The reason that Defendants chose to not file their Motion to Dismiss after sixty (60) days and instead chose to file it after one-hundred and twenty (120) days is because they wanted an easy way to escape liability in this matter. As a result, Defendants did nothing, sat quietly, relied on their single "demand for affidavit of merit" in their Answer, and waited for Plaintiff to not only default on the affidavit of merit requirement after sixty (60) days, but waited an additional sixty (60) days to ensure that Plaintiff would be barred from ever being able to file her affidavit of merit.

This conduct itself exhibits gamesmanship because the only logical explanation for waiting an additional sixty (60) days before filing their Motion to Dismiss was to ensure that Plaintiff would never have the ability to submit an affidavit of merit.

As further proof that Defendants were engaging not only in gamesmanship of the Affidavit of Merit Statute, but were making all attempts to stymie this litigation, Defendants failed to respond to any of Plaintiff's discovery requests. Now, Defendants argue that the requests were too broad and not specific enough. If Defendant had provided Plaintiff with the requisite medical records, which were requested in discovery, Plaintiff would have submitted a timely and sufficient affidavit of merit.

Gamesmanship of the Affidavit of Merit Statute was admonished in Ferreira because the Statute was not intended to award Defendants that look and formulate plans to escape liability based on a Statute that was intended to "strike a fair balance between preserving a plaintiff's right to sue and controlling nuisance lawsuits." Ferreira, 178 N.J. at 149. It is unquestionable that Defendants' tactic here was to wait until Plaintiff defaulted on the Affidavit of Merit requirement before choosing to engage in this litigation in any meaningful manner. Even if Plaintiff's discovery requests were too broad and non-specific, there is no manner in which Defendants can explain why they chose to file their Motion to Dismiss after one-hundred and twenty (120) days, rather than the initial sixty (60) days,

other than that they did so in attempt to bar Plaintiff from ever being able to submit an affidavit of merit. Even in other Affidavit of Merit cases, those defendants filed their Motion to Dismiss after the initial sixty (60) days had lapsed. See e.g., Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., No. A-7-23 (N.J. Jul. 11, 2024). The very conduct of Defendants exemplifies why Justice Long stated that, [t]he availability of sanctions short of dismissal with prejudice would align the Affidavit of Merit procedure with R. 4:37-2(a) for the first time since the statute was enacted. Moreover, it would provide judges with a response that is proportionate to most procedural violations and also would serve to save for trial the meritorious cases of injured victims of malpractice. Ferreira, 178 N.J. at 158 (Long, J., concurring and dissenting). Here, Plaintiff has a meritorious case that Defendants are attempting to escape liability in due to a procedural defect, which was caused by their own gamesmanship. Upholding the dismissal of Plaintiff's Complaint would be an unjust result that is not aligned with the purpose of the Affidavit of Merit Statute and promotes further gamesmanship of same.

III. N.J.S.A. 2A:53A-28 Excused Plaintiff From Submitting an Affidavit of Merit Because a Sworn Statement Was Submitted in Lieu of the Affidavit of Merit.

Within the text of N.J.S.A. 2A:53A-28 itself, it is never stated that the Sworn Statement must be filed within the same timeframe as the Affidavit of Merit.

"When a statute is susceptible of an interpretation true to its purpose and that permits plaintiffs to proceed with meritorious claims, we will not add requirements not explicitly set forth that deny plaintiffs their day in court." Burns v. Belafsky, 166 N.J. 466, 470 (2001).

The Trial Court Judge's interpretation of N.J.S.A. 2A:53A-28 was in error because he read in a requirement that was not in the plain text of the statute itself. See Dept. of Law Public Safety v. Bigham, 119 N.J. 646, 651 (1990) (quoting Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 556 (1979) (explaining that when the language of a statute is clear, the court's sole function is to enforce the statute in accordance with those terms). Defendant's argument as to why the Sworn Statement has to be submitted within the same timeframe as the Affidavit of Merit is antithetical to the purpose of N.J.S.A. 2A:53A-28. The reason why N.J.S.A. 2A:53A-28 allows for submission of a Sworn Statement in lieu of an Affidavit of Merit, without any explicit time restraint in the plain text of the statute, is for instances such as the one that is being argued on this appeal. Where Defendants fail to send over all medical records and those very medical records have a substantial bearing on the preparation of Plaintiff's Affidavit of Merit. Then, Defendants file a Motion for Dismissal due to Plaintiff's failure to acquire an Affidavit of Merit. Essentially, N.J.S.A. 2A:53A-28 is a safeguard for plaintiffs when defendants have prevented them from acquiring an Affidavit of Merit. The

Trial Court Judge and Defendants read into the statute that the Sworn Statement in lieu of an Affidavit of Merit must be filed within the sixty (60) or one-hundred and twenty (120) days that Plaintiff has to submit the Affidavit of Merit, but the legislature never included a temporal requirement in the plain text of the statute. Therefore, the Trial Court Judge and Defendants' arguments are unsubstantiated.

Defendants' argument that Plaintiff's counsel never requested the medical records with specificity is ill-founded. Specifically, Defendants were aware that a request was made with Plaintiff's Complaint, which they were personally served with. (15a). Additionally, Plaintiff's Counsel even instructed Defendant's Counsel to answer Form C Interrogatories. (44a). Defendant's Counsel argues that these requests are too broad and non-specific, but Form C Interrogatories are promulgated by the Court and they are specifically created for personal injury cases. Even further, those Form C Interrogatories instruct defendants to answer Form C(3) Interrogatories if the case is a medical malpractice case. Despite the fact that Form C interrogatories were in Defendants' contention, too broad and non-specific, Defendant provides no explanation as to why Answers to Form C(3) Interrogatories were not provided to Plaintiff. To be clear, at the very bottom of Form C Interrogatories, there is an instruction that is in bold font and reads, "**FOR MEDICAL MALPRACTICE CASES, ALSO ANSWER FORM C(3)**".

Lastly, Defendants argue that it is "entirely speculation" for Plaintiff to believe that Defendants were aware of and had in their possession medical records that the Plaintiff would need to produce an Affidavit of Merit. Well, Defendants are Preferred Care at Cumberland Nursing and Rehabilitation and Cumberland Operator, LLC., these entities operate a nursing home facility. Kenneth L. Dantzler was a long-term resident of Defendants' Nursing Home. Kenneth L. Dantzler was under the care of Defendants twenty-four (24) hours a day, seven (7) days a week. All care for Mr. Dantzler was administered by Defendants, other than specialty appointments, for which Defendants had the responsibility to take him to. Other than Kenneth L. Dantzler's specialty medical providers, Defendants are in possession of all of his medical records. Defendants did not send to Plaintiff a single medical record for Kenneth L. Dantzler, not even one. Defendants are more than aware—and no speculation is needed—that without the medical records in their possession, Plaintiff could never prove her case or submit a sufficient Affidavit of Merit. Defendant points to the fact that an Affidavit of Merit was submitted by Plaintiff to argue that Plaintiff could have gotten one in a timely manner, however, even at oral argument the Trial Court Judge stated that the Affidavit of Merit, even if it was timely, would not have been sufficient. Yet, the Trial Court Judge never explained why the untimely Affidavit of Merit was insufficient and Plaintiff should have been given an opportunity to at least address

the insufficiencies. The sole reason that Plaintiff even submitted an Affidavit of Merit was in an attempt to sufficiently comply with the Affidavit of Merit Statute. Plaintiff's Counsel knew that without the medical records from Defendants, it would be impossible for Plaintiff to produce a sufficient Affidavit of Merit.

In circumstances such as the ones presented in this case, N.J.S.A. 2A:53A-28 safeguards a plaintiff from a defendant that is attempting to defeat plaintiff's meritorious claims by withholding the very records that a plaintiff needs to acquire an Affidavit of Merit and prove their case. Here, Plaintiff has rightfully relied on N.J.S.A. 2A:53A-28 because Defendants have failed to provide even a single medical record, despite being fully aware that they alone possess the keys to the records Plaintiff requires. Upholding the dismissal of Plaintiff's Complaint is an unjust result and must be reversed.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that this Court reverse the dismissal of Plaintiff's Complaint and remand the case to Trial Court, so that the mandated Ferreira Conference can be held.

Respectfully submitted,

LAW OFFICES OF CRAIG A. ALTMAN, P.C.

BY: _____
CRAIG A. ALTMAN, ESQUIRE

DATE: October 1, 2024

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LYSHRON STATTEN, as Administrator Ad Prosequendum of the Estate of Kenneth L. Dantzler, deceased, Plaintiff, vs. PREFERRED CARE AT CUMBERLAND NURSING AND REHABILITATION, et al.: Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002867-23 **PROOF OF SERVICE**

Craig A. Altman, Esquire, of full age, on his oath deposes and says:

1. I am the attorney for Lyshron Statten in the above matter.

2. On October 1, 2024, copies of Appellant's Reply Brief was forward by regular, United States Mail to the following:

   Superior Court of New Jersey
   Appellate Division, Clerk's Office
   P.O. Box 006
   Trenton, NJ 08625

3. On October 1, 2024, copies of Appellant's Reply Brief was forward by regular, United States Mail to the following:

   Marshall Dennehey
   Jessica D. Wachstein, Esq.
   15000 Midlantic Drive, Suite 200
   P.O. Box 5429
   Mt. Laurel, NJ 08054

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment

LAW OFFICES OF CRAIG A. ALTMAN, P.C.

BY:_____
CRAIG A. ALTMAN, ESQUIRE

DATE: October 1, 2024