SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003131-22

CHRISTINE SULLIVAN,

Plaintiff-Appellant,

v.

DR. ASIT SHAH, M.D., PhD; ENGLEWOOD HEALTH; HACKENSACK MERIDIAN PARTNERS, LLC; MARK GABELMAN, M.D.; MAXWELL JANOSKY, M.D.; APURVA MOTIVALA, M.D.; JOSEPH S. FLEISCHER, M.D.; JOHN DOES 1-10 (fictitious names) and JANE DOES 1-10 (fictitious names),

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
BERGEN COUNTY
BER-L-001944-21

Honorable Mary F. Thurber, J.S.C.
Sat below

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF REVERSAL OF THE VARIOUS TRIAL COURT ORDERS DISMISSING THE APPELLANT'S COMPLAINT WITH PREJUDICE

Date Submitted: October 2, 2023
Revised: November 7, 2023

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PRELIMINARY STATEMENT

The Appellant submits this Brief appealing various trial court Orders, discussed at length herein, which ultimately led to the dismissal of the Appellant's Complaint with prejudice against the majority of the Respondents in this matter. The procedural history of this case is complex, but can be reduced to two issues.

The trial court improperly dismissed Joseph S. Fleischer, MD and Apurva Motivala, MD with prejudice for the Appellant's alleged failure to serve a compliant Affidavit of Merit ("AOM"). The Respondents argued that the Appellant's Affidavit of Merit expert, Marc Braunstein, MD, was not qualified to draft the AOM due to his lack of certification as a "Hospitalist". The Appellant contends that this argument lacks merit. Both doctors are licensed and Board-Certified in Internal Medicine, satisfying the AOM statute. Moreover, licensure as a Hospitalist does not exist, only a Certification, of which Dr. Fleischer does not even possess. Similar arguments exist regarding Dr. Motivala. Dr. Motivala's specialty of Cardiovascular Disease is merely a subspecialty of Internal Medicine. Furthermore, Dr. Braunstein specializes in Hematology, which is substantially similar to Cardiovascular Disease and directly relates to the Appellant's injuries. Therefore, the trial court Orders dismissing Dr. Fleischer and Dr. Motivala from this case must be reversed.

The dismissal of the Appellant's Complaint is based on her alleged failure to comply with the discovery process. The Respondents have argued that dismissal

with prejudice was necessary due to the lack of expert reports served by the Appellant, coupled with the fact that the discovery end date had lapsed. The Appellant sought to re-open and extend the discovery process in order to serve the expert reports based on unavoidable circumstances. These circumstances include the Appellant's physical condition and the expert's necessity for more time to review the Appellant's ongoing medical treatment and records. Due to the Respondents' negligence, the Appellant continues to suffer from substantial pain and suffering. As a result, it is very difficult for her to coordinate with her counsel in obtaining relevant information and documents. In addition, the Appellant's expert, Dr. Pupparo, required additional time to draft his expert report due to the Appellant's ongoing treatment to this day due to the negligence of the Respondents. The additional and ongoing medical records were necessary for Dr. Pupparo to provide a final and accurate report. The Appellant contends that the trial court failed to take these facts into consideration in dismissing her Complaint with prejudice. Therefore, the various trial court Order dismissing the Appellant's Complaint and denying her request to re-open and extend discovery must be reversed.

PROCEDURAL HISTORY

The Appellant filed her initial Complaint on March 23, 2021, which was amended on August 18, 2021. 1a-7a; 15a-20a. The prior AOM of Frank Pupparo, MD was included in the initial Complaint filing. 8a-11a. The original discovery end

date was November 17, 2022. Dr. Asit Shah, MD, PhD ("Dr. Shah") filed an Answer to the Amended Complaint on September 3, 2021. 21a-28a. Englewood Health filed an Answer to the Amended Complaint on September 13, 2021. 29a-37a. On December 27, 2021, the Appellant filed the Affidavit of Merit of Marc Braunstein, MD, PhD. 38a-39a. On February 28, 2022, Dr. Shah filed a Motion to Dismiss without prejudice for failure to make discovery. 54a-56a. Apurva Motivala, MD ("Dr. Motivala") filed an Answer to the Appellant's Amended Complaint on March 3, 2022. 57a-61a. Maxwell Janosky, MD ("Dr. Janosky") filed an Answer to the Appellant's Amended Complaint on March 4, 2022. 62a-67a. Joseph S. Fleischer, MD ("Dr. Fleischer") filed an Answer to the Appellant's Amended Complaint on March 16, 2022. 68a-76a. On April 1, 2022, the trial court granted Dr. Shah's Motion to Dismiss without prejudice. 77a. On July 5, 2022, Dr. Motivala filed a Motion for Dismissal with prejudice for failure to state a cause of action. 78a-81a. On July 15, 2022, Dr. Fleischer filed a Motion for Dismissal with prejudice for failure to serve a compliant Affidavit of Merit ("AOM"). 82a-86a. On August 26, 2022, the trial court entered an Order dismissing the Appellant's claims against Dr. Fleischer with prejudice. 87a-89a. The trial court entered a second Order that same day dismissing the Appellant's claims against Dr. Motivala with prejudice. 90-91a.

On September 2, 2022, the Appellant filed a Motion to Reinstate the Complaint against Dr. Shah which the trial court granted on October 21, 2022. 92a-

93a; 94a. On September 15, 2022, the Appellant filed a Motion to Reconsider the trial court's August 26, 2022, Order dismissing the Appellant's claims against Dr. Fleischer with prejudice, which the trial court denied on October 7, 2022. 95a-97a; 98a-100a. On December 14, 2022, Dr. Shah field a Motion to Dismiss with prejudice for failure to provide expert reports. 101a-104a. On December 16, 2022, Englewood Health filed a Motion to Dismiss for failure to serve an expert report. 105a-108a. On December 29, 2022, Dr. Janosky filed a Cross-Motion to Dismiss with prejudice for failure to serve an expert report. 109a-112a. On January 11, 2023, the Appellant filed Cross-Motions to Extend Discovery to the three Motions to Dismiss, requesting, for the first time, that discovery be extended for a period of one hundred eighty (180) days to May 5, 2023. 113a-116a. On January 20, 2023, the trial court entered five Orders. Three of the Orders granted the pending Motions to Dismiss with prejudice. 121a-126a. The remaining two Orders denied the Appellant's Cross-Motions to Extend Discovery. 127a-130a.

On February 9, 2023, the Appellant filed a Motion for Reconsideration of the January 20, 2023, trial court Orders. 131a-134a. On March 17, 2023, the trial court denied the Appellant's Motion for Reconsideration. 144a-157a. On April 13, 2023, the Appellant filed a Motion to Vacate the trial court's March 17, 2023, Order denying reconsideration and to Reinstate the Appellant's Complaint. 158a-161a. On May 12, 2023, the trial court entered an Order denying the Appellant's Motion to

Vacate Order and Reinstate. 162a-167a. On June 15, 2023, the Appellant filed her Notice of Appeal of the various trial court dismissal Orders, which are discussed at length herein.

STATEMENT OF FACTS

The Appellant will spare this Court the extensive medical details regarding the specific facts of the malpractice allegations, given that the crux of this appeal relates to this matter's procedural posture. The Appellant alleges that the named Respondents failed to properly treat/diagnose the Appellant while she was a patient at Englewood Health and subsequently thereafter. 5a-6a. The Respondents' negligence in treatment/diagnosis of the Appellant resulted in substantial injuries and damages suffered by the Appellant, which persist to this day and have significantly altered her daily life. Id. The specific details regarding the medical malpractice allegations are set forth at length in the Appellant's Amended Complaint. 15a-20a.

LEGAL ARGUMENT

A. APPELLANT SERVED A COMPLIANT AFFIDAVIT OF MERIT AGAINST RESPONDENT JOSEPH S. FLEISCHER, MD (ISSUE RAISED BELOW: SEE AUGUST 26, 2022, TRIAL COURT ORDER)

1. The "Same-Specialty" Requirement

The trial court erred in dismissing Joseph S. Fleischer, MD ("Dr. Fleischer" hereinafter) from this case with prejudice. The basis for Dr. Fleischer's dismissal

was that the Court found that the Appellant's timely filed Affidavits of Merit ("AOM") were not sufficient to implicate Dr. Fleischer's conduct and therefore held that the Appellant failed to state a claim against him. Dr. Fleischer's Motion for Dismissal, filed July 27, 2022, which gave rise to the Court's dismissal Order, argued that the Appellant's AOM expert, Dr. Braunstein, did not qualify as a valid expert against Dr. Fleischer because Dr. Fleischer specialized as a "Hospitalist" and the Dr. Braunstein specialized in Hematology/Oncology. This distinction allegedly violated the requirements of N.J.S.A. 2A:53A-27, which states, in pertinent part, "[i]n the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41)." Id. Providing extensive detail regarding the qualifications of experts executing an AOM, N.J.S.A. 2A:53A-41 states, in pertinent part:

> In an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit pursuant to the provisions of P.L.1995, c. 139 (C.2A:53A-26 et seq.) on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in the United States and meets the following criteria:
>
> > a. If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, **the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty**, recognized by the American Board of Medical Specialties or

> the American Osteopathic Association, **as the party against whom or on whose behalf the testimony is offered**, **and if the person against whom or on whose behalf the testimony is being offered is board certified and the care or treatment at issue involves that board specialty or subspecialty** recognized by the American Board of Medical Specialties or the American Osteopathic Association, the expert witness shall be:
>
> (1) a physician credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, that is the basis for the claim or action; or
>
> (2) a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association who is board certified in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, and during the year immediately preceding the date of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to [ ]:
>
> (a) the active clinical practice of the same health care profession in which the defendant is licensed, and, if the defendant is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, the active clinical practice of that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association….

Id. For the reasons discussed herein, Dr. Braunstein qualifies as an AOM expert against Dr. Fleischer.

"The determination whether plaintiff satisfied the AOM statute is a matter of statutory interpretation for which our standard of review is de novo." Hoover v. Wetzler, 472 N.J.Super. 230, 235 (App. Div. 2022) (citing Triarsi v. BSC Grp. Servs., LLC, 422 N.J.Super. 104, 113 (App. Div. 2011). New Jersey courts have

provided extensive interpretation of N.J.S.A. 2A:53A-41, commonly referred to as the "same-specialty" requirement:

> A court's role in statutory interpretation is to determine and effectuate the Legislature's intent. Initially, we consider the statute's plain language. We must begin with the words of the statute and ascribe to them their ordinary meaning, reading disputed language in context with related provisions so as to give sense to the legislation as a whole. If the statute is clear on its face, the analysis is complete, and it must be enforced according to its terms. If, however, a literal interpretation of a provision would lead to an absurd result or would be inconsistent with the statute's overall purpose, that interpretation should be rejected and the spirit of the law should control.

Pfannenstein v. Surrey, 475 N.J. Super. 83, 95 (App. Div. 2023), cert. denied, 254 N.J. 512 (2023) (internal citations omitted). Providing an overview of the statute's objective and requirements:

> Section 41 established a like-credentialed standard of qualification governing AOM affiants and requires "the challenging expert to be equivalently-qualified to the defendant." The statute applies to three categories of medical malpractice defendants:
>
> > (1) those who are specialists in a field recognized by the American Board of Medical Specialties (ABMS) but who are not board certified in that specialty; (2) those who are specialists in a field recognized by the ABMS and who are board certified in that specialty; and (3) those who are "general practitioners."

Hoover, 472 N.J.Super. at 236-237 (internal citations omitted) (quoting Buck v. Henry, 207 N.J. 377, 389 (2011)).

In Pfannenstein, the plaintiff filed a medical malpractice case against two doctors and a medical center. Id. at 91. The plaintiff also filed an AOM of a doctor who was Board Certified and specialized in hematology, but did not state that she

was Board Certified or specialized in internal medicine. Id. at 91-92. The defendant doctors filed an answer to the complaint, asserting that they were both specialists in internal medicine. Id. It was undisputed that both defendant doctors were not Board Certified or specialized in internal medicine. Id. The defendant doctors alleged that the subject of the claim was internal medicine, while the AOM doctor alleged that the subject of the claim was hematology. Id. at 91-92. The AOM doctor only became Board Certified in internal medicine after the alleged malpractice occurred. Id. at 93.

The defendant doctors filed a motion to dismiss for the plaintiff's failure to provide an AOM from an expert in their same specialty. Id. The trial court denied the motion, reasoning that the alleged malpractice involved hematology, the AOM doctor's specialty. Id. at 94. The Appellate Division reversed, reasoning that the same-specialty requirement is narrowly interpreted, despite each doctors' ability to prescribe a similar medication:

> Similarly, in the present matter, plaintiff's proffered expert and the defendant doctors were qualified to prescribe heparin. However, because both [defendant doctors] were "offered" as specialists in internal medicine, an area of medicine recognized by the [American Board of Medical Specialties ("ABMS")], "and the care or treatment involve[d] that specialty," the [Patient's First Act ("PFA")] mandated that plaintiff's expert "have specialized at the time of the occurrence…in the same specialty" as defendants. N.J.S.A. 2A:53A-41(a). It is undisputed that at the time of the alleged malpractice, [the AOM doctor] specialized in hematology. Although hematology is a subspecialty of internal medicine, it is likewise undisputed that [the AOM doctor] did not practice internal medicine at the time of the alleged malpractice. Accordingly, pursuant to the plain terms of the PFA, as explained by the Court in Nicholas, plaintiff's proffered AOM expert failed to satisfy the statute's kind-for-kind mandate for both defendant doctors.

Pfannenstein, 475 N.J. Super. at 102. The Court went on to hold that "the PFA's requirement is not satisfied where the affiant's practice falls within a subspecialty of a defendant doctor's specialty, when the subspecialist no longer specializes, nor is board certified, in the specialty." Id. Furthermore, clarifying the purpose of N.J.S.A. 2A:53A-41:

> [T]he apparent objective of N.J.S.A. 2A:53A-41 is to ensure that, when a defendant physician is subject to a medical-malpractice action for treating a patient's condition falling within his [or her] ABMS specialty, a challenging plaintiff's expert, who is expounding on the standard of care, must practice in the same specialty.

Id. at 102-103.

The case at hand is clearly distinguishable from Pfannenstein and meets the objective of N.J.S.A. 2A:53A-41. It is undisputed that Dr. Fleischer and Dr. Braunstein are both physicians who are Board Certified and specialize in Internal Medicine. See 68a-76a, Answer of Joseph S. Fleischer, MD, ¶ 7 (stating "…Joseph Fleischer, M.D. was a physician licensed to practice medicine in the State of New Jersey with a specialty in Internal Medicine and worked as a "Hospitalist" at EHMC…"); see also 38a-39a, Certification of Dr. Braunstein, M.D., PhD (stating "I am a licensed physician, am Board Certified in Internal Medicine, and I am Board Certified in Hematology and Oncology."). It is anticipated that Dr. Fleischer will argue that he was a "Hospitalist", while Dr. Braunstein was only a specialist in Hematology and Oncology. According to the ABMS, Hematology is defined as

"[a]n internist (hematologist) with additional training who specializes in diseases of the **blood**, spleen, and lymph. This specialist treats conditions such as anemia, clotting disorders, sickle cell disease, hemophilia, leukemia, and lymphoma." 180a. The Appellant's Complaint alleges negligence causing complications of the blood, which falls under the definition of Hematology. 2a-3a. On the other hand, a "Hospitalist" is not a specialty or subspecialty of anything. 168a-178a. A Hospitalist certification may be obtained, but Dr. Fleischer does not possess such certification. Dr. Fleischer's argument also confuses the distinction between specialties and subspecialties. According to the ABMS, Internal Medicine is a distinct medical specialty. 170a. Furthermore, Hematology and Medical Oncology are merely subspecialties of the Internal Medicine specialty. Id. N.J.S.A. 2A:53A-41(a) allows an expert to qualify on the basis of either their specialty *or* subspecialty.

Applying the express requirements of N.J.S.A. 2A:53A-41(a), the basis of the Appellant's claims involve the practice of Internal Medicine, more specifically, Hematology. 3a, Appellant's Complaint, ¶ 11-14 (alleging that the withholding of Xarelto, a prescription blood thinner (emphasis added), constituted part of the alleged medical malpractice). As discussed above, Hematology is a subspecialty of Internal Medicine. Dr. Braunstein is Board Certified in Internal Medicine, Hematology, and Oncology. Dr. Fleischer was also Board Certified in Internal Medicine.

Applying the express requirements of N.J.S.A. 2A:53A-41(a)(1), it cannot reasonably be disputed that, Dr. Braunstein, Board Certified in Internal Medicine and Hematology, is credentialed by NYU Langone Medical Center to administer Xarelto and other similar medications to patients to treat similar medical conditions as the Appellant's condition at the time. Furthermore, applying the express requirements of N.J.S.A. 2A:53A-41(a)(2), Dr. Braunstein is Board Certified in Internal Medicine and is Board Certified and specializes in Hematology and Oncology. Dr. Braunstein has devoted a majority of his time to the active clinical practice of Internal Medicine, the basis of the Appellant's claims. 38a.

Therefore, the Appellant has clearly established two avenues of meeting the requirements of N.J.S.A. 2A:53A-41(a) under subsections (a)(1) and (a)(2). The Appellant timely filed the AOM of Dr. Braunstein on December 27, 2021, prior to Dr. Fleischer's Answer, filed March 16, 2022. 38a-39a. This Court should reverse the trial court's August 26, 2022, Order dismissing Dr. Fleischer with prejudice for failure to serve an AOM, as Dr. Braunstein was qualified to draft the AOM and it was timely filed by the Appellant.

2. Dr. Fleischer's Implication in the Affidavit of Merit

It is also anticipated that Dr. Fleischer will argue that Dr. Braunstein's AOM does not implicate any specific conduct by Dr. Fleischer that fell below the standard of care. This argument clearly lacks any merit given the abundance of hospital

records showing Dr. Fleischer's extensive involvement in the Appellant's treatment. Specifically, Dr. Fleischer thoroughly examined the Appellant shown by the Discharge Summary he authorized on May 17, 2019. Vol. 002, 1a-6a. Dr. Braunstein's AOM states that he believes, with a reasonable degree of medical certainty, that the Appellant's pre- and post-operative mismanagement of anticoagulation, including the administration of Xarelto and heparin, deviated from the standard of care and led to the Appellant's complications. 38a-39a. Dr. Fleischer took part in the post-operative care of the Appellant and played a significant role in the management of her medications. Vol. 002, 7a-16a. Given that Dr. Braunstein's expert opinion went directly to the Appellant's pre- and post-operative care, the AOM clearly implicates Dr. Fleischer's conduct, despite the fact he is not named specifically.

B. APPELLANT SERVED A COMPLIANT AFFIDAVIT OF MERIT AGAINST RESPONDENT APURVA MOTIVALA, MD (ISSUE RAISED BELOW: SEE AUGUST 26, 2022, TRIAL COURT ORDER)

For nearly the same reasons that this Court should reverse the trial court's August 26, 2022, Order dismissing Dr. Fleischer with prejudice, this Court should also reverse the trial court's second August 26, 2022, Order dismissing Apurva Motivala, MD ("Dr. Motivala" hereinafter) with prejudice. The second Order is also based on the trial court's finding that Dr. Braunstein was not a qualified expert to draft the AOM against Dr. Motivala.

1. The "Same-Specialty" Requirement

According to the ABMS, like Hematology and Medical Oncology, Cardiovascular Disease is merely a subspecialty of Internal Medicine. The Cardiovascular Disease subspecialty is defined as "[a]n internist who specializes in diseases of the heart and blood vessels and manages complex cardiac conditions, such as heart attacks and life-threatening, abnormal heartbeat rhythms." 170a. As discussed above, the Appellant's Complaint alleges negligence causing complications of the blood, which also fits within the scope of the Cardiovascular Disease subspecialty. Dr. Braunstein was Board Certified in Internal Medicine and was Board Certified and specialized in Hematology and Oncology. It is clear that Dr. Braunstein had special knowledge to render an opinion on the treatment of the Appellant by Dr. Motivala, given the similarities between Hematology and Cardiovascular Disease. In fact, Hematology and Cardiovascular Disease all still fall under the specialty of Internal Medicine. Therefore, the requirements of N.J.S.A. 2A:53A-41(a) were met by Dr. Braunstein drafting the AOM against Dr. Motivala. For these similar reasons, this Court should likewise reverse the trial court's second August 26, 2022, Order dismissing Dr. Motivala with prejudice, on the basis that the Appellant timely filed an AOM against Dr. Motivala.

2. Dr. Motivala's Implication in the Affidavit of Merit

Also for similar reasons why Dr. Fleischer's negligence was implicated by Dr. Braunstein's AOM despite the lack of explicitly mentioning his name, Dr. Motivala's negligence was also implicated by the AOM. Any argument that Dr. Motivala's negligence was not implicated will be without merit in light of the numerous medical records showing his treatment of the Appellant. Vol. 002, 17a-32a. Dr. Braunstein's AOM implicated the pre- and post-operative treatment of the Appellant. Dr. Motivala clearly played a part in her post-operative treatment based on the records. Id. Therefore, despite the lack of explicitly mentioning Dr. Motivala in the AOM, it still clearly implicates his conduct.

C. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION OF THE AUGUST 26, 2022, ORDERS DISMISSING RESPONDENTS JOSEPH S. FLEISCHER, MD AND APURVA MOTIVALA, MD WITH PREJUDICE (ISSUE RAISED BELOW: SEE OCTOBER 7, 2022, TRIAL COURT ORDER)

The trial court's October 7, 2022, Order denied the Appellant's Motion for Reconsideration of the two August 26, 2022, Orders dismissing Dr. Fleischer and Dr. Motivala from this case with prejudice. This Order was entered in error for the reasons discussed above. The Appellate Division's standard of review of an Order granting or denying a Motion for Reconsideration is as follows:

> This court's standard of review on a motion for reconsideration is deferential. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound

> discretion of the trial court. Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015).

Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022).

This Court has reversed trial court Orders in similar circumstances. See Hoover, 472 N.J.Super. 230. In Hoover, this Court faced a similar issue regarding an AOM's compliance with N.J.S.A. 2A:53A-41(a) in a case for medical malpractice. The plaintiff claimed, due to the negligence of the defendants during a total knee replacement, that she suffered a damaged popliteal artery and vein, causing blood to pool and leading to permanent injuries. Id. at 233-234. The plaintiff filed a single AOM prepared by a board-certified orthopedic surgeon against the defendant doctor and assisting nurse. Id. The defense objected to the AOM, arguing that the AOM was not sufficient against the nurse because it was not prepared by a similar nurse. Id. The trial court agreed and dismissed the plaintiff's complaint with prejudice. Id. The trial court further denied the plaintiff's motion for reconsideration as to the dismissal. Id. at 235. On appeal, this Court reversed the trial court's denial of the plaintiff's motion for reconsideration. This Court reasoned that the plaintiff did in fact comply with N.J.S.A. 2A:53A-27.

Here, the Appellant has also provided substantial evidence and arguments how she did in fact comply with the AOM statutes. The trial court similarly denied the Appellant's Motion for Reconsideration of the issues. 144a-157a. Based on Hoover, this Court has a clear basis to reverse the trial court's denial of the Plaintiff's

Motion. Therefore, the Appellant respectfully requests that this Honorable Court reverse the trial court's October 7, 2022, Order denying the Appellant's Motion for Reconsideration.

D. THE TRIAL COURT ERRED IN DISMISSING THE RESPONDENTS AND DENYING APPELLANT'S CROSS MOTIONS TO EXTEND DISCOVERY (ISSUE RAISED BELOW: SEE JANUARY 20, 2023, TRIAL COURT ORDERS)

1. Exceptional Circumstances Exist to Re-Open and Extend Discovery

New Jersey case law has dealt with the issue facing the Plaintiff many times and has expressly laid out the requirements the Court must consider in determining whether to grant an extension of discovery after the discovery end date has passed:

> In order to extend discovery based upon "exceptional circumstances," the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

Rivers v. LSC Partnership, 378 N.J.Super. 68, 79 (App. Div. 2005). It is clear that each and every one of the requisite inquiries favors the Plaintiff.

First, Plaintiff's expert, Frank Pupparo, MD, did not provide his expert report within the original discovery end date due to the complexity of the case and the severity of Plaintiff's injuries. According to Dr. Pupparo's own Certification, he could not have provided a comprehensive final report until he obtained more of the

Appellant's ongoing medical records. 135a-139a. Appellant's counsel kept in constant communication with Dr. Pupparo regarding the timeliness of his report. Dr. Pupparo expressly certified that he would provide his final report within 90 days of the Court's Order to extend discovery, which was never granted. Id.

Second, the additional discovery sought is certainly essential. It is common knowledge in the practice of law that medical malpractice cases are complex and require the opinions of expert witnesses to provide clarity on whether a medical professional negligently caused a plaintiff's injuries. Here, the extension of discovery sought by the Appellant is for the purpose of allowing Dr. Pupparo to diligently examine the Appellant's ongoing medical records and treatments to prepare a comprehensive report regarding his findings and opinions. Dr. Pupparo's report is no doubt essential to this case because, as people not trained in the practice of medicine, we cannot provide the level of insight on the facts and evidence that Dr. Pupparo can.

Third, Appellant's counsel's reason for not requesting relief prior to the original discovery end date was due to staffing shortages leading to a simple oversight in counsel's calendar. Given that no discovery extension has been previously granted in this case, the lack of unfair prejudice to the defense, and the Appellant's due diligence otherwise, the Appellant did not deserve to suffer the ultimate sanction of a dismissal with prejudice.

Fourth, the Appellant has had Dr. Pupparo retained since the outset of this case. It cannot be argued that the Appellant did not perform her due diligence in obtaining an expert to review this case and file a report. The circumstances leading to the failure to provide defense counsel with the expert report were unquestionably beyond the control of the Appellant. Dr. Pupparo certified that, in order to provide the most comprehensive final report, he needs to evaluate the Appellant's ongoing medical treatment. 135a-139a. It is clearly in the interests of fairness and justice that the parties and the Court take this matter seriously and defer to a medical expert's opinion that additional time is needed to provide the most accurate findings and opinions of this case. Neither the Appellant, nor the Appellant's counsel, are in a position to rush a medical expert attempting to provide the most clarity possible on serious medical issues. Therefore, applying the four inquiries prescribed by New Jersey case law, it is clear that the Appellant had in fact established exceptional circumstances to extend the discovery end date in order to provide an accurate and comprehensive expert report.

New Jersey case law also makes it clear that a plaintiff should not suffer the ultimate sanction for a procedural oversight beyond their control, even when there is failure to timely seek relief from the original discovery end date. In Tucci v. Tropicana Casino and Resort, Inc., the plaintiffs brought a negligence action against the defendant casino and defendant elevator company for injuries suffered in the

casino's elevator. 364 N.J.Super. 48, 50 (App. Div. 2003). The complaint was filed just short of two years after the accident occurred. Id. The case was assigned a 300-day discovery period, but thereafter extended to December 14, 2021, and trial scheduled for May 20, 2002. Id. The plaintiffs were not provided with the elevator maintenance records sought until just short of the discovery end date. Id. The plaintiffs asserted that their expert could not provide the expert report until they received all of the relevant elevator maintenance records. Id. at 50-51. After a case management conference, the Court gave the plaintiffs until May 14, 2022, to serve their expert's report, gave the defendants leave to depose the plaintiff's expert and serve rebuttal expert reports, and rescheduled trial for September 9, 2002. Id. at 51. The plaintiffs did not end up serving their expert report until 39 days after the May 14 deadline. Id.

The trial court granted the defendant's motion barring testimony by the plaintiff's expert and dismissed the case with prejudice. Id. In considering the facts and circumstances of the case, the Court repeatedly made its position clear:

> In dismissing the complaint with prejudice because of the late report and denying the motion for reconsideration, the judge noted plaintiffs' failure to seek relief from the May 24 deadline or otherwise to move for extension of the discovery-end date and relied as well on defendants' assertion that the expert report had opened up new areas of inquiry that had to be explored. Our review of the record satisfies us, however, that the judge's perceptions provided an insufficient basis for the ultimate sanction of dismissal with prejudice, that it failed to take into account other countervailing considerations, and that the dismissal with prejudice constituted a mistaken exercise of discretion.

Id.

The Court's reasoning is equally clear: "To begin with, we think it plain that prior to the 2000 rule amendments denominated Best Practices, the late service of the expert report by plaintiffs might have resulted in some appropriate sanction, but the case would not and should not have been dismissed with prejudice." Id. at 52. "The defendants failed to show any irremediable prejudice." Id. "…ultimate sanction for an attorney's procedural violations of dismissal with prejudice must be a recourse of last resort, not to be invoked unless no lesser sanction is adequate in view of the nature of the default, its attendant prejudice to other parties, and the innocence of the sanctioned litigant." Id. See Woodward–Clyde v. Chem. & Pollution Sciences, 105 N.J. 464, 471, 523 A.2d 131 (1987) ("…a dismissal with prejudice is a severe sanction that should be imposed sparingly and only when no lesser sanction will erase the prejudice suffered by the non-delinquent party"); see also Zaccardi v. Becker, 88 N.J. 245, 253, 440 A.2d 1329 (1982) ("…although it is the policy of the law that discovery rules be complied with, it is also the rule that drastic sanctions should be imposed only sparingly"); Irani v. K–Mart Corp., 281 N.J.Super. 383, 387, 657 A.2d 911 (App. Div. 1995) ("[w]e review the extreme sanction of dismissal with prejudice in light of the salutary purposes of R. 1:2–4(a), its substantial range of permitted sanctions for failure to appear, and the case law interpretive of the rule); Georgis v. Scarpa, 226 N.J.Super. 244, 249–250, 543 A.2d 1043 (App. Div.

1988); Johnson v. Mountainside Hosp., 199 N.J.Super. 114, 119–120, 488 A.2d 1029 (App. Div. 1985); Jansson v. Fairleigh Dickinson University, 198 N.J.Super. 190, 195, 486 A.2d 920 (App. Div. 1985). Further elaborating:

> We had been particularly indulgent in not barring a late expert's report where the report was critical to the claim or defense, the late report was submitted well before trial, the defaulting counsel was not guilty of any willful misconduct or design to mislead, any potential prejudice to the adverse party could be remediated, and the client was entirely innocent.

Tucci, 364 N.J.Super. at 53. Our courts have also demonstrated a clear preference for lesser sanctions, when appropriate:

> Although R. 4:23–5 does not contain a list of possible sanctions, it does not explicitly limit the power of the court to a choice between imposing the ultimate sanction of dismissal with prejudice or imposing no sanction at all. The purpose of the rule change was to force the delinquent party to move for a reopening of the case, and not to strip the court of the power to equitably adjust the controversy by less drastic sanctions when appropriate.

Georgis v. Scarpa, 226 N.J. Super. 244, 250 (App. Div. 1988) (internal citations omitted).

The Court went even further in explaining its reasoning, providing its opinion on why the general policy of the court's procedural rules and cooperation between attorneys do not favor dismissal with prejudice:

> We point out, moreover, that the litigation process cannot effectively take place without some measure of cooperation among adversaries. Clearly the court ought not be unduly applied to for relief that the parties are able to arrange for themselves without prejudice to the justice system. Beyond that, the trial court's

> concern for the additional discovery by defendants that the expert report would require cannot justify the dismissal with prejudice.

Id. "In sum, we are satisfied that under the totality of the circumstances, the dismissal with prejudice as against [the elevator company] was improvident." Id. at 54.

Here, Tucci is nearly identical to the facts and circumstances of this matter currently faced by the Appellant. As a brief summary, the relevant similarities between these cases are as follows: (1) the cases were dismissed with prejudice for failure to serve a timely expert report; (2) a discovery end date and a trial date were set prior to dismissal; (3) the plaintiff/appellants' experts could not provide an expert report until they received additional records regarding the damages/injuries, causing the failure to meet the discovery end date; (4) the plaintiff/appellants' failed to seek relief from the discovery end date before it lapsed; and (5) the plaintiffs/appellants' motions for reconsideration were denied. Most notably, Tucci prescribed clear precedent regarding failing to seek relief from the original discovery end date. The Court made specific note of the oversight on the part of the plaintiff's counsel, but went on to explain that countervailing considerations weighed so heavily the other way, that the trial judge's dismissal with prejudice amounted to an abuse of discretion. Id. at 51. Here, Appellant's counsel overlooked the original discovery end date due to staffing and calendar issues; however, the Appellant has made it clear that there are numerous countervailing considerations that weigh heavily against upholding the ultimate sanction of a dismissal with prejudice.

Furthermore, in Tucci, the discovery end date had already been extended once from the original end date and the trial date was adjourned to a later date before the plaintiffs' counsel failed to seek relief. Here, the original discovery end date has remained since the outset of this case, no prior discovery extension has been sought until now, and the trial date can be adjourned to accommodate a discovery extension and allow the Respondents time to respond to any new discovery. Therefore, this Court should reverse the trial Court's January 20, 2023, Orders dismissing this case with prejudice to accurately reflect New Jersey case precedent and in the interest of justice.

2. The Appellant Has Substantially Complied with Discovery Proceedings Warranting Adjudication of Her Claims on the Merits

It is clear that a technical violation of the procedural rules occurred in the trial court, however, courts are reluctant to bar claims from being adjudicated on the merits. One of the ways courts avoid these harsh results is applying the doctrine of substantial compliance to otherwise good faith efforts to comply with the rules. New Jersey Courts invoke the doctrine of substantial compliance to "avoid technical defeats of valid claims." Zamel v. Port of New York Authority, 56 N.J. 1, 6, 264 A.2d 201 (1970). In light of the doctrine of substantial compliance, which requires reasonable effectuation of the statute's purpose, as in Zamel, and the existing practices in this general area that attempt to reconcile convenience and truth under

Court Rule 1:4-4(b), there is no reason to infer that the Legislature intended that the statute be applied literally and strictly, rather than in a manner that would assure substantial compliance with its essential provisions. Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 708 A.2d 401 (1998).

Application of the equitable doctrine of substantial compliance and the proper limits as to how far a court may go in finding flexibility in the words of the affidavit of merit statute are set forth in Cornblatt's five-part test, which indicate the following considerations. Similar considerations can be applied to the present matter:

> (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 claim; and (5) a reasonable explanation why there was not a strict compliance with the statute.

Mayfield v. Community Medical Associates, P.A., 335 N.J. Super. 198 (2000) (citing Cornblatt v. Barow, 153 N.J. at 239, 708 A.2d 401 (1998)).

The satisfaction of those elements guarantees that the underlying purpose of the statute is met and that no prejudice is visited upon the opposing party. In each case, the court is required to assess the facts against the clearly defined elements to determine whether technical non-conformity is excusable. The Court can assess this matter under the same principles. See Galik, supra, 167 N.J. at 352, 771 A.2d at 1148 ("It is a doctrine based on justice and fairness, designed to avoid technical rejection of legitimate claims.") Galik, supra, 167 N.J. at 353, 347-48, 771 A.2d at 1149, 1144-46 (finding "substantial compliance" where plaintiff did not file affidavit within

statutory time frame, but plaintiff's counsel, before initiating suit, provided defendants' insurance carriers with two detailed expert's reports that established legitimacy of complaint and served as basis for settlement discussions); Fink, supra, 167 N.J. at 561-64, 772 A.2d at 392-94 (finding "substantial compliance" where timely-served affidavit and extensive expert's report clearly focused on conduct of defendant and his relationship to malpractice case, even though both documents failed to name defendant doctor); Cornblatt, supra, 153 N.J. at 239-242, 708 A.2d at 411-13 (finding "substantial compliance" where plaintiff served timely certification instead of affidavit).

The Appellant in this matter satisfies each of the aforementioned elements set forth in the five-part Cornblatt substantial compliance test. First, there is no prejudice to the Respondents as all parties are continuing and prepared to move forward with discovery in a timely and compliant manner, whereas the Respondents have been provided with and will continue to have ample time to prepare their defense. Second, the Appellant is prepared in good faith to serve the expert reports and is available to proceed expeditiously on the merits. Third, the Appellant has complied with attempting to obtain an expert report. However, she has not been able to obtain same within the narrow time frame provided through no fault of the Appellant, discussed above, but rather based on significant circumstances severely impact her daily life as extensively set forth in the Appellant's filed Certification. 175a-178a. Fourth,

there has been ample notice of the claim. Finally, the delay is attributable to no fault of the Appellant, but rather arise out of chronic and severe physical conditions.

There has been no showing of prejudice to the Respondents that outweighs the strong preference for adjudication on the merits rather than final disposition based upon procedural reasons. See Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107-08, 275 A.2d 433 (1971); In re Comm'r of Insurance Issuance of Orders, 274 N.J. Super. 385, 396, 644 A.2d 616 (App. Div. 1993), aff'd, 137 N.J. 93, 644 A.2d 576 (1994), or would warrant visiting on the innocent client an error of their attorney, see Zaccardi v. Becker, 88 N.J. 245, 253, 440 A.2d 1329 (1982); Irani v. K-Mart Corp., 281 N.J. Super. 383, 388, 657 A.2d 911 (App. Div. 1995); Savoia v. Woolworth, 88 N.J. Super. 153, 160-61, 211 A.2d 214 (App. Div. 1965).

The Supreme Court has a long recognized "strong preference for adjudication on the merits rather than final disposition for procedural reasons." Galik v. Clara Mass Med. Ctr., 167 N.J. 341, 356, 771 A.2d 1141 (2001) (quoting Mayfield, supra); Ragusa v. Lau, 119 N.J. 276, 284, 575 A.2d 8 (1990); (Tumarkin v. Friedman, 17 N.J. Super. 20, 27, 85 A.2d 304 (App. Div. 1951), certif. denied, 9 N.J. 287, 88 A.2d 39 (1952)); see also Ponden v. Ponden, 374 N.J. Super. 1, 9-10, 863 A.2d 366 (App. Div. 2004), certif. denied, 183 N.J. 212, 871 A.2d 90 (2005); Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 53, 834 A.2d 448 (App. Div. 2003). Based on the Courts' preference for adjudication on the merits and the applicability

of the doctrine of substantial compliance, this matter should be allowed to proceed to trial in the interests of justice.

E. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION OF THE JANUARY 20, 2023, ORDERS DISMISSING THE COMPLAINT AND DENYING APPELLANT'S CROSS MOTION TO EXTEND DISCOVERY (ISSUE RAISED BELOW: SEE MARCH 17, 2023, TRIAL COURT ORDER)

The Appellant contends that the trial court abused its discretion by denying the Appellant's request to extend discovery based on the circumstances regarding the Appellant's physical condition and her expert's need to review her ongoing treatment records. The Court in D'Atria v. D'Atria set forth that a motion for reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice. 242 N.J.Super. 392, 401 (Ch. Div.1990) (citing Johnson v. Cyklop Strapping Corp., 220 N.J.Super. 250, 257, 263, 531 A.2d 1078 (App. Div. 1987); Cf. Michel v. Michel, 210 N.J.Super. 218, 509 A.2d 301 (Chanc.Div.1985)). Further elaborating on the relevant standard:

> A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court. Rather, the preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal or, if the Order is final, by a notice of appeal. Id. Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either **1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.**

> A litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process.

D'Atria, 242 N.J.Super. at 401.

In the present matter, the Court expressed its decision upon a palpably incorrect or irrational basis by unreasonably failing to consider the extreme medical circumstances the Appellant has endured in the relevant time period and the necessity of ongoing treatment due to the Respondents' negligence, which prevented her from providing the expert report in the required discovery timeframe. 140a-143a. The Appellant sought reconsideration, not through mere dissatisfaction with a decision of the Court, but based on the failure to consider the unfortunate and extraordinary circumstances which prevented timely compliance with the discovery timeframe. The injuries expressly set forth by the Appellant include, but are not limited to: COVID-19 diagnosis (Id. at ¶ 3), Ketamine treatment (Id. at ¶ 4-5), broken ankle (Id. at ¶ 6), broken leg fibula (Id. at ¶ 6), Complex Regional Pain Syndrome (CRPS) diagnosis (Id. at ¶ 7-8), abdomen and stomach pain (Id. at ¶ 10), therapy for the right-side arm with limited use up to the elbow (Id. at ¶ 13). The trial court's decision is obvious that it either, did not consider, or failed to appreciate, the significance of probative evidence presented by the Appellant. Therefore, this Court should reverse the trial court's March 17, 2023, Order denying Reconsideration of the January 20, 2023, Orders dismissing the Appellant's claims with prejudice.

F. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE THE MARCH 17, 2023, ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION (ISSUE RAISED BELOW: SEE MAY 12, 2023, TRIAL COURT ORDER)

The Plaintiff is entitled to seek relief from a Court's order pursuant to New Jersey Court Rule 4:50-1, which provides the following grounds for such motion:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

R. 4:50-1. The Appellant was entitled to seek relief under subsection (f) of this Rule.

For the reasons discussed herein, the trial court should have vacated its March 17, 2023, Order. In Brazza v. Kagen, the trial court dismissed the plaintiff's medical malpractice action with prejudice due to the plaintiff's expert being disqualified and the plaintiff's failure to obtain a new expert. 2023 WL 4418263 at *1. One year after the dismissal, the plaintiff sought vacation of the dismissal order. Id. The trial court denied the motion, and the Appellate Division affirmed. Id. Here, the Appellant sought relief less than one month after the March 17, 2023, Order denying Reconsideration. The Appellant did not cause undue delay as the plaintiff did in

Brazza. The Appellant was completely justified in seeking immediate relief from the harsh results of the trial court's Order. Therefore, this Court should reverse the trial court's May 12, 2023, Order denying vacation of its prior Order.

G. THE APPELLANT WILL SUFFER IMMEDIATE AND IRREPARABLE UNFAIR PREJUDICE AS A RESULT OF UPHOLDING THE TRIAL COURT'S ORDERS DISMISSING HER CLAIMS WITH PREJUDICE

Reversing the trial court's Orders and granting the Appellant's request for a discovery extension would not result in unfair prejudice to the Respondents, but would significantly prejudice the Appellant if this Court were to uphold the denial of this request. It is crucial to note that this was the Appellant's first request for a discovery extension. The Appellant has diligently pursued discovery to the best of her ability, and is only delayed in providing an expert report due to her desire to provide the most comprehensive findings and opinions of Dr. Pupparo. The Appellant did not seek an open-ended extension, but rather a reasonable amount of additional time for Dr. Pupparo to fully explore the facts and circumstances of her injuries and ongoing treatment.

The Appellant recognizes that discovery is a two-way process, and that both parties should have a fair opportunity to obtain relevant evidence. However, the Appellant should not be unfairly penalized for a slight oversight in her counsel failing to timely seek relief from the original discovery end date, particularly when

the Respondents cannot show that they would be unfairly prejudiced by a reasonable extension.

On the other hand, upholding the trial court's Orders denying the Appellant's request for a discovery extension would significantly prejudice the Appellant. Medical malpractice cases involve significant injury and hardship to plaintiffs, and these cases should not be thrown out for slight procedural errors. The Respondents know or should know that the Appellant has suffered significant injuries as a result of the alleged malpractice, and denying the Appellant a reasonable opportunity to pursue her claims on the merits would result in significant unfair prejudice.

Moreover, the Respondents would unfairly benefit from a free dismissal with prejudice under the circumstances. The Appellant should not be punished for a mistake that had no effect on the substantive claims of the case. The Appellant has made a good faith effort to comply with discovery obligations, and this Court should not allow the Respondents to unfairly benefit from a mistake that did not harm them in any way.

Furthermore, medical malpractice cases require extensive discovery due to the complexity of medical treatment and records involved in such cases. Discovery in a medical malpractice case typically involves obtaining medical records, interviewing witnesses, and consulting with medical experts to evaluate the standard of care provided by the defendant healthcare provider. Additionally, given that medical

treatment is an ongoing process, it is often difficult to anticipate with absolute certainty the timelines for discovery in a medical malpractice case.

Medical records are voluminous and complex, and require significant time and effort to review and analyze. The medical records in a medical malpractice case often include not only the records from the specific case in question, but also a plaintiff's prior medical history and ongoing treatment. As a result, it may take several months to obtain all relevant medical records and review them thoroughly.

Medical malpractice cases also often require the use of medical experts to establish the standard of care and to provide opinions on whether a defendant healthcare provider breached that standard of care. These experts need time to review the medical records, evaluate the facts of the case, and prepare their opinions. This process can also take several months, particularly if multiple experts are involved or if there are disputes between the parties' experts.

Given the complexity of medical malpractice cases and the extensive discovery required, it is often impossible to anticipate with absolute certainty the timelines for discovery. The parties may need to request additional time to complete discovery, or the court may need to issue scheduling orders with built-in flexibility to account for the ongoing nature of medical treatment and the review of medical records. Ultimately, the goal of discovery in a medical malpractice case is to ensure that all relevant evidence is obtained and analyzed, so that the parties can make

informed decisions and the Court can render a just and fair decision. Therefore, the Appellant should not suffer the ultimate sanction of a dismissal with prejudice for simply not predicting when discovery will be completed with absolute certainty.

CONCLUSION

For the aforementioned reasons, the Appellant respectfully requests that this Honorable Court reverse the various trial court Orders dismissing Dr. Fleischer and Dr. Motivala with prejudice, as well as the Orders dismissing the Appellant's Complaint with prejudice. The Appellant has demonstrated substantial medical malpractice claims against the Respondents that must be adjudicated on the merits. The existence of any procedural deficiencies must be set aside in the interest of justice and fairness.

Respectfully submitted,
/s/ *Chip Dunne*

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CHRISTINE SULLIVAN, V. DR. ASIT SHAH, M.D., Ph.D., ENGLEWOOD HEALTH, HACKENSACK MERIDIAN HEALTH PARTNERS, LLC; MARK GABELMAN, M.D.; MAXWELL JANOSKY, M.D., APURVA MOTIVALA, M.D., JOSEPH S. FLEISCHER, M.D., JOHN DOES 1-10 (fictitious names) and JANE DOES 1-10 (fictitious names).	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003131-22T4 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-1944-21 Sat Below: Hon. Mary F. Thurber, J.S.C. Hon. Robert C. Wilson, J.S.C. Civil Action

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT/RESPONDENT, MAXWELL JANOSKY, M.D.

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[1] "1T" refers to the transcript of the January 20, 2023, oral arguments on several defendants' motions and cross-motions to dismiss, and plaintiff's cross-motion to reopen and extend discovery, before the Hon. Robert C. Wilson, J.S.C.

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[2] Excerpted portions of this brief are included, pursuant to Rule 2:6-1(a)(2) to elucidate a reference to "staffing shortages" in the trial court's Order filed May 12, 2023 (163Pa). Plaintiff's appendix fails to include any documents supplied to the Law Division in support of this motion.

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PRELIMINARY STATEMENT

Defendant / Respondent Maxwell Janosky, M.D. ("Dr. Janosky") submits this brief, appendix, and confidential appendix in opposition to plaintiff's appeal. This is a medical malpractice case in which plaintiff alleges that Dr. Janosky and codefendants were negligent in the care and treatment provided to plaintiff Christine Sullivan ("Ms. Sullivan"), in or about March and April of 2019.

It is ***uncontested*** that when the discovery period ended on November 17, 2022, plaintiff had not served the report of any expert witness who opined that Dr. Janosky deviated from applicable standards of care, or that such alleged deviations proximately caused Ms. Sullivan's claimed injuries. It is similarly uncontested that plaintiff did not seek to extend discovery either before the discovery end date, or before the Law Division assigned a trial date. Plaintiff's first request to reopen and extend discovery was made after the discovery end date; after a trial date was assigned; and after defendants, including Dr. Janosky, moved to dismiss plaintiff's claims on grounds that plaintiff had never served the reports of any expert witnesses, and thus could not set forth a *prima facie* case against any defendant. Finally, it is uncontested that plaintiff's failure to seek a discovery extension was an admitted oversight by plaintiff's attorney. (Pb18, Pb31.)

On behalf of Dr. Janosky, we respectfully submit that the Law Division's decisions denying plaintiff's January 11, 2023, motion to reopen and extend discovery, and granting Dr. Janosky's motion to dismiss, were properly granted. Plaintiff failed to set forth the existence of any "exceptional circumstances" to justify a discovery extension, as our Court Rules mandate once the discovery end date has passed and a trial date has been set. Moreover, plaintiff only sought an extension so that she could serve a report from an expert witness, Dr. Pupparo, who is not qualified to opine that Dr. Janosky deviated from the standard of care. Therefore, even if the Law Division had granted an extension so that plaintiff could serve Dr. Pupparo's report, she still could not set forth a *prima facie* case against Dr. Janosky. Dismissal of the claims against Dr. Janosky remained the appropriate outcome. Plaintiff has ***never*** explained, either to the court below, or in her current appeal, why she did not serve the report of an expert qualified to offer opinions regarding Dr. Janosky.

The Law Division's subsequent order, denying the plaintiff's motion for reconsideration, was an appropriate exercise of discretion. As noted by the court below, the only explanation that plaintiff had provided for not serving expert reports was Ms. Sullivan's ongoing medical problems. But these would not logically affect any expert witness' ability to draft a report, or her attorney's ability to request an extension of discovery in a timely fashion.

The denial of the plaintiff's subsequent "motion to vacate" pursuant Rule 4:50-1, essentially a second motion for reconsideration, was another appropriate exercise of the Law Division's discretion. Plaintiff's motion merely repeated her prior arguments under the guise of a different court rule and failed to demonstrate the existence of "truly exceptional circumstances" that would warrant any relief under that rule. The vague references by plaintiff's attorney to "staffing shortages," and his own admitted oversight (19a at ¶ 12; 22a-24a), did not amount to "exceptional circumstances," as that term is understood by our courts.

Therefore, for the reasons set forth herein, defendant Dr. Janosky respectfully submits that all of the Law Division's rulings should be affirmed.

PROCEDURAL HISTORY RELEVANT TO DEFENDANT DR. JANOSKY

This lawsuit commenced with the filing of plaintiff's Complaint on January 27, 2020. (1Pa.) The Complaint was subsequently amended to name additional party defendants including Dr. Janosky. (15Pa.) Dr. Janosky's Answer to the Amended Complaint was filed on March 4, 2022. (62Pa.) On or about September 12, 2022, the Law Division issued a notice reminding the parties of the November 17, 2022, discovery end date. (4a.) On or about

November 22, 2022, the Law Division issued a notice advising the parties that trial had been scheduled for May 1, 2023. (5a.)

On December 14, 2022, codefendant Asit Shah, M.D., Ph.D. ("Dr. Shah") filed a motion to dismiss the plaintiff's Complaint, on the basis that plaintiff had not served the report of an expert witness. (101Pa.) On December 16, 2022, codefendant Englewood Hospital and Medical Center ("EHMC") filed a motion to dismiss plaintiff's Complaint, on the basis that plaintiff had not served the report of an expert witness. (105Pa.) On December 29, 2022, Dr. Janosky filed a cross-motion to dismiss plaintiff's Complaint, on the basis that plaintiff had not served the report of an expert witness. (109Pa, 6a.) On January 11, 2023, plaintiff filed a cross-motion to extend discovery. (113Pa, 9a.) Oral argument was heard by the Hon. Robert C. Wilson, J.S.C., on January 10, 2023. (1T.) Following oral argument, Judge Wilson entered orders granting Dr. Shah's, EHMC's, and Dr. Janosky's motions to dismiss, and denying plaintiff's cross-motion to extend discovery. (121Pa-130Pa.)

On February 9, 2023, plaintiff filed a motion to reconsider the orders that had been filed on January 20, 2023. (131Pa-143Pa, 12a-14a.) On March 17, 2023, the Hon. Mary F. Thurber, J.S.C.[3], filed an Order and decision denying

[3] Plaintiff's motion for reconsideration was heard by Judge Thurber due to the retirement of Judge Wilson. (146Pa at n.2)

plaintiff's motion for reconsideration. (144Pa.) On April 13, 2023, plaintiff filed a motion to vacate Judge Thurber's Order of March 17, 2023. (158Pa-161Pa, 17a-24a.) On May 12, 2023, Judge Thurber filed an Order and decision denying plaintiff's motion to vacate. (162Pa.)

Plaintiff filed a notice of appeal on June 15, 2023, and an amended notice of appeal on June 21, 2023. (See codefendant Englewood Hospital and Medical Center's Appendix at Da10-Da23.). Codefendants Englewood Hospital and Medical Center ("EHMC") and Dr. Shah each filed motions to dismiss plaintiff's appeal as untimely, in which Dr. Janosky joined. (25a-27a.) By Orders filed August 23, 2023, this Court denied all motions to dismiss plaintiff's appeal as untimely. (28a-33a.)

STATEMENT OF FACTS RELEVANT TO DEFENDANT DR. JANOSKY

This is a medical malpractice lawsuit brought by plaintiff Christine Sullivan, arising from treatment and care rendered during an admission to Englewood Hospital and Medical Center ("EHMC") beginning March 29, 2019. (15Pa; 1Pca.) Dr. Janosky is a physician who practices in the medical subspecialty of hematology and oncology, and the care and treatment he rendered to Ms. Sullivan as a consulting hematologist fell within his subspecialty field. (65Pa; 2a; 3a.) Dr. Janosky performed a consultation on

April 3, 2019 (1ca-10ca); he ordered tests and medications between April 3 and April 6, 2019 (11ca-21ca); and he was called about the patient on April 4, 2019 (22ca).

The discovery end date in this lawsuit was November 17, 2022. (4a.) On November 21, 2022, the Law Division fixed a trial date of May 1, 2023. (5a.) Dr. Janosky filed a cross-motion to dismiss plaintiff's claims on December 29, 2022. (109Pa-112Pa, 6a-8a.) As of the date Dr. Janosky's cross-motion was filed, plaintiff had neither served an expert report regarding Dr. Janosky, nor requested that discovery be extended to permit her to do so. (7a at ¶¶ 4-6.)

On January 11, 2023, plaintiff's attorney filed a cross-motion to extend (*i.e.*, ***reopen*** and extend) discovery. (113Pa-120Pa, 9a-11a.) In his supporting certification, plaintiff's attorney admitted that expert reports remained outstanding. (10a at ¶ 8.) Plaintiff's attorney ***did not***, however, identify any circumstances which had prevented him from obtaining an expert review or report regarding the care and treatment by Dr. Janosky, or any circumstances which prevented him from seeking an extension of discovery before discovery ended and a trial date was fixed. (9a-11a.) Plaintiff's attorney did provide a certification from Ms. Sullivan herself, in which she described her injuries and medical and physical issues. (117Pa-120Pa.)

When plaintiff's attorney subsequently moved for reconsideration of the orders dismissing plaintiff's claims, and denying plaintiff's cross-motion to extend discovery, he again failed to identify any circumstances which had prevented him from obtaining an expert report regarding Dr. Janosky, or any circumstances which had prevented him from seeking an extension of discovery in a timely fashion. (12a-14a.) In support of reconsideration, plaintiff's attorney provided another certification from Ms. Sullivan, in which she again described her injuries and medical and physical issues. (Pa140-Pa143.) Plaintiff's attorney also provided a certification from an expert witness, Frank Pupparo M.D., ("Dr. Pupparo") who stated that he needed additional time to obtain and review additional medical records regarding plaintiff's health issues, "before I can prepare a final report documenting exactly what damages are related to this incident and which are not. I also require time to review these records to evaluate the extent of the damages." (138Pa-139Pa at ¶¶ 16, 17, 20.)

Plaintiff's expert Dr. Pupparo ***did not*** allege in his certification that additional time was needed to determine if defendant Dr. Janosky (or any other defendant) had been negligent in the care provided to plaintiff. (135Pa-139Pa.) Dr. Pupparo practices in the specialty of orthopedic surgery, and not in Dr. Janosky's subspecialty field of hematology. (8Pa; 12Pa) Dr. Pupparo had

previously admitted in a March 9, 2021, Affidavit of Merit that "I cannot expertly critique non-Orthopedic services." (10Pa.)

When plaintiff's attorney filed a motion to vacate the March 17, 2023, Order denying reconsideration, he again failed to identify any circumstances which had prevented him from obtaining any expert report regarding Dr. Janosky. (17a-20a.) Plaintiff's attorney only referred to prior certification of orthopedic surgeon, Dr. Pupparo, and stated that "Plaintiff's expert is attempting[4] to provide the most detained and comprehensive report as possible …" (17a-20a at ¶¶ 8, 14.) Plaintiff's attorney also admitted, in his certification to the Court and his letter brief, to a "misstep" and "oversight" in not seeking an extension of discovery before the discovery period ended. (19a at ¶ 12; 22a-24a.)

Additional facts relevant to this appeal are set forth in the Procedural History Relevant to Defendant Dr. Janosky, *supra*, and are incorporated here by reference.

[4] Counsel's reference to "Plaintiff's ***expert***" (singular), as opposed to "plaintiff's experts" (plural), indicates that he was referring to Dr. Pupparo, the only expert named in counsel's certification.

LEGAL ARGUMENT

POINT I

STANDARDS OF REVIEW.

The standard of review regarding plaintiff's underlying cross-motion to extend discovery is deferential. The standard of review regarding a motion to extend discovery is "limited to a determination of whether the trial court mistakenly exercised its discretion." Leitner v. Toms River Reg'l Sch., 392 N.J. Super. 80, 87 (App. Div. 2007) (citing and quoting Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 471 (App. Div. 2005), certification granted, cause remanded, 185 N.J. 290 (2005)); see also, Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005) ("We generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion, or its determination is based on a mistaken understanding of the applicable law.")

Review of the Law Division's decision on plaintiff's motion for reconsideration is also deferential. "[The Appellate Division's] standard of review on a motion for reconsideration is deferential … 'Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court.'" Hoover v. Wetzler, 472 N.J. Super. 230, 234 (App. Div. 2022) (citations omitted).

Review of the Law Division's decision on plaintiff's motion to vacate, pursuant to Rule 4:50-1, is also deferential.

> The trial court's determination under the rule warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion … The Court finds an abuse of discretion when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."

[US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467–68 (2012) (citations omitted).]

POINT II

THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S CLAIMS AGAINST DR. JANOSKY AND CORRECTLY DENIED PLAINTIFF'S CROSS-MOTION TO EXTEND DISCOVERY (Rulings below at 1T; 125Pa-130Pa.)

A. Plaintiff's Claims Against Dr. Janosky Were Appropriately Dismissed.

Plaintiff offers no basis to challenge the dismissal of her claims against Dr. Janosky other than asserting that her request to reopen and extend discovery should have been granted. (See plaintiff's Point "D" at Pb17-Pb28.) We respectfully submit that the Law Division's dismissal of the Complaint was appropriate, because it remains undisputed that the plaintiff never served the report of any expert witness who opined that Dr. Janosky deviated from the

applicable standard of care, or that such deviation was a proximate cause of plaintiff's injuries and damages. Even when plaintiff cross-moved to extend discovery; when plaintiff moved for reconsideration; and when plaintiff moved to vacate the denial of reconsideration, ***no expert report was ever served regarding Dr. Janosky***. It is well settled in our jurisprudence that in a professional malpractice lawsuit like this, a plaintiff cannot set forth a *prima facie* case at trial without the testimony of a qualified expert regarding both deviations from the standard of care and proximate causation. Newmark-Shortino v. Buna, 427 N.J. Super. 285, 304 (App. Div. 2012); Gardner v. Pawliw, 150 N.J. 359, 375 (1997). Because no expert reports were ever served regarding Dr. Janosky, plaintiff was unable to set forth a *prima facie* case against him. Plaintiff's claims were therefore appropriately dismissed.

B. Plaintiff's Request to Extend Discovery Was Appropriately Denied.

The Law Division's denial of plaintiff's cross-motion to extend discovery was an appropriate exercise of its discretion. It is undisputed that plaintiff did not seek to extend discovery in this lawsuit until the discovery end date had passed, and a trial date had been fixed. Rule 4:24-1(c) states explicitly that "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." As this Court has explained,

> In order to extend discovery based upon "exceptional circumstances," the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

[Rivers v. LSC P'ship, 378 N.J. Super. 68, 78–79 (App. Div. 2005) (citing Vitti v. Brown, 359 N.J. Super. 40, 51 (Law. Div. 2003)).

Although the additional discovery that plaintiff sought to complete, *i.e.*, service of an expert report, was obviously essential her case, the other three inquiries were clearly not satisfied here. Plaintiff's cross-motion to extend offered no facts or evidence demonstrating counsel's diligence in pursuing discovery, or what steps had been taken to obtain an expert report regarding Dr. Janosky within the discovery period. (9a-11a.) "Any attorney requesting additional time for discovery should establish that he or she did make effective use of the time permitted under the rules. A failure to pursue discovery promptly, within the time permitted, would normally be fatal to such a request." Rivers v. LSC P'ship, 378 N.J. Super. at 79 (citation omitted). Nor was there any explanation offered for why counsel did not request any extension of

discovery within the original discovery period, or before plaintiff was confronted with several motions to dismiss. (9a-11a.)

Ms. Sullivan's certification, listing her health issues, was appropriately disregarded by the Law Division because Ms. Sullivan had been represented by counsel at all times since her lawsuit commenced. A plaintiff's attorneys may be reasonably expected to bear the responsibility for retaining expert witnesses, monitoring discovery deadlines, and filing motions for relief as needed. None of the circumstances set forth in Ms. Sullivan's or her attorney's certifications explained why ***plaintiff's attorney*** had not obtained an expert report regarding Dr. Janosky, or why ***plaintiff's attorney*** had not made a timely motion to extend discovery before the discovery end date. Plaintiff's attorney now admits, at Pb18, that his failure to do so was an "oversight," due to unspecified "staffing shortages." But as our Supreme Court has warned, "[a] ***precise*** explanation that details the cause of delay and what actions were taken during the elapsed time is a necessary part of proving … exceptional circumstances as required by Rule 4:24–1(c) to extend discovery after a trial or arbitration date is set." Bender v. Adelson, 187 N.J. 411, 429 (2006) (emphasis added); see also, O'Donnell v. Ahmed, 363 N.J. Super. 44, 51 (Law. Div. 2003) (discussing examples of exceptional circumstances in the context of Rule 4:24-1(c)). An attorney's workload and problems with staff are ***not*** exceptional circumstances that will

justify an extension once the discovery end date has passed, and a trial date has been set. Zadigan v. Cole, 369 N.J. Super. 123, 132 n.8 (Law. Div. 2004).

As correctly stated by the court below, the explanation that plaintiff herself suffered some problems did not constitute exceptional circumstances. 1T at 11:05-22. Because plaintiff did not set forth exceptional circumstances, as our case law requires, denial of her cross-motion to extend discovery was a straightforward application of Rule 4:24–1(c). Therefore, the Law Division's denial of plaintiff's cross-motion to extend discovery was clearly within the court's discretion, and it should be affirmed.

C. Plaintiff's Arguments on Appeal are Unavailing.

Absent from plaintiff's current appeal is any explanation of her failure to serve a report from a qualified expert regarding Dr. Janosky. Plaintiff offers only the same excuses as to why her orthopedic surgery expert, Dr. Pupparo, did not provide a report within the discovery period. (Pb17-Pb18.) These excuses are unavailing, because no report from Dr. Pupparo would enable the plaintiff to set forth a *prima facie* case against Dr. Janosky. Under New Jersey law, Dr. Pupparo cannot testify regarding the standard of care applicable to Dr. Janosky, or any alleged deviations therefrom, because at the time of the underlying events, Dr. Pupparo did not practice in the same medical specialty as Dr. Janosky, and he did not have equivalent qualifications to Dr. Janosky. See,

N.J.S.A. 2A:53A-41; Nicholas v. Mynster, 213 N.J. 463, 481-82 (2013). Dr. Janosky practiced in the subspecialty of hematology; he was board certified in hematology; and his treatment and care of Ms. Sullivan fell within that subspecialty. (65Pa; 2a; 3a.) Dr. Pupparo, by contrast, practiced in the specialty of orthopedic surgery. (8Pa; 12Pa) Dr. Pupparo readily admitted in a March 9, 2021, Affidavit of Merit that "I cannot expertly critique non-Orthopedic services." (10Pa.) Plaintiff's excuses for not serving Dr. Pupparo's report are therefore moot with regard to her claims against Dr. Janosky, and she offers no explanation for her failure to serve a report from an expert hematologist. Because plaintiff has never provided ***any*** basis to permit more time to serve a report regarding Dr. Janosky, let alone "exceptional circumstances," the Law Division's denial of plaintiff's motion to extend discovery was clearly appropriate, and it should be affirmed.

Plaintiff's reliance upon this Court's decision in Tucci v. Tropicana Casino & Resort, Inc., 364 N.J. Super. 48 (App. Div. 2003) is misplaced. The facts in Tucci are clearly distinguishable, because in that case, the plaintiff's expert report was served. The issue in Tucci was whether the trial court had abused its discretion by barring the report because it was ***late***. Tucci v. Tropicana Casino & Resort, Inc., 364 N.J. Super. at 51. In this case, by contrast, the plaintiff's expert reports were ***never*** served. Moreover, the expert whose

report the plaintiff intended to serve, Dr. Pupparo, is not even qualified to testify that hematologist Dr. Janosky was negligent. On appeal, plaintiff offers no evidence that she would have ever been able to prove her claims against Dr. Janosky. She provides neither evidence of circumstances that prevented her attorney from obtaining a report from an expert hematologist, nor evidence of what steps had been taken to do so.

The various additional decisions cited by plaintiff in "Point D" of her brief are equally unavailing because they arise from cases in which claims were dismissed as a sanction in circumstances where a party had failed to comply with some discovery obligation, or in circumstances where a party had failed to appear for trial. See, e.g., Woodward-Clyde Consultants v. Chem. & Pollution Scis., Inc., 105 N.J. 464 (1987) (defendant's counterclaim dismissed for failure to make discovery as directed by court's order); Irani v. K-Mart Corp., 281 N.J. Super. 383 (App. Div. 1995) (plaintiff's complaint dismissed as sanction for failure to appear at trial); Georgis v. Scarpa, 226 N.J. Super. 244 (App. Div. 1988) ("dismissal of defendant's answer" imposed as sanction for delay in answering interrogatories); Johnson v. Mountainside Hosp., Respiratory Disease Associates, 199 N.J. Super. 114, 118–20 (App. Div. 1985) (plaintiff's complaint dismissed for failure to comply with discovery order and for counsel's failure to appear at trial).

But the issue in this case is not a whether this plaintiff was improperly sanctioned for a discovery violation. The issue is whether, after discovery ended, and a trial date was fixed, plaintiff was able to set forth a *prima facie* case against Dr. Janosky. She clearly could not. And that fact has never changed. Plaintiff never produced an expert report regarding Dr. Janosky, either timely or late. And plaintiff never provided an explanation, even on appeal, for her failure to do so. Given the record before the court below, and now on appeal, both the dismissal of plaintiff's claims against Dr. Janosky, and the denial of plaintiff's request to extend discovery, remain appropriate. The Law Division's decisions should accordingly be affirmed.

D. Plaintiff's Substantial Compliance Argument is Unavailing.

Plaintiff's argument regarding "substantial compliance" (Pb24-Pb28) is also misplaced. Plaintiff's claims against Dr. Janosky were not dismissed because she had failed to comply, strictly or otherwise, with a statutory requirement, such as the Affidavit of Merit Statute. (125a-126a; 1T at 10:21-11:04.) Her claims were dismissed because, after the end of the discovery period, and with a trial date fixed, the plaintiff was not able to set forth a *prima facie* case against Dr. Janosky. Even assuming, *arguendo*, that the 5-part test discussed in Cornblatt v. Barow, 153 N.J. 218 (1998), was ever applicable, the record still demonstrates that plaintiff cannot satisfy all of its elements, and thus

does not deserve equitable relief. Plaintiff has not set forth the steps that were taken to comply with the requirement to serve an expert report as to Dr. Janosky; all that plaintiff offered was a vague intention to serve a report from an expert orthopedic surgeon, Dr. Pupparo, who is not qualified to offer an opinion regarding Dr. Janosky. Plaintiff has not established "general compliance" with the requirement to serve expert reports; it is undisputed that no expert reports were served. Plaintiff has also not offered a reasonable explanation why she did not serve expert reports. Instead, plaintiff has offered her attorney's admission to an "oversight" (Pb18, Pb31), his vague reference to "staffing shortages" (Pb18), and irrelevant information regarding Ms. Sullivan's medical conditions. The latter have no logical bearing on her attorneys' ability to obtain an expert report against Dr. Janosky, or their ability to have filed a timely motion for an extension. Plaintiff and her attorneys were afforded a reasonable amount of time in which to have the case reviewed by an appropriate expert. They simply failed to do so, with the result that plaintiff was, and remains, unable to prove her claims against Dr. Janosky. Equitable relief is not warranted, and the decisions of the Law Division should be affirmed.

POINT III

THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE ORDERS FILED JANUARY 20, 2023 (Argued below. Ruling below at 144Pa.)

The Law Division's denial of plaintiff's motion for reconsideration was an appropriate exercise of discretion. It is well settled that a party seeking reconsideration must "demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process."

> A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court … Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process … Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.

[D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) (emphasis added) (citations omitted).]

We respectfully maintain that the Law Division ***did not*** "fail to appreciate" probative or competent evidence, or act in an arbitrary or capricious manner. Plaintiff's claim that the Law Division failed to consider Ms. Sullivan's "extreme medical circumstances" (Pb29) is disproven by the record below. Judge Wilson considered these circumstances and determined that they were not "exceptional" circumstances. (1T at 11:15-22.) Judge Thurber noted this in her own detailed decision. (155Pa-156Pa.) Judge Thurber further agreed that Ms. Sullivan's medical problems had no effect on her experts' ability to provide timely expert reports, or her attorney's ability to file a timely motion to extend discovery. (155Pa.) Both Judge Wilson and Judge Thurber thus acknowledged and considered the argument that plaintiff offered, and rejected it, as was within their discretion to do. Plaintiff's request for reconsideration offered no more than a repetition of her prior arguments. Both judges in the Law Division applied the appropriate legal standard for the underlying request to extend discovery, and Judge Thurber applied the appropriate standard to the motion for reconsideration. Because their decisions were not arbitrary, capricious, or unreasonable, they should be affirmed.

POINT IV

THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO VACATE THE ORDER FILED MARCH 17, 2023 (Argued below. Ruling below at 162Pa.)

As correctly noted by Judge Thurber, plaintiff's motion to vacate her order denying reconsideration was effectively a second motion for reconsideration. (163Pa.) Plaintiff offered no new facts, no new circumstances, and no new arguments; only a repetition of her contentions that the "exceptional circumstances" standard had been met, and that plaintiff would be unfairly prejudiced by the dismissal of her claims. (See, e.g., 19a-20a; 165Pa-167Pa.)

On appeal, plaintiff only claims that she was "entitled to seek relief under subsection (f)" of Rule 4:50-1. Plaintiff fails to provide any reasons for such relief to have been granted. (Pb30-31.) As our Supreme Court has explained, "[b]ecause of the importance that we attach to the finality of judgments, relief under Rule 4:50–1(f) is available only when 'truly exceptional circumstances are present.'" Hous. Auth. of Town of Morristown v. Little, 135 N.J. at 286 (citing and quoting Baumann v. Marinaro, 95 N.J. 380, 395 (1984)). This standard was appropriately cited and applied by Judge Thurber. (166Pa-167Pa.)

Plaintiff offers nothing further on appeal, only a vague reference to prior arguments, and an irrelevant assertion that the plaintiffs' motion to vacate had not caused undue delay. (Pb30.) Absent any new argument by plaintiff as to

how her circumstances were "truly exceptional," the Law Division's denial of plaintiff's motion was an appropriate exercise of its discretion. See, US Bank Nat. Ass'n v. Guillaume, supra, 209 N.J. at 467–68. Absent any substantive argument by plaintiff in her appeal, the Law Division's decision should be affirmed.

CONCLUSION

It is therefore respectfully requested that, for all of the foregoing reasons, the Law Division's decisions below regarding dismissal of plaintiff's claims against Dr. Janosky; denial of plaintiff's request to reopen and extend discovery; denial of plaintiff's motion for reconsideration; and denial of plaintiff's request to vacate the Law Division's prior order(s), should all be affirmed.

Respectfully submitted,

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Appellate Division

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DOCKET No: A-3131-22

CHRISTINE SULLIVAN, Plaintiff-Appellant, v. DR. ASIT SHAH, M.D., PhD; ENGLEWOOD HEALTH; HACKENSACK MERIDIAN PARTNERS, LLC; MARK GABELMAN, M.D.; MAXWELL JANOSKY, M.D.; APURVA MOTIVALA, M.D.; JOSEPH S. FLEISCHER, M.D.; JOHN DOES 1-10 (fictitious names) and JANE DOES 1-10 (fictitious names), Defendants-Respondents	On appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY Docket No. BER-L-1944-21 Sat Below: Hon. Mary F. Thurber, J.S.C. Hon. Robert C. Wilson, J.S.C.

BRIEF OF RESPONDENT, DR. ASIT SHAH, M.D., PH.D.

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A. Preliminary Statement

Dismissal of Plaintiff's complaint for failure to provide an expert's report was completely warranted and was in no way erroneous. It is uncontested that Plaintiff did not obtain and present an expert report critical of Dr. Shah during the discovery period.

It should also be understood that this was not a one-time failure by Plaintiff, as his complaint had already been dismissed for failure to provide discovery.

Further, Plaintiff also did not timely request an extension of discovery, instead waiting until after a trial date had been issued and a motion for summary judgment was filed to do so. It was only then that Plaintiff cross-moved to reopen discovery. However, the trial judge properly determined that Plaintiff did not demonstrate the proper standard to reopen discovery.

Finally, the attempts to have the case reconsidered were all properly denied. For all the reasons that follow, this Court is asked to affirm the grant of summary judgment.

B. Procedural History

On March 23, 2021, Plaintiff filed his complaint against, *inter alia*, Defendant Dr. Asit Shah. (Pa1-7) An Amended Complaint was filed on August 18, 2021. (Pa15-20) Dr. Shah answered on August 24, 2021. (Pa21-28) On

February 28, 2022, Dr. Shah filed his motion to dismiss the complaint for failure to make discovery, specifically answers to interrogatories, which was granted without prejudice by the Court on April 1, 2022. (Pa54-56; 77a) A motion to dismiss complaint with prejudice was filed on July 19, 2022. (See, Motion, filed July 19, 2022) On August 24, 2022, having received the discovery responses, Dr. Shah withdrew the motion. (See, Withdrawal of Motion, filed on August 24, 2022)

On December 14, 2022, after the discovery period ended, Dr. Shah filed his motion to dismiss the complaint for failure to provide an expert report. (Pa101-104) In response, Plaintiff filed a cross motion to extend discovery on January 11, 2023. (Pa113-116)

On January 20, 2023, Judge Robert C. Wilson entered his orders dismissing the complaint and denying the cross-motion to reopen and extend discovery. (Pa121-122) On February 9, 2023, Plaintiff filed a motion to reconsider, which was denied on March 17, 2023 by Judge Mary F. Thurber. (Pa131-134; 144-157)

On April 13, 2023, Plaintiff filed a motion to vacate, which was essentially a second reconsideration motion. (Pa158-161) That motion was denied on May 12, 2023. (Pa162-167) This appeal followed.

C. Statement of the Facts

The genesis of this case was the plaintiff's March 29, 2019 knee replacement surgery. (See, Pa1-7; 15-20) Plaintiff has alleged experiencing negative effects from that surgery. (Id.) She has also asserted that those negative outcomes were the result of alleged medical malpractice by, *inter alia*, Dr. Shah. (Id.)

Plaintiff filed a complaint on March 23, 2021 and an amended complaint on August 18, 2021. (Id.) During discovery, Dr. Sha moved twice to strike plaintiff's complaint for failure to provide discovery. (Pa54-56; Motion filed July 19, 2022) The first motion resulted in an order striking the complaint without prejudice and a motion to strike the complaint with prejudice was pending when Plaintiff finally answered interrogatories. (Pa77; Withdrawal of Motion filed on August 24, 2022)

The case proceeded through discovery yet plaintiff never produce an expert report critical of Dr. Shah. As a result, after the discovery end date, Dr. Shah filed his motion requesting summary judgment in light of the fact that the Plaintiff did not produce an expert report against him. (Pa101-104) Plaintiff cross moved to reopen discovery and for an extension of discovery—by this point a trial date had been set—but failed to establish any exceptional circumstances warranting the reopening of discovery. (Pa121-122)

Because there is no question that a lay jury would be unable to determine negligence in this medical malpractice action the absence of expert testimony, summary judgment was ordered. (Pa121-122)

After two post-judgment motions seeking to put aside the summary judgment were denied, this appeal followed. (Pa131-134; 144-167)

D. Legal Argument

ISSUE I: STANDARD OF REVIEW IN AN APPEAL OF AN ORDER GRANTING SUMMARY JUDGMENT

The review of an order granting summary judgment is plenary and a reviewing court applies the same standard as the motion judge. Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 135-36 (2017)

New Jersey Court Rule 4:46-2(c) provides that summary judgment:

> ...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

Summary Judgment is warranted when the evidence presents no genuine issue of fact or when it is so one sided that one party must prevail as a matter of law. Brill v. Guardian Life Insurance of America, 142 N.J. 520, 536 (1995). To avoid summary judgment, the opposing party must come forward with evidence that creates a genuine issue as to a challenged material fact. Brill, 142 N.J. at 529. A Court cannot deny a motion for summary judgment merely because the opposing party points to an insubstantial or controverted fact. Id.

In this case, it is uncontested that Plaintiff failed to obtain an expert opinion, which set out the applicable standard of care, demonstrate that Dr. Shah violated that standard of care, and established causal link between that alleged breach and Plaintiff's injuries. As a result, summary judgment was appropriate in light of Plaintiff's failure to establish a basis to reopen discovery.

ISSUE II: THE PLAINTIFF WAS REQUIRED TO PROVIDE EXPERT TESTIMONY IN ORDER TO ESTABLISH A CAUSE OF ACTION.

The Plaintiff's first argument against Dr. Shah is contained in Issue D, asserting that it was error to deny the cross motion to extend discovery. However, it is important to demonstrate that expert testimony was, in fact, required.

In order to demonstrate that Dr. Shah was negligent in his care of Plaintiff, Plaintiff must demonstrate: (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury alleged. L.A. v. New Jersey Div. of Youth & Family Servs., 217 N.J. 311, 323 (2014); Gardner v. Pawliw, 150 N.J. 359, 375 (1997). The mere fact that the injury occurred is insufficient to establish the cause of action. Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J. Super. 8, 20 (App. Div. 1963)("No presumption of negligence arose from the mere happening of the accident.")[1]

The discovery end date in this case ran on November 17, 2022. It is uncontested that, as of that date, Plaintiff had yet to produce an expert report establishing the standard of care applicable to Dr. Shah, that he breached that standard, and that the brief caused Plaintiff's injury. Consequently, Plaintiff did not establish a valid cause of action for medical malpractice. In general, expert testimony is required whenever a subject is so esoteric that the average juror, of common judgment and experience, cannot form a valid conclusion in the absence of expert guidance. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426,

[1] This discounts the possibility that Plaintiff could assert a medical malpractice case without an expert's opinion, under the "common-knowledge exception." See, Estate of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 469 (1999). This exception has not been advanced by Plaintiff.

450 (1993); Ford Motor Credit Co., LLC v. Mendola, 427 N.J. Super. 226, 236 (App. Div. 2012).[2] This is so because a jurors should not be allowed to speculate in an area where laypersons have insufficient knowledge or experience, which they would be doing if they were to act without expert testimony. Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999).

In this case, Plaintiff's complaint asserts that Dr. Shah committed malpractice in the treatment of Plaintiff, given her medical history, her then-current condition, and her medication regimen. However, the average lay juror could not be expected to know the proper post-operative treatment of Plaintiff, given her medical condition, and the fact that such medical knowledge is well beyond the common knowledge of lay people.

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[2] Of course, not every case involving medical care requires expert testimony, such as when the common knowledge exception applies and the jury is capable, "using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts." This exception "allow[s] the jury to supply the applicable standard of care and thus [] obviate[s] the necessity for expert testimony relative thereto." Sanzari v. Rosenfeld, 34 N.J. 128, 141 (1961).

Matters for which this doctrine applies includes, extracting the wrong tooth, Hubbard v. Reed, 168 N.J. 387, 396 (2001); misreading specimen identification numbers in a test result report for the results themselves, Palanque v. Lambert-Woolley, 168 N.J. 398, 400 (2001); or accidentally connected a gas line rather than a fluid line to the patient's uterus during a diagnostic hysteroscopy, Estate of Chin, 160 N.J. at 460.

Consequently, for all the foregoing reasons, as the plaintiff failed to provide the expert testimony which was required, summary judgment was appropriate and properly granted.

ISSUE III: THE DECISION NOT TO REOPEN DISCOVERY WAS NOT ERROR.

In Issue D, Plaintiff argues that it was error not to reopen discovery to permit Plaintiff an additional one-hundred twenty days to obtain the expert report which she should have obtained during discovery and to serve it. There was no error in Judge Thurber's decision to deny the cross motion to reopen discovery.

In Bender v. Adelson, 187 N.J. 411 (2006), the New Jersey Supreme Court held that allowing in a late report after a trial date has been set would require the re-opening of discovery, thus triggering Rule 4:24-1 and the plaintiff's burden of showing exceptional circumstances. Id. at 427. Under that rule, "No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." R. 4:24-1(c). In this case, at the time Plaintiff filed her cross motion to extend discovery, a trial date had been issued. (*Cf.* November 21, 2022 notice of trial date, and Plaintiff's January 1, 2023 notice of cross motion.)

Consequently, Plaintiff was required to demonstrate exceptional circumstances. This requires a party seeking to extend discovery to provide a

detailed explanation as to why the report could not be served timely, in order to establish exceptional circumstances. Bender, at 429. See, also, Rivers v. LSC Partnership, 378 N.J. Super. 68, 78 (App. Div. 2005) cert. denied 185 N.J. 296 (2005) (declining to find exceptional circumstances for a second extension where no effort had been made during the extended discovery period to obtain expert report.)

The intent of the drafters of the Rule is manifest in Recommendation 4.1, in which they advised the New Jersey Supreme Court that "[t]he rules should state the discovery period for each track, and make it clear that once the discovery period is over and an arbitration or trial date is set, no more discovery must occur, unless authorized by the court on a showing of 'exceptional circumstances.'" Montiel v. Ingersoll et al., 347 N.J. Super. 246, 254 (Law Div. 2001)(emphasis added.) See, also, Ponden v. Ponden, 374 N.J. Super. 1, 11 (App. Div. 2004).

The provision for a discovery cut-off is a fundamental part of the Rules and would only be meaningful, to counsel and the court, if the rules are enforced. Montiel, at 254. The prohibition against granting such an extension absent exceptional circumstances has been called by the Supreme Court a "mandate [which] could not be clearer..." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 396 (2005).

In this case, because a trial date was set at the time the plaintiff sought to reopen and extend discovery, she was required to establish "exceptional circumstances." "Exceptional circumstances" has been defined as legitimate problems beyond mere attorney negligence, inadvertence or the pressure of a busy schedule. *See*, O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003). *See, also*, Rivers, 378 N.J. Super. at 78 (recognizing that the circumstances must be "unusual or remarkable.")

In Rivers, the Court held that a party seeking to extend discovery based upon "exceptional circumstances," had to satisfy four inquiries:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [Rivers, at 79.]

In this case, Plaintiff can satisfy none of these inquiries except for number 2. First, her attempt to demonstrate why the expert report had not been completed on time nor counsel diligence in pursuing it. Rather, Plaintiff merely asserts that her case is a complex one and that she has experience on-going medical issues and symptoms. However, Plaintiff did not attempt to

demonstrate why this might have prevented her expert from authoring a report, especially given that it is hardly an "exceptional circumstance" for a medical malpractice plaintiff to have complex medical issues with the need for on-going treatment. Yet most every expert physician is able to nevertheless produce an expert report in the time permitted by the rules of discovery.

Further, even though it was an inappropriate attempt to add to the record, Plaintiff's presentation of the certification by Dr. Pupparo on reconsideration did no better in demonstrating why the report could not have been produced. The certification merely regurgitated the Plaintiff's medical history and allegations and stated, in summary fashion that "additional time" was needed to obtain and review unspecified records, and promising that a report could be written within ninety days of an extension, without any explanation why the records could not have been obtained and reviewed, and a report written in the time prior to the expiration of the discovery period. (Pa135-139)

The second inquiry can be met, as the expert's opinion is essential.

The third inquiry cannot be met, as Judge Thurber noted, in denying the second reconsideration motion, Plaintiff's counsel made no attempt to explain why he did not chose to seek the extension prior to the expiration of discovery.

> The only justification for not producing the report(s) was plaintiff's ongoing medical problems. As Judge Wilson noted, those did not satisfy the exceptional

> circumstances standard. As defendants note, this factor had no effect on the ability of plaintiff's expert(s) to provide the critical causation reports within the time frame. And plaintiff does not even address the failure to request the extension before the discovery end date except to say it was due to circumstances beyond the control of plaintiff and plaintiff's counsel, referring to plaintiff's medical conditions. Obviously that had no effect on counsel's ability to file a timely motion.
>
> [(Pa155)]

In the second motion for reconsideration, Plaintiff advanced the idea that "staffing shortages" were the basis for failing to seek the extension sooner. When addressing the chance to file for an extension of discovery during the discovery period, Judge Thurber recognized that, "Counsel's failure to [timely file] due to 'staffing shortages' is not an exceptional circumstance." (Pa163)

Finally, despite Plaintiff's protestations to the contrary, the circumstances presented were not clearly beyond the control of Plaintiff and her counsel. Nothing in the explanations offered by Plaintiff, her counsel or Dr. Pupparo presented anything other than the rather standard challenges that medical malpractice litigants face and overcome every day. The fact that they could not comply with the rules of discovery during the time permitted (or even seek an extension prior to its expiration) does not demonstrate exceptional circumstances, and does not demonstrate any error by Judge Wilson.

The order dismissing this case should be affirmed.

ISSUE IV: PLAINTIFF DID NOT DEMONSTRATE SUBSTANTIAL COMPLIANCE

Next, Plaintiff argues that the failure to produce an expert report should be excused under the doctrine of substantial compliance.

Substantial compliance is an equitable doctrine designed to apply when a party meets the spirit of the law in question, but falls short of full compliance due to a technical misstep. Sroczynski v. Milek, 197 N.J. 36, 44 (2008). The doctrine's limitations—to correct for technical failures to strictly comply with the law in those occasions when it was complied with in spirit—is well established in the law. Cnty. of Hudson v. State, Dep't of Corr., 208 N.J. 1, 21–22 (2011) (doctrine is designed to address "technically inadequate actions that nonetheless meet a statute's underlying purpose."); Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 354 (2001) (court's task is determining if "technical non-conformity is excusable."); Henderson v. Herman, 373 N.J. Super. 625, 637 (App. Div. 2004) (doctrine addresses "technical" defects.) See, also, Lameiro v. W. N.Y. Bd. of Educ., 136 N.J. Super. 585, 588 (Law Div. 1975) (stating, in the context of the Tort Claims Act Notice requirement, "...substantial compliance means that the notice has been given in a way, which though technically defective, substantially satisfies the purposes for which notices of

claims are required." cited with approval in Lebron v. Sanchez, 407 N.J. Super. 204, 216 (App. Div. 2009).)

The substantial compliance doctrine does not apply in this case, on its face. Plaintiffs did not commit a mere technical defect, while complying with the underlying purpose of the discovery rules concerning expert opinions. Rather, Plaintiff is citing the doctrine in an attempt to excuse a complete and wholesale failure to fulfill her discovery her obligations in a timely fashion. The substantial compliance simply does not apply in that circumstance.

The substantial compliance doctrine has five requirements, ***all*** of which must be met in order for substantial compliance to be found. The 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 rules regarding expert discovery;
>
> (3) A general compliance with the purpose of the rules regarding expert discovery;
>
> (4) A reasonable notice of the plaintiff's claim; and
>
> (5) A reasonable explanation why there was not a strict compliance with the rules regarding expert discovery.
>
> [Negron v. Llarena, 156 N.J. 296, 305 (1998).]

The failure of a party seeking to apply the substantial compliance doctrine to meet any one requirement precludes the application of the doctrine. Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 239 (1998). Defendants believe that Plaintiffs met none of the requirements.

This Court should affirm the dismissal of the Plaintiff's complaint because, as the following sections will demonstrate, Plaintiffs were unable to demonstrate ***any*** of the five elements of the substantial compliance doctrine. At the very least, Plaintiff did not demonstrate them all.

A) The First Element: A Lack Of Prejudice To Defendant

First, Plaintiff must demonstrate a lack of prejudice to the Defendant. In this case, Plaintiff asserted that no such prejudice exists, but did not seek to prove it with citation to any facts of record. Furthermore, it cannot be denied that, at the very least, the potential for exceptional prejudice exists by extending discovery in this manner.

Plaintiff has already suggested that her expert will need one-hundred twenty days to produce a report, and Defendants' expert will, likely, require significant time to reply to it, and for expert deposition to take place. Each step risks prejudice to Defendants in claims going stale and memories fading.

B) The Second Element: A Series Of Steps To Comply With The Rules

The second element requires Plaintiffs to have taken a series of steps to comply with the requirement of producing an expert report during the discovery period. The "series of steps" requirement required Plaintiffs to produce the report in a timely manner. See, e.g., Corcoran v. St. Peter's Med. Ctr., 339 N.J. Super. 337, 339 (App. Div. 2001) (defendant substantially complied with court rule service requirement by mistakenly serving demand for a trial de novo upon plaintiff's original counsel instead of substituted counsel); Stegmeier v. St. Elizabeth Hosp., 239 N.J. Super. 475, 483 (App. Div. 1990) (holding that when motion papers are placed with a reputable independent messenger service for delivery within the time limitation of the rule, that limitation is satisfied when there has been timely filing, despite a short delay in effecting service.)

In this case, Plaintiffs took no steps during the discovery period to produce the expert report, other than to send some records to his expert for review. Indeed, the report, itself, has not even been drafted, and the most Plaintiff could offer is that it would be produced if a further four month extension were granted.

Because Plaintiffs failed to take the series of steps to comply with the discovery rules, the second requirement is not met. H.C. Equities, LP v. Cnty.

of Union, 247 N.J. 366, 388 (2021) (series-of-steps requirement not met when plaintiff "made no effort to file tort claims notices with the public entities as N.J.S.A. 59:8-7 requires"); Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144, 152–53 (2003) (requirement not met when plaintiff failed to take any steps to forward Affidavit of Merit to opposing counsel within statutory time frame.)

C) The Third Element: A General Compliance With The Purpose Of The Discovery Rules

Third, there was no general compliance with the purpose of the rules concerning the production of expert discovery, the purposes for which include, "the fair and efficient administration of justice" and the "efficiency and expedition of the litigation process." A.T. v. Cohen, 231 N.J. 337, 351 (2017).

The Courts have recognized that the rules are a vehicle which empower individual trial judges to step in, where appropriate, and manage cases so that a case can proceed efficiently and fairly. See, Leitner v. Toms River Reg'l Schs., 392 N.J. Super. 80, 91 (App. Div. 2007). Further, this Court has recognized that "calendars must be controlled by the court, not unilaterally by [counsel], if civil cases are to be processed in an orderly and expeditious manner." Vargas v. Camilo, 354 N.J. Super. 422, 431 (App. Div. 2002).

In this case, none of those goals were met. The Plaintiff proceeded as if she was not going to produce an expert at all, and then, only after a motion to

dismiss the case had been brought, moved to reopen and extend discovery. None of the purposes of the discovery rules—setting out the time by which discovery must be done and the circumstances under which the discovery period may be reopened—have been advanced by the Plaintiff's acts in this case.

None of the acts of Plaintiff in this case advances the fair, efficient, and expeditious proceeding of the case. Rather, they have accomplished the opposite by delaying the progress of the suit beyond the discovery end date and attempting to replace the orderly rules with an *ad hoc* extension, the ultimate length of which is unknowable.

Thus, the third element cannot be met.

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

The fourth element requires Plaintiff to have given Defendant reasonable notice of Plaintiff's claim. While Defendants had notice of the claim in general, the purpose of the discovery rules concerning experts is to ensure that the entirety of the expert's opinion is disclosed, including the basis for the expert's beliefs regarding what the standard of care requires, how the Defendant supposedly violated it, and all of the other "whys and wherefores" necessary for an opinion to not be a net opinion. Townsend v. Pierre, 221 N.J. 36, 54 (2015).

However, because Plaintiff failed to provide an expert report, there was no reasonable notice of those necessary matters.

E) The Fifth Element: A Reasonable Explanation Why There Was Not Strict Compliance

Fifth, and finally, Plaintiff presented no reasonable explanation for their failure to strictly comply with the rules of discovery. Plaintiff's explanation for the failure to have the expert report during the discovery period points to nothing more than the fact that the Plaintiff had a difficult case and on-going symptoms allegedly referable to the incident in this case.

However, those reasons do not provide a reasonable explanation. The discovery period is more than long enough for the expert, working in concert with Plaintiff and Plaintiff's carrier, to produce a timely expert report. Indeed, the Plaintiff suggests that if a one-hundred twenty day extension were given, that the report could be produced, without explaining why it could be produced no, but could not have been produced, say, in the two hundred days before the discovery end date.

Moreover, Plaintiff's counsel failed to provide any explanation other than staffing issues for why he did not move to extend discovery earlier. "[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.); Medina v. Pitta, 442 N.J. Super. 1, 21–22 (App. Div. 2015) ("carelessness, lack of circumspection, or lack of diligence on the part of counsel are not extraordinary circumstances which will excuse missing a filing deadline.")

Thus, Plaintiff has not provided any explanation for failing to provide the report during the discovery period, nor for why the request to extend discovery was not made during discovery and before the trial date was issued.

As such, the fifth element cannot be met and Defendant asks this Court to find that the doctrine of substantial compliance does not apply in this case.

ISSUE V: NO ERROR IN DENYING RECONSIDERATION OR MOTION TO VACATE

Finally, there was no error in the child judge denying either Plaintiff's motion for reconsideration or Plaintiff's second motion for reconsideration which she titled a motion to vacate. Because both of these motions addressed interlocutory orders, Plaintiff had to demonstrate that reconsideration was in the "interest of justice" in order for reconsideration to be proper. Lawson v. Dewar, 468 N.J. Super. 128, 134–35 (App. Div. 2021); Rule 4:42-2.[3]

[3] This argument presumes that this Court's order dated August 21, 2023, denying Defendant's motion to dismiss this appeal as interlocutory, concluded that

However, nothing in Plaintiff's brief indicated a basis for the interests of justice to find error in the resolution of the motions for reconsideration or to vacate. Plaintiff's arguments simply assert that the trial judge did not give sufficient weight to her excuses as to why she did not produce an expert report in a timely manner. However, plaintiff does not support this argument with citation to any fact of record and, Judge Thurber's decision clearly indicates why the two reconsideration motions were denied. (Pa142-157; Pa162-167)

Moreover, while the Plaintiff argues in this appeal that Judge Thurber did not properly consider Plaintiff's medical condition, she directly addressed Plaintiff's condition when discussing Judge Wilson determinations. (Pa156) Further, Plaintiff specifically put them before the Court in her unsigned certification. (Pa140-143) There is no question that Judge Thurber considered them, and found them to be insufficient to meet the "interest of justice" standard.

As such, this argument is without merit.

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the motions being reconsidered were interlocutory, otherwise the appeal would be untimely.

ISSUE VI: DISMISSAL IS NOT UNFAIR PREJUDICIAL.

Finally, Plaintiff asserts that dismissal was unfairly prejudicial, asserting that she "diligently pursued discovery," that there was only a "slight oversight" in failing to timely move to extend discovery, and that all that occurred here were "slight procedural errors." (Pb31-32) However, in reality, Plaintiff committed an abject failure to provide discovery or to otherwise move to extend discovery.

As Judge Thurber noted when denying the motion to vacate, any prejudice which Plaintiff suffers is not unfair prejudice:

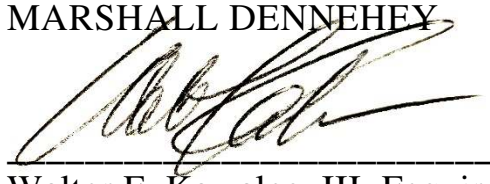
> While it is true that dismissal of plaintiff's case is detrimental, it is not unfairly prejudicial for all the reasons previously stated both by Judge Wilson and by Judge Thurber. Plaintiff is arguing for an indulgence to her benefit and the detriment of defendants. The court rules are designed to promote the interests of justice for all the parties, not only plaintiff. In this case, the prior rulings reflect that.
>
> [Pa167]

This Court should agree and affirm the decisions in this case.

E. Conclusion

For all of the foregoing reasons, defendant Dr. Asit Shah, respectfully request that this Court affirm the judgment in the defendants' favor.

Respectfully Submitted,
MARSHALL DENNEHEY



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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003131-22

CHRISTINE SULLIVAN,

Plaintiff-Appellant,

v.

DR. ASIT SHAH, M.D., PhD; ENGLEWOOD HEALTH; HACKENSACK MERIDIAN PARTNERS, LLC; MARK GABELMAN, M.D.; MAXWELL JANOSKY, M.D.; APURVA MOTIVALA, M.D.; JOSEPH S. FLEISCHER, M.D.; JOHN DOES 1-10 (fictitious names) and JANE DOES 1-10 (fictitious names),

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
BERGEN COUNTY
BER-L-001944-21

Honorable Mary F. Thurber, J.S.C.
Sat below

PLAINTIFF-APPELLANT'S REPLY BRIEF IN SUPPORT OF REVERSAL OF THE VARIOUS TRIAL COURT ORDERS DISMISSING THE APPELLANT'S COMPLAINT WITH PREJUDICE

Date Submitted: January 22, 2024

On the Brief:
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LEGAL ARGUMENT

A. JOSEPH FLEISCHER, M.D. AND ENGLEWOOD HEALTH

a. Dr. Fleischer Misinterprets N.J.S.A. 2A:53A-41(a).

Dr. Fleischer misinterprets the plain language of N.J.S.A. 2A:53A-41(a) by arguing that Dr. Braunstein must have spent the majority of his professional time to the active practice of that specialty or subspecialty during the year immediately preceding the date of occurrence. Respondent Fleischer Brief at 4, n.4. Appellant has already walked through the plain language of the statute in her initial brief. Dr. Fleischer is attempting to implicate subsection (a)(2) of the statute, even though it is not required to satisfy the statute. This is shown by the fact that subsections (a)(1) and (a)(2) are separated by an "**or**," rather than an "and." Dr. Braunstein qualifies as a person in the same specialty of internal medicine as Dr. Fleischer. Furthermore, Dr. Braunstein satisfies subsection (a)(1) of the statute. The bases of the Complaint are negligence in the administration of Appellant's medications and failure to diagnose Appellant's conditions. These medications and conditions had to do with Appellant's blood. This is confirmed by the allegations stated in the Complaint, that when Appellant showed complications, the hospital's Hematology/Oncology department responded. Pa3 ¶14. Dr. Braunstein's credentials satisfy subsection (a)(1) of the statute because he is credentialed with treating patients and performing the same procedures that are the bases of the Complaint.

b. Dr. Fleischer Should Not Be Allowed to Escape Liability Simply Because of the Classification of "Hospitalist"; Dr. Braunstein is the Most Qualified Expert to Author an Affidavit of Merit Based on the Facts

Dr. Fleischer's reliance on the Carr decision is unpersuasive and not binding on this Court's consideration of the issues in this matter. 2015 N.J.Super.Unpub. LEXIS 1484 (App. Div. 2015). The crucial distinction in this case is that Dr. Fleischer is attempting to escape liability as classifying himself as a Hospitalist, which as discussed in Appellant's initial brief, is not a distinct specialty or subspecialty. Pa168-178, Vol. 001. As a hospitalist, Dr. Fleischer "provides primary care to patients while they are in the hospital." Kennedy v. Renda, 2012 N.J.Super.Unpub. LEXIS 1864 (App. Div. 2012). Classification as a Hospitalist is not contemplated by N.J.S.A. 2A:53A-41(a) because it is limited to classifications of specialties or subspecialties. Again, a Hospitalist is not a specialty or subspecialty. Appellant retained Dr. Braunstein to draft the AOM because the bases of the Complaint had to do with administration of medication and failure to diagnose conditions in her blood. Dr. Braunstein is Board Certified in Internal Medicine and specializes in Hematology/Oncology, which is the study of the blood.

As Appellant's Hospitalist, Dr. Fleischer was responsible for Appellant's care while she was in Englewood Health, including administration of her medications and diagnosis of her conditions in her blood. This is shown by the medical records bearing Dr. Fleischer's name and the discharge summary. Pa1-6, Vol. 002. There is

no better expert for Appellant to retain as a matter of law, as the statute does not contemplate any other area lower than a subspecialty. Given the allegations in the Complaint have to do with conditions of Appellant's blood, and Dr. Fleischer was responsible for administering medications and diagnosing her conditions, Dr. Braunstein satisfies the purpose of the statute. Therefore, Dr. Braunstein is qualified to render an AOM that implicates Dr. Fleischer.

c. Dr. Fleischer's Implication in Dr. Braunstein's AOM

While Dr. Braunstein's AOM does not mention Dr. Fleischer by name, it describes with sufficient particularity Appellant's administration of medications and conditions that go directly to the bases of the Complaint, of which Dr. Fleischer was directly involved with. Again, the discharge summary by Dr. Fleischer made on May 17, 2019, shows that he was responsible for Appellant' medications and diagnosis of her conditions. The first page of the discharge summary includes a section titled "Discharge Diagnoses." The second page of same includes a section titled "Hospital Course," which makes specific note of Appellant's administration of Lovenox and Xarelto, which go directly to the bases of the Complaint. These sections unequivocally show that Dr. Fleischer was in fact responsible for Appellant's medications and diagnosis of her conditions. Therefore, Dr. Braunstein's AOM describes the negligent acts with such specificity to implicate Dr. Fleischer in the AOM.

B. MAXWELL JANOSKY, M.D. AND DR. ASIT SHAH, M.D., PH.D.

a. Appellant Has Informed the Court on the Exceptional Circumstances that Exist for Failure to Seek Relief Prior to the Discovery Deadline

Respondents argue that Appellant has not properly pled all of the elements required to show exceptional circumstances to extend discovery. This argument willfully ignores Appellant's pleadings. Appellant, in her initial Appellate Brief, walked through each of these elements. To briefly recap the arguments, first, Appellant's initial expert, Dr. Pupparo, was retained to provide the expert report and testimony in this matter. Dr. Pupparo certified that, due to Appellant's ongoing medical treatment, he could not provide an accurate expert report until such treatment was completed. Appellant's counsel kept in constant communication with Dr. Pupparo during this time regarding when the report could be drafted. Second, it is undisputed that the expert report is essential to Appellant's case. Third, Appellant's counsel admitted that it was an oversight due to uncontrollable circumstances that it did not seek an extension prior to the discovery deadline. This was due to calendar issues and staffing shortages. Counsel acknowledges that these are not preferable reasons for failure to seek relief, but they are the truth. Lastly, these circumstances were beyond the control of Appellant's counsel. Counsel could not force Dr. Pupparo to draft the expert report any faster due to Appellant's ongoing treatment. The same applies for Dr. Braunstein. Counsel simply took the advice of

the medical experts to wait on an expert report, and beyond the control of the Appellant. Therefore, Appellant sufficiently pled all of the elements required to show exceptional circumstances to extend discovery. Furthermore, as discussed in Appellant's initial Brief, the ultimate sanction of a dismissal with prejudice was not in line with the circumstances regarding failure to seek relief prior to the discovery deadline.

b. Service of an Expert Report is a Discovery Obligation That Falls Within the Discovery Rules

Dr. Janosky, after citing a portion of Appellant's case law, all of which supporting her arguments, attempts to argue that service of the expert report is not a discovery issue. This argument is untenable, as the issue in this appeal is whether Appellant should have been granted an extension of discovery to serve her expert report. This is confirmed by Respondents' arguments that Appellant has not shown exceptional circumstances to extend discovery. Furthermore, Dr. Shah admits that failure to produce the expert report is a discovery obligation: "…Plaintiff is citing the doctrine in an attempt to excuse a complete and wholesale failure **to fulfill her discovery her** [*sic*] **obligations** in a timely fashion." Dr. Shah Brief at 14. Appellant filed Cross-Motions to Extend Discovery in the trial court in response to Dr. Janosky's and Dr. Shah's Motion Dismissing Complaint. Granting of Appellant's Cross-Motion would have allowed her sufficient time to serve an expert report. Appellant did not intend to rely on the lack of an expert report. Dr. Janosky is

attempting to confuse the issues in an attempt to divert the Court's attention from the fact that New Jersey courts heavily disfavor dismissals with prejudice for failure to comply with discovery. See Consultants v. Chemical & Pollution SCIS., Inc., 105 N.J. 464, 471 (1987) ("a dismissal with prejudice is a severe sanction that should be imposed sparingly and 'only when no lesser sanction will erase the prejudice suffered by the non-delinquent party.'" (citation omitted)). Therefore, the Orders dismissing Appellant's Complaint against Dr. Janosky and Dr. Shah with prejudice should be reversed.

Respectfully submitted,
/s/ *Chip Dunne*

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