Plaintiffs CELIA C. FERNANDEZ AND LUIS R. FERNANDEZ, HER HUSBAND vs. Defendants ALEXIS PARCELLS, M.D., KARYNA NEYRA, M.D., NOHA GHUSSON, M.D., MARJUT KOKKOLA-KORPELA, M.D., SPIRO PLASTIC SURGERY, LLC, INFECTIOUS DISEASE CENTER OF NEW JERSEY, LLC, ST. BARNABAS MEDICAL CENTER, RWJ BARNABAS HEALTH, INC., JOHN AND/OR JANE DOES, M.D., "A" THROUGH "Z" (FICTITIOUS NAMES AND PRESENTLY UNKNOWN), JOHN AND/OR JANE ROES, "A" THROUGH "Z" (FICTITIOUS NAMES AND PRESENTLY UNKNOWN), AND ABC CORPORATIONS "A" THROUGH "Z" (FICTITIOUS NAMES USED TO DESCRIBE UNKNOWN DEFENDANTS) INDIVIDUALLY, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2949-24 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY Docket No. ESX-L-6145-21 SAT BELOW: Hon. Robert H. Gardner, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS CELIA C. FERNANDEZ AND LUIS R. FERNANDEZ, HER HUSBAND

JAVERBAUM WURGAFT HICKS KAHN
WIKSTROM & SININS
505 Morris Avenue, Suite 200
Springfield, NJ 07081
Telephone: (973) 379-4200
Attorney for Plaintiffs/Appellants

Eric G. Kahn, Esq. (021031993)
ekahn@lawjw.com
Of Counsel

Annabelle M. Steinhacker, Esq. (021332007)
asteinhacker@lawjw.com
On The Brief

TABLE OF CONTENTS

TABLE OF ORDERS

TABLE OF CITATIONS

Cases:

Rules:

PRELIMINARY STATEMENT

On July 22, 2019, Plaintiff, Celia Fernandez, underwent reconstructive breast surgery at Lenox Hill Hospital in New York City. Thereafter, Plaintiff developed chest and abdomen wounds for which she was admitted to St. Barnabas Medical Center and came under the care of four (4) infectious disease doctors and Defendant, Dr. Parcells. Dr. Parcells performed three (3) irritation and debridement procedures, but at no time did she take a skin biopsy or request a consultation from a dermatologist. Ultimately, after consulting with a different medical facility, on September 20, 2019, Plaintiff was diagnosed with pathology consistent with Pyoderma Gangrenosum. The underlying medical malpractice action was filed thereafter.

During the course of discovery, delays in obtaining Plaintiffs' expert report occurred because Defendants were unavailable for depositions. As a result, Plaintiff was unable to serve her expert report by its February 15, 2025, Court-ordered deadline. The report was produced on March 27, 2025, five (5) weeks late, but more than two (2) months **before** discovery was scheduled to end on May 30, 2025. No arbitration or trial dates had been set. At issue in this Appeal is whether the Trial Court erred in *sua sponte* dismissing Plaintiff's Complaint with prejudice for her late submission of the expert report.

Prior to Plaintiff's production of her report, Defendants filed a Motion for Summary Judgment alleging that Plaintiff could not prove her case. Plaintiff attached the expert report to her Opposition. Plaintiff's expert report indicated that Dr. Parcells had deviated from accepted standards of care by failing to take skin biopsies and by failing to request a dermatology consultation.

Notably absent from Defendants' motion was a request to dismiss Plaintiff's case for failure to provide discovery. Additionally, there was no claim that Defendants were prejudiced by the 5-week delay. Without making any findings as to whether genuine issues of material fact existed, the Trial Court dismissed Plaintiffs' Complaint with prejudice on March 28, 2025 as to all Defendants.

The Trial Court erred by dismissing a case where genuine issues of material fact exist. Plaintiff's expert report clearly indicated contested issues of fact. The Trial Court failed to address the issues of material fact in argument or in its written opinion, instead *sua sponte* penalizing the Plaintiff for delays in discovery that initially emanated, not from the Plaintiff, but from Defendants.

Given the Trial Court's failure to address the Brill standard, Plaintiff moved for Reconsideration asserting that the Court failed to consider probative evidence, and that it issued its decision on a palpably incorrect basis. Plaintiff also argued that the Trial Court violated three long-held legal tenets that guide our judiciary. First, where discovery violations occur, courts should avoid imposing the ultimate

sanction of dismissal with prejudice so long as there are lesser sanctions available. Second, courts frown on visiting the sins of an attorney upon a blameless client. Finally, our system seeks to determine claims based upon merit rather than dispose of cases based upon procedural deficiencies.

Despite Plaintiff and Defendant requesting oral argument on Plaintiff's dispositive Motion for Reconsideration, the Trial Court failed to hold oral argument. Failure to hold oral argument on a dispositive Motion where a request has been properly made constitutes reversible error.

For all of the foregoing reasons, Plaintiff respectfully requests that the Appellate Division reverse the Trial Court's Order dismissing Plaintiffs' case against Defendants Parcells and Spiro Plastic Surgery, LLC, reinstate Plaintiffs' Complaint and remand to the Trial Court for determination on its merits.

PROCEDURAL HISTORY

Plaintiff Celia Fernandez (hereinafter "Ms. Fernandez" or "Plaintiff") filed a Complaint on August 10, 2021, against several Defendants, including Defendants Dr. Alexis Parcells (hereinafter "Parcells" or "Defendant"), and her employer, Spiro Plastic Surgery, LLC. The Complaint also named Co-Defendant Karyna Neyra, M.D., Co-Defendant Marjut Kokkola-Korpela, M.D., Co-Defendant Noha Ghusson, M.D., Co-Defendant Infectious Disease Center of New Jersey, LLC, Co-Defendant St. Barnabas Medical Center, Co-Defendant RWJ Barnabas Health, Inc., and numerous fictitious unidentified persons and entities. The Complaint alleged that Defendants failed to provide proper care for and treatment of Plaintiff in that they failed to follow procedures and deviated from accepted standards of their respective professions and, among other things, failed to timely diagnose the Plaintiff's condition of pyoderma gangrenosum; failed to order the appropriate diagnostic testing; failed to send tissue for pathological diagnosis; failed to consider pyoderma gangrenosum as a cause for the Plaintiff's skin lesion; failed to provide the appropriate treatment; failed to properly evaluate the patient before discharging her home; failed to provide proper informed consent; and were otherwise negligent, careless, reckless, and unskillful in their care and treatment of Plaintiff. (**Pa1 to Pa20**).

Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC, filed their Answer on April 11, 2022. (**Pa21 to Pa37**).[1] Thereafter, discovery proceeded with delays as several Defendants failed to appear in a timely manner for deposition.

Defendant Parcells was originally scheduled for deposition on October 11, 2023. (**Pa38 to Pa39**). It was adjourned by Defendant. (**Pa40**). Defendant Parcells' deposition was noticed again for March 13, 2024. (**Pa41 to Pa42**). This deposition was also adjourned by Defendant. (**Pa43 to Pa44**). Dr. Parcells' deposition was rescheduled to May 8, 2024, but was adjourned as Plaintiff's counsel was set to be on trial. (**Pa45 to Pa47**). When the trial was moved, Plaintiff's counsel attempted to reschedule the deposition for May 8, 2024, but Defendant was no longer available. Defendant Parcells was noticed a fourth time for August 15, 2024, and the deposition was then completed. (**Pa48**).

While co-Defendants are not relevant to this appeal, their delays in being produced for discovery contributed to the discovery delays at the heart of this appeal. For example, co-Defendant Noha Ghusson, M.D., was originally noticed for deposition on October 17, 2023. (**Pa49 to Pa50**). Her deposition was adjourned by

---

[1] While all co-Defendants answered, none of them are relevant to this Appeal. In an effort to avoid burdening the Court with irrelevant documents, co-Defendants' Answers have not been included in the appendix. If this Court would prefer a complete recitation of the procedural history and accompanying documents, Plaintiff will gladly submit them on the Court's request.

her counsel. (**Pa51**). Thereafter, Dr. Ghusson was rescheduled for deposition on August 29, 2024. (**Pa52 to Pa53**). Dr. Ghusson failed to appear, and her deposition was re-noticed for November 19, 2024. (**Pa54 to Pa55**). Dr. Ghusson was not produced again. (**Pa56**). In point of fact, Dr. Ghusson was not produced until December 16, 2024. (**Pa57 to Pa58**).

Meanwhile, Plaintiff's deposition was timely completed in July of 2023.

In and around October 16, 2024, Co-Defendant Karyna Neyra, M.D., filed a Motion for Summary Judgment claiming that Plaintiff had failed to prove her case against Dr. Neyra because no expert report had yet been served. Over the course of the next month, all co-Defendants filed motions or cross-motions asserting the same argument.[2]

In response thereto, Plaintiff opposed the Motions and filed a cross-motion to Extend Discovery arguing that it was not possible

---

[2] While all co-Defendants filed Summary Judgment motions asserting that Plaintiff could not prove her case because her expert report had not been timely served, Plaintiff is not appealing this "round" of Summary Judgment Motions. Accordingly, in an effort to avoid burdening the Court with irrelevant documents, co-defendants' motions for Summary Judgment have not been included in the appendix. If this Court would prefer, Plaintiff will gladly submit them on the Court's request.

for an expert to make liability determinations when Defendants' depositions had not been completed.[3]

The Motions were heard by the Honorable Robert H. Gardner, J.S.C., who denied Defendants' Motions for Summary Judgment and issued a Case Management Order setting forth the following discovery schedule:

- Fact & Party Depositions: December 16, 2024
- Plaintiffs' Expert Reports: February 15, 2025
- Defendants' Expert Reports: April 15, 2025
- Expert Depositions: May 30, 2025
- Discovery End Date: May 30, 2025

(**Pa59 to Pa61**). As part of its issuing Order, the Trial Court stated, "For the reasons stated on the record on November 22, 2024; See other Orders this date; No further extensions shall be granted." (**Ibid.**).[4]

On February 18, 2025, co-Defendants Marjut Kokkola-Korpela, M.D., and

---

[3] As Plaintiff is not appealing the result of October 2024 Motions for Summary Judgment, in an effort to avoid burdening the Court with irrelevant documents, Plaintiff's Opposition and accompanying exhibits for Summary Judgment have not been included in the appendix. If this Court would prefer, Plaintiff will gladly submit them on the Court's request.
In accordance with R. 2:6-1(a)(2), the Plaintiff's brief in support of its Opposition to Defendants' Motion for Summary Judgment has been omitted from the Appendix.

[4] Including the extension memorialized in the November 22, 2024 case management order, discovery in this litigation was extended only four (4) times. Discovery originally ran on May 26, 2023. It was initially extended to March 1, 2024. (**Pa62 to Pa63**). Thereafter, on a motion, discovery was extended until August 1, 2024. (**Pa64 to Pa65**). Again, on a motion, discovery was extended until November 29, 2024. (**Pa66 to Pa67**).

Infectious Disease Center of New Jersey, LLC, refiled their Motion for Summary Judgment again asserting that Plaintiff had failed to prove her case because no expert report had yet been served.[5] Thereafter, co-Defendants Karyna Neyra, M.D., and Noha Ghusson, M.D., and Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC, filed similar Motions for Summary Judgment on February 28, 2025. (**Pa68 to Pa78**).[6] Co-Defendants St. Barnabas Medical Center and RWJ Barnabas Health, Inc., filed a Cross-Motion for Summary Judgment on the same grounds on March 17, 2025.

On March 27, 2025, Plaintiff filed an Opposition solely to Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC's Summary Judgment Motions attaching thereto her expert report. (**Pa79 to Pa98**).[7] While her expert report was

---

[5] While all co-Defendants filed their Motions for Summary Judgment on the same grounds, Plaintiff is not seeking to reverse their dismissal except with regard to Defendants Parcells and Spiro Plastic Surgery, LL. Accordingly, in an effort to avoid burdening the Court with irrelevant documents, co-defendants' motions for Summary Judgment have not been included in the appendix. If this Court would prefer, Plaintiff will gladly submit them on the Court's request.

[6] In accordance with R. 2:6-1(a)(2), the Defendant's brief in support of its Motion for Summary Judgment has been omitted from the Appendix. The Plaintiff's Complaint, attached to Defendant's Motion for Summary Judgment as Exhibit A, was omitted and can instead be found at **Pa1 to Pa20**. Defendants' Answer, attached to Defendants' Motion for Summary Judgment as Exhibit B, was omitted and can instead be found at **Pa21 to Pa37**. The Trial Court's Order dated Nov. 22, 2024, attached to Defendants' Motion for Summary Judgment as Exhibit C, was omitted and can instead be found at **Pa59 to Pa61**.

[7] In accordance with R. 2:6-1(a)(2), the Plaintiff's brief in support of its Opposition to Defendants' Motion for Summary Judgment has been omitted from the Appendix.

approximately five (5) weeks beyond the date ordered for service in the November 22, 2024 case management order, it was still within the discovery period which did not run until May 30, 2025, another two (2) months thereafter. (**Pa59 to Pa61**). Further, there were no arbitration or trial dates set. Plaintiff's expert report causally related Plaintiff's personal injuries to deviations from accepted standards of care rendered by Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC. (**Pa79 to Pa98**).

The Honorable Robert H. Gardner, J.S.C., held oral argument on the Motions for Summary Judgment on March 28, 2025. Despite the existence of genuine issues of material fact as to whether Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC, deviated from accepted standards of care, the Trial Court dismissed all Defendants with prejudice. (**Pa99 to Pa106**).

In their Motions and at argument, Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC, put forth no evidence of prejudice resulting from Plaintiff's 5-week delay in serving her expert report. (**T:Passim**).[8] Further, the Court did not identify any substantive basis for its punitive decision other than the late submission of the report. (**Ibid.**). It stated in part, "this is outrageous how long this case has gone on." (**T13:6-10**).

[8] Hereinafter "T" will refer to the Motion Transcript from March 28, 2025.

On April 16, 2025, Plaintiff filed a Motion for Reconsideration asserting that the Court erred by dismissing Plaintiff's claims as to Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC, when genuine issues of material fact existed. Further, Plaintiff asserted equitable doctrines which favor determination of claims based on their merits rather than procedural deficiencies, not imposing the ultimate sanction when lesser sanctions are available and not punishing a blameless client for the sin of her attorney. (**Pa107 to Pa131**).[9]

Defendants Alexis Parcells, M.D., and Spiro Plastic Surgery, LLC, filed Opposition to the Motion for Reconsideration on April 28, 2025. (**Pa132 to**

---

[9] In accordance with R. 2:6-1(a)(2), the Plaintiff's brief in support of its Motion for Reconsideration has been omitted from the Appendix. Additionally, Plaintiff's Complaint, attached to Plaintiff's Motion for Reconsideration as Exhibit A, was omitted and can instead be found at **Pa1 to Pa20**. Plaintiff's Expert Report, attached to Plaintiff's Motion for Reconsideration as Exhibit C, was omitted and can instead be found at **Pa79 to Pa98**. The Transcript from the hearing for the Motion for Summary Judgment dated March 28, 2025, attached to Plaintiff's Motion for Reconsideration as Exhibit D, was omitted and can instead be found at **T:passim**. Notice of Deposition, attached to Plaintiff's Motion for Reconsideration as Exhibit E, was omitted and can instead be found at **Pa38 to Pa39**. Notice of Deposition, attached to Plaintiff's Motion for Reconsideration as Exhibit F, was omitted and can instead be found at **Pa49 to Pa50**. The Trial Court's Order dated Nov. 22, 2024, attached to Plaintiff's Motion for Reconsideration as Exhibit G, was omitted and can instead be found at **Pa59 to Pa61**. Defendants' Motions for Summary Judgment, attached to Plaintiff's Motion for Reconsideration as Exhibit H, were omitted and Defendants Parcells and Spiro Plastic Surgery, LLC's, Motion for Summary Judgment, can instead be found at **Pa68 to Pa78**.

Pa152).[10] Plaintiff filed a Reply Brief on May 6, 2025.[11] Both Plaintiff and Defendant requested oral argument. (**Pa142; Pa153**).[12]

Without holding oral argument and while claiming that the issues raised were identical to those in the Motions for Summary Judgment, the Trial Court denied Plaintiff's Motion on May 9, 2025. (**Pa154 to Pa155**).

Plaintiff filed her Notice of Appeal on May 22, 2025, together with her accompanying Civil Case Information Statement. (**Pa156 to Pa168**). An original transcript of the oral argument dated March 28, 2025, was uploaded on May 23, 2025.

---

[10] In accordance with R. 2:6-1(a)(2), the Defendant's Opposition to Plaintiff's Motion for Reconsideration has been omitted from the Appendix. The Plaintiff's Complaint, attached to Defendant's Opposition to Plaintiff's Motion for Reconsideration as Exhibit A, was omitted and can instead be found at **Pa1 to Pa20**. Defendants' Answer, attached to Defendants' Opposition to Plaintiff's Motion for Reconsideration as Exhibit C, was omitted and can instead be found at **Pa21 to Pa37**. The Trial Court's Order dated Nov. 22, 2024, attached to Defendants' Opposition to Plaintiff's Motion for Reconsideration as Exhibit D, was omitted and can instead be found at **Pa59 to Pa61**.

[11] In accordance with R. 2:6-1(a)(2), the Plaintiff's Reply brief in support of its Motion for Reconsideration has been omitted from the Appendix.

[12] Defendants' Correspondence dated May 1, 2025, was omitted and can be found at **Pa142**.

STATEMENT OF FACTS

On July 22, 2019, Plaintiff, Celia Fernandez, underwent reconstructive breast surgery at Lenox Hill Hospital in New York City. Thereafter, Plaintiff developed chest and abdomen wounds for which she was admitted to St. Barnabas Medical Center on July 28, 2019. (**Pa80**).

Upon admission to St. Barnabas Medical Center, Plaintiff came under the collective care of four infectious disease doctors and Dr. Alexis Parcells, a plastic surgeon. (**Pa1 to Pa20; Pa81**). Defendant Parcells was an employee of Defendant, Spiro Plastic Surgery, LLC. (**Pa10 to Pa11**). Dr. Parcells performed three (3) irrigation and debridement procedures upon the Plaintiff's breasts and abdomen on August 13, 2019, August 20, 2019 and September 18, 2019. (**Pa81 to Pa82**).

Because of ongoing pain, on September 17, 2019, Plaintiff consulted with Dr. Ernest S. Chiu at the NYU Langone Medical Center who indicated the need to rule out Pyoderma Gangrenosum. (**Pa82**). Dr. Parcells was apprised of Dr. Chiu's assessment but failed to involve a dermatologist in Plaintiff's care. (**Pa82 to Pa83**). Plaintiff ultimately decided to transfer to the NYU Langone Medical Center where she was evaluated by a dermatologist and diagnosed with pathology consistent with Pyoderma Gangrenosum on September 20, 2019. (**Ibid.**). At no time did Dr. Parcells ever take a skin biopsy or consult with a dermatologist.

Plaintiff filed the within action on August 10, 2021. (**Pa1 to Pa20**). At the heart of this appeal is Plaintiff's late production of her expert report. The discovery period for this matter was extended on four (4) occasions with discovery ending on May 30, 2025. (**Pa59 to Pa67**). The most recent Order extending discovery required Plaintiff to serve her expert reports by February 15, 2025, and it included a note that no further discovery extensions would be granted. (**Pa59 to Pa61**).

During the course of discovery, the production of Defendant witnesses was delayed repeatedly. As a result, Plaintiff was unable to have her expert perform a comprehensive analysis of the various Defendants' actions until after the final defendant deposition was completed. Accordingly, Plaintiff produced her expert report on March 27, 2025, approximately five (5) weeks beyond the February 15, 2025 court-ordered deadline. (**Pa79 to Pa98**). Nevertheless, Plaintiff's expert report was produced over two (2) months **prior** to the end of the discovery, and no arbitration or trial date had been set. (**Pa59 to Pa61**).

The delays which contributed to the tardiness of Plaintiff's expert report were mainly driven by the failure to produce Defendants for deposition. For example, Defendant Parcells was originally scheduled for deposition on October 11, 2023. (**Pa38 to Pa39**). It was adjourned by Defendant. (**Pa40**). Defendant Parcells' deposition was noticed again for March 13, 2024. (**Pa41 to Pa42**). This deposition was also adjourned by Defendant. (**Pa43 to Pa44**). Dr. Parcells' deposition was

rescheduled to May 8, 2024, but was adjourned as Plaintiff's counsel was set to be on trial. (**Pa45 to Pa47**). When the trial was moved, Plaintiff's counsel attempted to reschedule the deposition for May 8, 2024, but Defendant was no longer available. Defendant Parcells was noticed a fourth time for August 15, 2024, and the deposition was then completed. (**Pa48**).

While co-Defendants are not relevant to this appeal, their failure to be produced further contributed to the discovery delays. For example, co-Defendant Noha Ghusson, M.D., was originally noticed for deposition on October 17, 2023. (**Pa49 to Pa50**). Her deposition was adjourned by her counsel. (**Pa51**). Thereafter, Dr. Ghusson was rescheduled for deposition on August 29, 2024. (**Pa52 to Pa53**). Dr. Ghusson failed to appear, and her deposition was re-noticed for November 19, 2024. (**Pa54 to Pa55**). Dr. Ghusson was not produced again. (**Pa56**). In point of fact, Dr. Ghusson was not produced until December 16, 2024. (**Pa57 to Pa58**).

Plaintiffs' depositions were timely completed in July of 2023.

As is customary, the production of Plaintiffs' expert report was reliant upon receiving all deposition testimony. Accordingly, the report could not be written until after December 16, 2024. With the turnaround time involved in reviewing all deposition transcripts and thousands of pages of medical records, the report was completed the last week of March, in 2025. (**Pa79 to Pa98**).

On March 27, 2025, within the discovery end date, Plaintiff produced her expert report authored by Dr. Lloyd M. Krieger. (**Ibid.**). Dr. Krieger opines that Dr. Parcells deviated from accepted standards of care by failing to submit tissue specimen for pathological analysis on three different occasions: August 13, 2019, August 20, 2019 and September 18, 2019. (**Pa83 to Pa86**). Further, Dr. Krieger opines that Dr. Parcells deviated from accepted standards of care by failing to perform irrigation and debridement on August 20, 2019 and again on September 18, 2019 without first seeking a dermatology consult. (**Ibid.**).

All Defendants filed Summary Judgment Motions, returnable before the Trial Court on Friday, March 28, 2025, asserting that, having missed the deadline for filing her expert report, Plaintiff was unable to prove her case. (**Pa68 to Pa78**). None of the Defendants identified any prejudice resulting from Plaintiff's five-week delay in serving her expert report. (**Ibid.; T:passim**). In fact, at oral argument on its Motion for Summary Judgment, rather than identify any prejudice suffered by Defendants, defense counsel for Defendants Dr. Parcells and Spiro Plastic Surgery, LLC, stated, "I just—I—I have a real problem with the way this has been handled by the plaintiff. I mean, I don't think it's fair to my client." (**T10:22-25**).

Despite Plaintiff filing her expert report within the discovery period and with more than two (2) months before the expiration thereof, and despite the report clearly

indicating that Plaintiff has a meritorious claim, this Court dismissed Plaintiff's case with prejudice. (**Pa99 to Pa106**).

In support thereof, the Court did not give any basis other than Plaintiff's late submission of her expert report. The Court stated, "this is outrageous how long this case has gone on." (**T13:9-10**). Despite the prior discovery order indicating that no further discovery extensions would be permitted, the Court further stated that it was inclined to grant dismissal of Plaintiff's Complaint with prejudice because Plaintiff "didn't move to modify the prior Order." (**T13:14-15**). At no point did the Trial Court make findings as to whether genuine issues of material fact existed. (**T:passim**).

Plaintiff filed a Motion for Reconsideration asserting that, in *sua sponte* dismissing her Complaint on grounds other than those advocated in Defendants' Motion for Summary Judgment, the Trial Court had failed to consider significant probative evidence and, accordingly, issued its decision on a palpably incorrect basis. (**Pa107 to Pa131**). Further, Plaintiff raised a number of equitable arguments protesting the Trial Court's decision to impose the ultimate sanction of dismissal with prejudice in response to a procedural misstep. (**Ibid.**). Defendant filed Opposition and requested oral argument. (**Pa132 to Pa 152**). Plaintiff also requested oral argument. (**Pa153**). The Trial Court, nevertheless, refused to hold oral argument and denied Plaintiff's Motion stating only,

> [t]his Court has considered the moving papers and the opposition submitted; this matter previously heard for oral argument and counsel fully and completely argued their positions; nothing presented in this motion raises any additional reasons to reconsider this Court's prior decision nor does it raise any matters or controlling decisions that this Court overlooked or in which it had erred. See Rules of Court 4:42-2 and 4:49-2.

(Ibid.).

Where a party violates a discovery order, our Courts are loathe to impose the ultimate sanction of dismissal. Further, where a meritorious action exists, our Courts prefer for cases to be determined on their merits as opposed to dismissed on procedural grounds. Also, whenever possible, our Courts avoid imposing the faults of the attorney on the client. Finally, Plaintiffs' expert report created a genuine question of material fact as to whether Dr. Parcells deviated from accepted standards of care such that dismissal pursuant to Summary Judgment was in error.

For the foregoing reasons, this Court erred in dismissing Plaintiff's case where her expert report was served, within the discovery period, but 5 weeks beyond the ordered date of service.

This Appeal followed the Trial Court's dismissal of Plaintiff's Complaint. **(Pa156 to Pa168)**.

STANDARD OF REVIEW

At issue in this matter is whether the Trial Judge properly dismissed Plaintiff's case at Summary Judgment for late production of her expert report. The standard of review by which the Appellate Division must analyze this issue is well-established. Review of summary judgment orders is *de novo*, and the Appellate Division applies the same standard as that of the trial court. W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012). Because dismissal at summary judgment essentially amounts to a ruling as a matter of law, no special deference is accorded the trial court. See Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

Summary judgment must be granted "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 a judgment . . . as a matter of law." New Jersey Court Rule 4:46-2(c). The appropriate inquiry must determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill v. Guardian Life Inc. Co. of Am., 142 N.J. 520, 533 (1993)(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The court must review the evidence presented "in the light most favorable to the non-moving party." Id. at 540.

In the absence of genuine issues of material fact, the Appellate Division must "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)).

LEGAL ARGUMENT

POINT I

IN CONTRAVENTION OF THE BRILL STANDARD THE TRIAL COURT WRONGLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITHOUT CONSIDERATION OF OR MAKING A DETERMINATION ON WHETHER GENUINE ISSUES OF MATERIAL FACT EXISTED (Pa59 to Pa61; T:passim)

In the case *sub judice*, Defendants moved for Summary Judgment alleging that Plaintiff could not prove her case because her expert report was served out of time. What was **not** briefed or argued is that Plaintiff's expert report should be barred for late submission. Further, the Trial Court's Case Management Order setting forth the Court-created deadline for submission of the report did not include penalties for late submissions such that, for example, Plaintiff's case would be automatically dismissed should the expert report be served late. Accordingly, pursuant to the Summary Judgment standard on the motion below, the sole issue before the Court was if Plaintiff raised a genuine issue of material fact as to whether Defendant Parcells deviated from accepted standards of care with regard to her treatment and care of Plaintiff.

The Trial Court wholly failed to address this at oral argument instead dismissing Plaintiff's case due to the length of time discovery was taking. The Trial

Court erred in its failure to apply the Brill standard and in its *sua sponte* decision to dismiss Plaintiff's case on grounds other than those requested by the parties.

In determining whether a jury question exists, Brill mandates that the Trial Court give Plaintiff every reasonable, factual inference. Where material facts conflict, submission to a jury is required. In the case within, there are genuine issues of material fact over whether Defendants breached their duties to Plaintiff.

R. 4:46-2 represents the New Jersey Court Rule regarding Motions of summary judgment. It provides, in pertinent part:

> ...The judgment or order sought 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 a judgment or order as a matter of law.

The often cited and leading authority on the issue of summary judgment is the Supreme Court decision in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). In Brill, our Supreme Court established a "new standard" for trial courts to follow in deciding motions for summary judgment. The Brill Court noted that, pursuant to R. 4:46-2, a court should deny a motion for summary judgment "only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged'" in the case. Id. at 529 (emphasis

in original). The Brill Court was careful to note that the non-moving party cannot defeat a motion for summary judgment merely by pointing to "any fact in dispute." Ibid. (emphasis in original). Thus, the Supreme Court observed that where the party opposing the motion points only to disputed issues of fact that are "of an insubstantial nature" summary judgment is proper. In other words, to defeat the motion, the non-moving party must establish "substantial" issues of fact, i.e. issues that are "true, solid, real." Ibid.

The Brill Court went on to explain when a disputed issue of fact should be considered "genuine" and substantial." Id. at 530. To glean "genuine" or substantial" issues of material fact, the Brill Court held that the motion judge is required to engage in the same type of "evaluation," "analysis" or "sifting of evidential materials" under R. 4:46-2, as required by R. 4:37-2(b). Id. at 539-540. In other words, the motion judge deciding an application for summary judgment must engage in "an analytical process" similar to that used when ruling on a motion for a directed verdict. Using that weighing process, the judge deciding a motion for summary judgment is guided by the same evidentiary standard of proof - by a preponderance of the evidence or by clear and convincing evidence - that applies to a motion for a directed verdict.

After applying that evidentiary standard of proof, the motion judge must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91L.Ed. 2d 202, 214 (1986). When the evidence is so one-sided that the moving party should prevail as a matter of law, the motion for summary judgment should be granted. Id. at 540.

The thrust of the Brill decision was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances presented themselves. Id. at 541. Notwithstanding, the Supreme Court was careful to point out that the motion judgment not "shut a deserving litigant from his [or her] trial." Id. at 540, citing Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67, 77 (1954). For this reason, many of the principles established in Judson were reaffirmed by the Supreme Court in Brill.

As the Supreme Court declared in Judson, the role of a trial judge on a motion for summary judgment is to determine whether there is a genuine issue as to material facts, but not to decide the issues if the trial judge finds them to exist. Judson, supra, 17 N.J. at 73. The Brill Court's decision was in keeping with the Judson principle that, in the context of a motion for summary judgment, it is not the function of the

court to adjudicate the facts. Thus, in Brill, the Supreme Court explained that the weighing process which it advocated "is not the same kind of weighing" that a fact-finder (judge or jury) engages in when assessing the preponderance or credibility of evidence. Brill, supra, 142 N.J. at 536.

Another long-standing summary judgment standard established by our Supreme Court in Judson requires that the party opposing the motion be given all favorable inferences, and all facts be interpreted in a light most favorable to the non-movant. Judson, supra, 17 N.J. at 74-75. The "new standard" established by Brill did not deviate from this critical Judson rule. On the contrary, the Brill Court embraced this well-founded, time-honored standard originally pronounced in Judson, and held:

Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgement requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, 477 U.S. at 249, 106 S.Ct. at 2511, 91 L.Ed. 2d at 212.

Credibility determination will continue to be made by a jury and not the judge. Brill, supra, 142 N.J. at 540.

In the case *sub judice*, giving Plaintiff every reasonable inference, as is required on a Motion for Summary Judgment, at the very least, there are genuine issues of material fact as to whether Dr. Parcells deviated from accepted standards of care. After Plaintiff developed skin-related injuries from her breast reconstruction, she was admitted to St. Barnabus Medical Center and was evaluated by Dr. Parcells and the other now-dismissed Defendants. Dr. Parcells performed three (3) irrigation and debridement procedures upon the Plaintiff's breasts and abdomen on August 13, 2019, August 20, 2019 and September 18, 2019. At no time did Dr. Parcells biopsy Plaintiff's skin, request a consultation from a dermatologist or otherwise explore derm-related pathology.

Pursuant to Plaintiff's expert report, Dr. Parcells deviated from accepted standards of care by failing to submit tissue specimen for pathological analysis on three different occasions: August 13, 2019, August 20, 2019 and September 18, 2019. Further, Dr. Krieger opines that Dr. Parcells deviated from accepted standards of case by failing to perform irrigation and debridement on August 20, 2019 and again on September 18, 2019 without first seeking a dermatology consult.

At no time have Defendants questioned Plaintiff's expert as being unqualified to issue his opinions on the subject case. Further, none of the Defendants offered

any argument in their Summary Judgment motions indicating that Dr. Krieger's expert report was net or otherwise legally insufficient to causally relate Plaintiff's injuries to Dr. Parcells' deviations from accepted standards of care. At oral argument, this Court did not comment on the sufficiency of the report, and it did not bar it.

In point of fact, the Motions before the Trial Court only asked the Court if Plaintiff had met her burden of providing sufficient evidence to raise genuine issues of material fact as to whether Defendants deviated from accepted standards of care. The Trial Court did not address the substance of Defendants' Motion at all. Instead, it dismissed Plaintiff's case, not on substantive issue of proof, but rather on the procedural issue of a late discovery obligation. The Motion before the Court did not contemplate procedural missteps, and accordingly, the Plaintiff did not brief same.

Under these circumstances, Summary Judgment is wholly inappropriate. Accepting Plaintiffs' facts as true as required on a Motion for Summary Judgment, Plaintiffs have demonstrated that, at the very least, there are genuine issues of material fact as to whether Dr. Parcells deviated from accepted standards of care in her treatment of Plaintiff.

Further, case law supports accepting late service of an expert report where no arbitration or trial date has been set. In Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), the Appellate Division held that:

> In the absence of a scheduled arbitration or trial date, the rigid enforcement of the discovery end date and the mechanical refusal to relax that date even where the adverse party would not suffer irremediable prejudice, would quickly force litigants and their attorneys into the unwarranted circumstance of being required to diligently complete discovery significantly in advance of the court's ability to schedule a meaningful trial date. We are disinclined to believe that the "Best Practices" rules were intended to create a "hurry up and wait" approach to the processing of civil actions. Instead, we are satisfied that the rules remain equipped to allow a trial judge to render substantial justice in all cases and that where the court system is not in a position to schedule a meaningful arbitration or trial date, a sanction that results in a deprivation of a litigant's day in court on the merits is anathema to the fair and efficient administration of justice.

Id. at 10-11.

Nevertheless, at oral argument, this Court decided to impose a sanction that results in the deprivation of Plaintiffs' day in court. The Trial Court noted that it was inclined to grant Summary Judgment because "this is outrageous how long this case has gone on," and because Plaintiff "didn't move to modify the prior Order" which itself stated "no further discovery extensions." Pursuant to Ponden and myriad other cases, where no trial date has been scheduled, and where there is no evidence that the scheduling of such a date was imminent and would be delayed by a brief extension of discovery, the salutary purposes of the "Best Practices" rule amendments are neither impacted nor jeopardized. Id. at 11.

Here, Plaintiffs have put forth evidence of a meritorious claim against Defendant Parcells. The brief delay in serving her expert report does not implicate an arbitration or trial date or raise issues of prejudice to Defendants. Given the *sua sponte* dismissal on grounds other than those urged by Defendants, and the Trial Court's failure to address the substance of the Summary Judgment motions pursuant to the Brill standard, the dismissal pursuant to Summary Judgment should be vacated, and Plaintiffs and Defendants should be permitted to finish discovery.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO HOLD ORAL ARGUMENT ON A DISPOSITIVE MOTION WHERE BOTH PLAINTIFF AND DEFENDANT PROPERLY REQUESTED ARGUMENT (Pa154 to Pa155)

In New Jersey, it is generally considered reversible error to deny a request for oral argument on a dispositive motion, such as a Motion for Reconsideration of a Motion for Summary Judgment, when the request is properly made. R. 1:6-2(d) mandates that oral argument on substantive motions, including dispositive motions, must be granted as of right if requested, unless the court articulates a valid reason for denying the request. R. 1:6-2(d); see also Raspantini v. Arocho, 364 N.J. Super. 528 (App. Div. 2003), Vellucci v. Dimella, 338 N.J. Super. 345 (App. Div. 2001), LVNV Funding, L.L.C. v. Colvell, 421 N.J. Super. 1 (App. Div. 2011).

Pursuant to R. 1:6-2(d),

> Except as otherwise provided in R. 5:5-4 (family action), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reason and shall be deemed denied unless the court otherwise advises counsel prior to

> the return day. As to all other motions, the request shall be granted as of right.

In Raspantini v. Arocho, supra, defendants filed a Motion for Summary Judgment asserting that plaintiff had failed to meet the Verbal Threshold pursuant to Automobile Insurance Cost Reduction Act (AICRA). Plaintiff opposed the motion and requested oral argument, but the trial judge granted the motion without argument. Thereafter, plaintiffs timely filed a Motion for Reconsideration and again requested oral argument. The trial judge denied the motion, failed to hold argument and did not place on the record any reasoning for the denial. Raspantini v. Arocho, supra, 364 N.J. Super. at 530-31.

On appeal, the plaintiffs argued that the court erred in its evaluation of plaintiff's injuries with regard to the threshold issue. In addressing same, the Appellate Division held that, without a record explaining the court's reasoning on the substantive issues, it could not evaluate whether plaintiffs had, in fact, raised genuine issues of material fact. Instead, the Appellate Division reversed on the basis of the trial court's failure to hold oral argument and make an adequate record. Id. at 531.

After quoting R. 1:6-2(d), the Appellate Division noted that the rule offered a "clear mandate . . . because defendants' initial motion sought dispositive relief, plaintiffs' request for oral argument should have been granted as of right." Ibid. The

Appellate Division went on that, had plaintiffs' initial request for oral argument on the Motion for Summary Judgment been granted, oral argument on the Motion for Reconsideration could have been denied if "that motion on its face did not meet the applicable test for that relief, and if that substantive shortcoming were given as the reason for denying oral argument." Id. at 532 (citations omitted). Because the trial court failed to offer any explanation in the record for its dismissal, the Appellate Division reversed and remanded for further proceedings consistent with its decision. Id. at 534.

In the case herein, the Trial Court failed to hold oral argument on Plaintiff's Motion for Reconsideration despite both Plaintiff and Defendant properly requesting it. The Court initially held oral argument on the Motion for Summary Judgment, but it failed to adjudicate the issues raised by the Motion.

To clarify, Defendants moved for Summary Judgment on the basis that Plaintiff could not prove her case without an expert opinion. In response thereto, Plaintiff filed opposition attaching her expert report. Rather than evaluate whether genuine issues of material fact existed as to Dr. Parcells' deviation from accepted standards of care, the Trial Court solely focused on Plaintiff's Counsel's late service of her expert report. Notably, however, none of the Defendants filed a Motion to Bar Plaintiff's expert report for being submitted late. Instead, the Trial Court, *sua sponte*, transformed a Summary Judgment motion on substantive threshold issues

into a procedural Motion to Dismiss for a discovery violation that was not indicated by the pending Summary Judgment papers. Plaintiff never briefed the Summary Judgment motion on the grounds of a potential procedural dismissal as Defendants did not move therefor.

At oral argument on the Summary Judgment motion, the Trial Court wholly ignored the substance of the Summary Judgment motion, never questioning whether the expert report raised a genuine issue of material fact. Further, the Court issued no findings as to whether a genuine issue existed.

In her Motion for Reconsideration, Plaintiff asserted that the Court failed to consider significant probative evidence and, accordingly, issued its decision on a palpably incorrect basis because the Court never adjudicated the substantive issue of whether the Defendants deviated pursuant to the Brill standard. Further, in her Motion for Reconsideration, Plaintiff raised equitable doctrines that advocate against dismissals with prejudice under the circumstances presented therein. In so doing, Plaintiff met the procedural requirements articulated by R. 4:49-2.

When the Motion for Reconsideration was opposed, **both Plaintiff and Defendant requested oral argument.** Nevertheless, the Court refused to hold oral argument asserting that there were "no new issues raised." Given that the Trial Court never made a ruling on the substance of the Summary Judgment Motion, instead *sua sponte* dismissing the case because of the violation of a court-created deadline, there

can be no question that Plaintiff raised issues that were not addressed in the Summary Judgment oral argument. Accordingly, the Trial Court's given reason for refusing to hold oral argument and permitting Plaintiff and Defendant to place their arguments on the record is not valid.

Like the Appellate panel in Raspaniti, supra, this panel cannot evaluate whether Plaintiff raised genuine issues of material fact as to whether Dr. Parcells deviated from accepted standards of care based upon the record created by the Trial Court. Further, Plaintiff met the substantive and procedural requirements for her Motion for Reconsideration. Pursuant to R. 1:6-2(d) and case law, Plaintiff should have been granted argument to build her record as of right.

Under these circumstances, the Trial Court's failure to hold oral argument or place on the record meaningful, factual findings and legal conclusions, constitutes reversible error.

POINT III

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CASE WITH PREJUDICE BECAUSE OUR COURTS ADVOCATE AGAINST IMPOSING THE MOST SEVERE SANCTION TO REMEDY PROCEDURAL ERRORS PREFERRING DETERMINATIONS OF A CLIENT'S RIGHTS ON THE MERITS (Pa59 to Pa61; T:passim)

The Court erred in dismissing Plaintiff's case with prejudice. New Jersey law has traditionally favored less severe sanctions for discovery violations than the ultimate sanction of dismissal with prejudice. Especially where meritorious claims exist, our legal doctrine frowns upon punishing a client for procedural missteps by depriving her of access to the judicial system. It has been held to be reversible error to impose the harshest sanction when others were available.

A. The Trial Court Had Less Draconian Remedies Available to it Other Than Dismissal With Prejudice

While it is accepted that our trial courts have "inherent discretionary power to impose sanctions for failure to make discovery," Calabrese v. Trenton State College, 162 N.J. Super. 145, 151-52 (App. Div. 1978), *aff'd*, 82 N.J. 321 (1908), our courts have repeatedly been instructed to impose the sanction of dismissal with prejudice "only sparingly." Zaccardi v. Backer, 88 N.J. 245, 253 (1982). "The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of

the cause of action, or where the refusal to comply is deliberate and contumacious." Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 515 (1995). See also Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951)(citations omitted); Allegro v. Afton Village Corp., 9 N.J. 156, 160-61 (1952); Johnson v. Mountainside Hosp., 199 N.J. Super. 114, 119 (App. Div. 1985). "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault." Zaccardi, supra, 88 N.J. at 253 (citations omitted); see Johnson, supra, 119 N.J. Super. at 119.

As a result of our State's commitment to impose sanctions less severe than dismissal with prejudice, there exists a scarcity of cases ordering dismissal. Cf. Aujero v. Cirelli, 110 N.J. 566, 580 (1988)(stating that "[j]udges, no less than lawyers, strain to avoid the ultimate sanction of dismissal of an affirmative claim or striking of a responsive pleading" for failure to provide discovery); Crews v. Garmoney, 141 N.J. Super. 93, 96(App. Div. 1976)(stating that courts are reluctant "to invoke the sanction of dismissal where lesser measures [are] appropriate" for failure to answer interrogatories).

In Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48 (App. Div. 2003), plaintiffs suffered injuries due to an improperly leveled elevator. After

discovery had been extended, a case management order was entered requiring plaintiffs to serve their expert reports by May 24, 2002 and setting a trial date for September 9, 2002. Because of scheduling difficulties, plaintiffs were unable to serve the report until July 2, 2022, thirty-nine (39) days after the due date. Thereafter, defendants moved for various forms of relief including barring plaintiffs' expert. The trial court granted defendants' motion and dismissed plaintiffs' case with prejudice. On a subsequent Motion for Reconsideration, the trial court noted that plaintiffs failed to seek relief from the May 24, 2002 deadline, and it accepted the defendants' assertion that the expert report opened new avenues of inquiry. Id. at 50-51.

The Appellate Division reversed the trial court. The Appellate Division reasoned that, following the 2000 rule amendments adopting Best Practices, it was reasonable for there to be some sanction for the late service of the expert report. However, the Appellate Division was unequivocal that dismissal with prejudice was inappropriate – especially where "plaintiffs' failure to serve the report on time was neither willful nor intended to mislead". Id. at 52. The Court stated:

> As we had repeatedly held prior to Best Practices, the 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. See, e.g., Woodward-Clyde Consultants v. Chem. &

> Pollution Sciences, Inc., 105 N.J. 464, 471 (1987); Zaccardi v. Becker, 88 N.J. 245, 253 (1982); Irani v. K-Mart Corp., 281 N.J. Super. 383, 387 (App. Div. 1995); Georgis v. Scarpa, 226 N.J. Super. 244, 249-250 (App. Div. 1988); Johnson v. Mountainside Hosp., 199 N.J. Super. 114, 119-120 (App. Div. 1985); Jansonn v. Fairleigh Dickinson University, 198 N.J. Super. 190, 195 (App. Div. 1985).

Ibid.

The Court went on:

> 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.

Ibid. (citations omitted). This was in large part because Best Practices were designed to "improve the efficiency and expedition of the civil litigation process," Vargas v. Camilo, 354 N.J. Super. 422, 425 (App. Div. 2002), not to "do away with substantial justice on the merits or to preclude rule relaxation when necessary to 'secure a just determination.'" Tucci, supra, 364 N.J. Super. at 53(quoting R. 1:1-2).

To the extent that defendants were unable to address the new inquiries raised by the expert report, the Appellate Division made clear that the 39-day delay in service of the expert report simply delayed the supplementary discovery by 39-days.

If defendants were unable to complete the additional discovery, adjournment of the trial was the more appropriate remedy than dismissal with prejudice. Id. at 53.

In the case *sub judice*, Plaintiff's facts are less egregious than those set forth in Tucci, supra. Here, no arbitration or trial date has been set. Plaintiff served her expert report within the discovery period and well in advance of the requirement that she serve it twenty days prior to the expiration of discovery pursuant to R. 4:17-4.

Pursuant to the considerations outlined in Tucci, supra, Plaintiff's conduct was not willful or in an attempt to mislead. As is the custom in medical malpractice cases, before Plaintiff could provide a substantive expert report, all depositions needed to be conducted. Because of Defendants' failure to timely produce their clients for depositions, Plaintiff's counsel was left in the unsavory position of trying to obtain an expert report with a very tight turnaround. Certainly, however, there was no malfeasance on the part of counsel for Plaintiff – the delay was strictly a result of scheduling delays outside of the control of Plaintiff's counsel.

Notably, Defendants did not file a Motion to Bar Plaintiff's expert report. Further, their Motion for Summary Judgment did not cite any prejudice from the late service of Plaintiff's report. Prior to the dismissal, the remaining Defendants, Dr. Parcells and her employer, still had two (2) months to complete any additional discovery, and as was the case in Tucci, if necessary, the discovery end date could have been extended to provide Defendants additional time.

As the Appellate Division held in Tucci, courts should be indulgent with late service of expert reports when the report is essential to the claim. Tucci, supra, 364 N.J. Super. At 52. In this medical malpractice case, the expert report is pivotal. Finally, the Plaintiff herself was entirely innocent for the late service of her expert report. Plaintiff timely completed her deposition in July of 2023. She did not contribute in any way to the late submission.

Under these circumstances, the Court could have applied a lesser sanction for Plaintiff's late submission. For example, given that there were no arbitration or trial dates listed, the Trial Court could have extended discovery giving Defendants the time needed to explore any new discovery issues. Or the Court could have imposed upon Plaintiff the cost of Defendants' deposition of Plaintiff's expert. In short, there were other avenues available to the Trial Court to address the late submission other than the ultimate sanction of dismissal.

B. Our Courts Frown Upon Visiting the "Sins" of Counsel Upon Innocent Clients

Ultimately, through no fault of her own, it is Plaintiff, Celia Fernandez, who will suffer as a result of this dismissal. Such a result is in striking contrast to the long-held traditions of this state which seek to protect clients in similar situations.

Our courts have repeatedly held that "courts should be reluctant to penalize a blameless client for the mistakes of the attorney." Familia v. Univ. Hosp. of Univ.

of Med. & Dentistry of N.J., 350 N.J. Super. 563, 568 (App. Div. 2002). "[I]n the absence of demonstrable prejudice to the other party [,] it is neither necessary nor proper to visit the sins of the attorney upon his blameless client." Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 196 (App. Div. 1985).

Our courts are committed to, among other things, fairness and quality service. The doctrine of our state ensuring fairness to a client under these circumstances is, in large part, a reflection of our courts' commitment to determining cases on their merits rather than based upon procedural deficiencies. See Woodward-Clyde Consultants v. Chem. & Pollution Scis., Inc., 105 N.J. 464, 472-74 (1987). Our courts have long held that "'cases should be won or lost on their merits and not because litigants have failed to comply precisely with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available.'" Irani v. K-Mart Corp., 281 N.J. Super. 383, 387(App. Div. 1985) (quoting Connors v. Sexton Studios, Inc., 270 N.J. Super. 390, 395(App. Div. 1994)).

In Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190 (App. Div. 1985), plaintiffs were students at Fairleigh Dickinson University when they were attacked in their dorm rooms and raped repeatedly. Plaintiffs retained an attorney who filed a complaint. Plaintiffs forwarded answered interrogatories to their

attorney, but the attorney failed to serve them. As a result, Defendant moved for and was granted a dismissal. Id. at 192-93.

Eventually, plaintiffs retained a new attorney who moved to vacate the dismissal and reinstate the Complaint. Defendant opposed claiming that it was severely prejudiced by not having the opportunity to investigate the incident in a timely manner. The trial court agreed and denied plaintiffs' motion to reinstate. Id. at 193.

The Appellate Division reversed. Initially, the Court weighed the finality of litigation and judicial economy with the equitable notion of our court system striving to achieve justice in every case. Specifically, the Appellate Division noted the "need to instill firmness and meaning to the provisions of our discovery rules, thereby maintaining a consistent and predictable sense of order. . . ." Ibid. (quoting Crews v. Garmoney, 141 N.J. Super. 93, 96 (App. Div. 1976)). But the Court acknowledged the "general disinclination to invoke the ultimate sanction of dismissal" where "the parties are blameless and have relied upon the presumed competence and good faith of their attorneys." Id. at 194.

The Court analyzed the question as follows:

> Our review of the relevant decisions discloses several important factors that have generally been considered in determining whether the rules should be relaxed. These include (1) the extent of the delay, (2) the underlying reason or cause, (3) the fault or blamelessness of the

> litigant, and (4) the prejudice that would accrue to the other party.

Id. at 195. The Appellate Division determined that the delay was substantial, as four (4) years had passed between the entry of dismissal and the motion for reinstatement. The Court further found that plaintiffs themselves were entirely blameless and had, in fact, actively attempted to get their first attorney to respond to discovery demands. Finally, the Court found an absence of prejudice to the defendant. Based on these facts and considerations, the Appellate Division chose not to "visit the sins of the attorney upon his blameless client." Id. at 195-96.

In the case *sub judice*, again, the facts are less egregious than those in Jansson. Here, Plaintiff's counsel did not delay four (4) years, rather she was a mere five (5) weeks late in the service of her expert report. The deadline was court-ordered and two (2) months of additional discovery remained before the discovery end date expired. Further, while there is no question that this case had several discovery extensions, no arbitration or trial date had been set.

Plaintiff's counsel also put forth a reasonable explanation for the delay in the service of her expert report. As is customary, all depositions were necessary in order for an expert to fully appreciate the medical landscape at issue in Plaintiff's case. Certain Defendants delayed the deposition schedule such that Plaintiff had not completed depositions until a mere three (3) months before the expert report was

due. Thereafter, the expert had thousands of pages of deposition transcripts and medical records to review before a report could be authored. Plaintiff's attorney provided the report as soon as it was in her possession.

As with the plaintiffs in Jansson, supra, Celia Fernandez had absolutely no part in the late service of her expert report. At no point in this litigation was Plaintiff dilatory or delinquent in providing discovery. In point of fact, Plaintiff's depositions were completed in July of 2023. Defendants have not put forth any suggestion that Plaintiff is at all at fault for the late submission.

Finally, and most importantly, Defendants did not allege, in their motion papers or at oral argument, any prejudice as a result of Plaintiff's five (5) week delay in providing her expert report. At oral argument, defense counsel stated, "I just—I—I have a real problem with the way this has been handled by the plaintiff. I mean, I don't think it's fair to my client." Fairness, however, is not the standard for determining a penalty for a discovery violation. Counsel never gave any reason as to why the delay was "unfair" to her client. Counsel never even suggested that they needed more time to explore new issues raised as a result of the expert report. Defense Counsel may not like how discovery has proceeded, but that does not constitute prejudice to her client.

Under these circumstances, the Trial Court's decision to dismiss Plaintiff's case with prejudice constitutes reversible error. The Trial Court's Draconian

decision punished the Plaintiff because of a fairly common procedural delay that was remedied well within the discovery period. In New Jersey, our courts strive to ensure that cases are determined on their merits, and that procedural dismissals resulting from discovery violations are not held against blameless clients. Here, through no fault of her own, the Trial Court's punitive decision bars Plaintiff from our system of justice and the determination of her substantive rights.

C. Our Courts Favor the Broad Policy Goals Resulting From Adjudication on the Merits Rather than Dismissal for Procedural Errors

Our Courts have traditionally favored the doctrine of adjudication on the merits over dismissals from procedural technicalities because it supports the long-held notion that our court system offers a pathway to fairness and justice. This principle is rooted in the idea that procedural rules are a means to achieve justice, not an end unto themselves. The Trial Court's *sua sponte* decision to dismiss Plaintiff's case with prejudice for her late submission of her expert report and its refusal to determine whether genuine issues of material fact existed directly contradicts this broadly endorsed equitable doctrine.

In Alpha Beauty Distributors, Inc. v. Winn-Dixie Stores, Inc., plaintiff supplier sued defendant grocery store chains alleging unpaid book accounts. In and around the same time, plaintiff sued fellow shareholders in federal court for

conversion of corporate assets. The trial court dismissed plaintiff's case for failing to identify the federal action in its R. 4:5-1(b)(2) certification. Alpha Beauty Distributors, Inc. v. Winn-Dixie Stores, Inc., 425 N.J. Super. 94, 96-100 (App. Div. 2012).

The Appellate Division reversed. The panel did not find commonality of issues such that R. 4:5-1(b)(2) was violated. But perhaps more notably, the Appellate Division held:

> [E]ven if we were to assume Alpha violated the Rule, we would conclude that the leap to dismissal rather than some lesser sanction was inappropriate. Our Court Rules, from their inception, have been understood as "a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits." As a result, the Supreme Court has recognized a "strong preference for adjudication on the merits rather than final disposition for procedural reasons."

Alpha Beauty Distributors, Inc. v. Winn-Dixie Stores, Inc., supra, 425 N.J. Super. at 101-02 (citations omitted). This fundamental doctrine highlights the strong preference for resolving disputes on their merits rather than through procedural dismissals, emphasizing that procedural rules should not obstruct substantial justice.

The public policy guiding the role of the judiciary demands judges decide contested matters on their merits and avoid the dismissal of actions because of inconsequential procedural deficiencies. See State v. Farrell, 320 N.J. Super. 425, 447 (App. Div. 1999) ("We have been loath to sponsor the more severe sanction of

dismissal because the demands of justice require adjudications on the merits to the greatest extent possible."). See also Midland Funding LLC v. Albern, 433 N.J. Super. 494, 496 (App. Div. 2013) (noting the longstanding policy of "favoring the disposition of cases on their merits"); Irani v. K-Mart Corp., 281 N.J. Super. 383, 387 (App. Div. 1995) ("Cases should be won or lost on their merits and not because litigants have failed to comply precisely with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available." (quoting Connors v. Sexton Studios, Inc., 270 N.J. Super. 390, 395 (App. Div. 1994))). Ordering the ultimate sanction of dismissal must be exercised sparingly. Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582, 584-85 (App. Div. 1977). This is especially true where there "has been no showing of prejudice" on part of the opposition. Mayfield v. Cmty. Med. Assocs., P.A., 335 N.J. Super. 198, 207 (App. Div. 2000).

The same is true for the case herein. By *sua sponte* dismissing Plaintiff's Complaint because of the length of time discovery was taking, many of the delays resulting from Defendants' inability to schedule their clients' depositions, the Trial Court elevated procedural missteps over substantive rights in contravention of a long-line of cases holding the opposite. Our courts are charged with dispensing justice, not simply conforming to expediency. Here, where no prejudice to Defendants was articulated, the Trial Court could have extended discovery, fined

Plaintiff's counsel, or otherwise sanctioned the Plaintiff without sacrificing this tenet of fairness fundamental to our system of justice.

For the forgoing reasons, Plaintiff respectfully requests that the Trial Court's Order dismissing her Complaint be reversed, and she be permitted to have her substantive rights adjudicated on their merits.

CONCLUSION

For the forgoing reasons, it is respectfully requested that the Trial Court Order granting Defendants' Summary Judgment Motion and Dismissing Plaintiff's Complaint with prejudice be reversed, and that Plaintiff be permitted to proceed to trial.

Respectfully submitted,

Eric G. Kahn

Dated: August 26, 2025

CELIA C. FERNANDEZ and LUIS R. FERNANDEZ, her husband,

Plaintiff(s)/Appellants

vs.

ALEXIS PARCELLS, M.D, KARYNA NEYRA, M.D., NOHA GHUSSON, M.D., MARJUT KOKKOLA-KORPELA, M.D. SPIRO PLASTIC SURGERY LLC, INFECTIOUS DISEASE CENTER OF NEW JERSEY, LLC, ST. BARNABAS MEDICAL CENTER, RWJ BARNABAS HEALTH, INC., JOHN and/or JANE DOES, M.D., "A" through "Z" (fictitious names and presently unknown), JOHN and/or JANE ROES, "A" through "Z" (fictitious names and presently unknown), and ABC CORPORATIONS "A" through "Z" (fictitious names used to describe unknown defendants) individually, jointly, severally and in the alternative,

Defendant(s)/Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2949-24

Civil Action

ON APPEAL FROM THE
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ESSEX COUNTY
DOCKET NO. ESX-L-006145-21

SAT BELOW:
Hon. Robert H. Gardner, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS/REPONDENTS SPIRO PLASTIC SURGERY, LLC AND ALEXIS PARCELLS, M.D.

RONAN, TUZZIO & GIANNONE, P.C.
One Hovchild Plaza, 4000 Route 66, Suite 231
Tinton Falls, NJ 07753
(732) 922-3300
Attorneys for Defendants/Respondent, Spiro Plastic Surgery, LLC and Alexis Parcells, M.D.

Rowena M. Durán, Esq. – 017821984
Email: Rduran@ronanlaw.com
Of Counsel

Jack E. Potash, Esq. – 208822016
Email: JPotash@ronanlaw.com
On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

APPENDIX TABLE OF CONTENTS

PRELIMINARY STATEMENT

Defendants/Respondents, Spiro Plastic Surgery, LLC and Alexis Parcells, M.D. (hereinafter collectively "Defendants"), respectfully contend that this Court should reach the same decision as the trial court upon completion of its *de novo* review of Defendants' motion for summary judgment. The trial court's decision was supported not only by case law and the Rules of Court but, also, by the unusual and egregious circumstances of this case.

The summary judgment motion at issue on appeal was not the first, nor the second, such motion filed by Defendants. It was, in fact, the third motion for summary judgment filed on the same exact basis—the failure of Plaintiffs/Appellants, Celia C. Fernandez and Luis R. Fernandez (hereinafter collectively "Plaintiffs"), to serve any expert reports critical of Defendants by the deadline for same.

Considering that backdrop, there are several reasons why the trial court's order granting summary judgment was correct—and why this Court should rule in the same manner.

In particular, Plaintiffs' attempt to both produce an expert report and oppose Defendants' third motion for summary judgment simultaneously violated several Rules of Court. Defendants' motion was returnable on March 28, 2025. Pursuant to R. 4:46-1, Plaintiffs' opposition to the motion was due by March 18, 2025. No opposition was field by that date, nor did Plaintiffs ever request an adjournment of the motion. Further,

Plaintiffs never requested a discovery extension pursuant to R. 4:24-1(c) to accommodate any expert reports.

Nine days after the due date for Plaintiffs' opposition, at 6:25 p.m. on March 27, 2025—the literal eve of the motion's return date and of scheduled oral argument—Plaintiffs filed a purported opposition to the motion, to which they attached an expert report prepared by Lloyd M. Krieger, M.D. Plaintiffs never served that report upon Defendants, in violation of R. 4:10-2(d)(1), R. 4:17-4(a), 4:17-4(e), and R. 4:17-7. Indeed, to this day, Dr. Krieger's report has never been served on Defendants, nor have Plaintiffs ever provided a certification of due diligence with respect to Dr. Krieger's report. Further, the opposition filed by Plaintiffs did not contain "a responding statement either admitting or disputing each of the facts in the movant's statement" pursuant to R. 4:46-2(b).

As set forth below, under these circumstances—and especially considering that Defendants had filed two prior summary judgment motions on the same basis—the trial court was fully justified in granting Defendants' third motion for summary judgment. Defendants respectfully submit that this Court should affirm the trial court's decision.

PROCEDURAL HISTORY

Plaintiffs filed their complaint in this medical malpractice action on August 10, 2021 (Pa001 –020). Following service of the complaint, Defendants filed an answer on April 11, 2022 (Pa021 – 037). Below is a summary of only the procedural history specifically-relevant to the present appeal.

Following the filing of pleadings and the exchange of written discovery, counsel for Plaintiffs first noticed the deposition of Respondent/Defendant, Alexis Parcells, M.D. (hereinafter referred to as "Dr. Parcells" when referenced individually), for October 11, 2023, which date was adjourned by counsel for a co-defendant who is not involved in the present appeal (Pa040). The deposition of Dr. Parcells was then noticed for March 13, 2024, which was adjourned by counsel for Defendants (Pa043). The third notice, for May 8, 2024, was adjourned by counsel for Plaintiffs (Pa047).

The deposition of Dr. Parcells was ultimately completed on August 15, 2024 (Pa048), more than seven months prior to the return date of the motion for summary judgment at issue.

Defendants filed a total of three motions for summary judgment due to Plaintiffs' failure to serve an expert report critical of them by the deadline for same: on April 17, 2024 (Da1 – 14), October 21, 2024 (Da15 – 28), and February 28, 2025 (Da29 –45). Following oral argument on March 28, 2025, the trial court granted Defendants' third motion for summary judgment (Pa099-100).

On April 15, 2025, Plaintiffs filed a motion for reconsideration of the trial court's order granting summary judgment in favor of Defendants (Pa107 –08). The trial court denied Plaintiffs' motion on May 9, 2025 (Pa154–155). This appeal followed.

COUNTERSTATEMENT OF FACTS

As the treatment rendered by Dr. Parcells to Appellant/Plaintiff, Celia Fernandez (hereinafter "Mrs. Fernandez" when referred to individually), is not at issue in this appeal, nor are purported discovery delays by other defendants who are not involved in this appeal, this Counterstatement of Facts is primarily limited to 1) alleged discovery delays by Defendants and 2) Plaintiffs' late opposition to Defendants' third motion for summary judgment. Defendants only note, for purposes of background, that Mrs. Fernandez underwent surgery on July 22, 2019 by non-party surgeons at a hospital in New York, following which she developed complications and sought treatment at St. Barnabas Medical Center (Pa080). Dr. Parcells was called in consultation for the plaintiff's condition and rendered treatment in July, August, and September, 2019 (Pa081–082).

The first attempt by counsel for Plaintiffs to schedule the deposition of Dr. Parcells, for October 11, 2023, was adjourned by counsel for a co-defendant, not by counsel for Defendants (Pa040). The second attempt, scheduled for March 13, 2024, was adjourned by counsel for Defendants, who offered alternate dates in April, 2024 (Pa043). The third attempt, scheduled by counsel for Plaintiffs for May 8, 2024, was adjourned by counsel for Plaintiffs (Pa047). Counsel for Defendants offered dates to reschedule the deposition in June, 2024 (Pa047). Despite the fact that these earlier dates were offered, the deposition was later scheduled for August 15, 2024 (Pa048), and was completed on that date.

The only defendant left to be deposed after Dr. Parcells was Noha Ghusson, M.D., one of three infectious diseases specialists whose care and treatment of Mrs. Fernandez had no bearing on the care and treatment provided by Dr. Parcells, who is a plastic surgeon (Pa002–003). Dr. Ghusson's deposition was completed on December 16, 2024 (Pa057 – 058).

As noted in the Procedural History, Defendants previously filed two other motions for summary judgment—both also due to Plaintiffs' failure to serve any expert reports critical of Defendants by the deadline for same. The first was filed on April 17, 2024 (Da1 – 14). That motion was denied (Da46 –47) and Plaintiffs were given additional time to serve expert reports (Pa066 –067). Defendants then filed a second motion for summary judgment—again, due to Plaintiffs' failure to serve any expert reports critical of Defendants by the deadline for same—on October 21, 2024 (Da15–28). That motion, too, was denied and Plaintiffs were, once again, given additional time to serve expert reports (Pa059–061).

In its order denying Defendants' second motion for summary judgment and again extending the deadline for Plaintiffs' expert reports, the trial court expressly stated that "[n]o further extensions shall be granted" (Pa059 –061).

Subsequently, for a third time, plaintiffs failed to serve an expert report critical of Defendants by the deadline for same, and Defendants filed a third motion for summary judgment on this issue on February 28, 2025 (Da29– 45). Plaintiffs' expert reports had

been due on February 15, 2025 (Pa060), which was six full months after the completion of the deposition of Dr. Parcells (Pa048).

The motion was returnable on March 28, 2025 (Pa069). Plaintiffs filed opposition to that motion at 6:25 p.m. on March 27, 2025, the evening before the return date of the motion (Da48–51), to which they attached the expert report of Lloyd M. Krieger, M.D. (Pa079–086). Although he reviewed her deposition transcript (among numerous other materials), Dr. Krieger did not mention defendant, Dr. Ghusson, anywhere within the body of his report (Pa079 –086).

At oral argument, the trial court stated that its prior orders would not "mean anything" if it were to consider Dr. Krieger's report in opposition to Defendants' motion (T7:21 –9:3). The trial court also noted that counsel for Plaintiffs had still not yet served Dr. Krieger's report on counsel for Defendants (T9:12-23). The trial court stated that counsel for Plaintiffs "ran roughshod off of the rules" (T9:24-25). Although counsel for Plaintiffs advised the trial court that she "will e-mail my filing to her right now" (T10:1-2), it has still never been served on counsel for Defendants.

In rendering its decision, the trial court stated that "prior Orders have to be obeyed" and that it was "outrageous how long this case has gone on" (T12:23–13:10). Following oral argument, the trial court entered an order granting Defendants' motion (Pa099-100).

Defense expert reports were due by April 15, 2025 (Pa059– 060). Therefore, if summary judgment had not been granted, Defendants would have had barely more than two *weeks* to serve a rebuttal report to Dr. Krieger's report.

On that date, April 15, 2025, Plaintiffs filed a motion for reconsideration of the trial court's order granting summary judgment in favor of Defendants (Pa107 –08), which the trial court denied on May 9, 2025 (Pa154–155).

LEGAL ARGUMENT

POINT I

THIS APPEAL MUST BE DENIED BECAUSE THE TRIAL COURT CORRECTLY REFUSED TO CONSIDER PLAINTIFFS' LATE EXPERT REPORT AND GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

On February 28, 2025, Defendants filed a motion for summary judgment due to Plaintiffs' failure to serve expert reports by the deadline of February 15, 2025 (Da29 – 45). The motion was returnable on March 28, 2025 (Pa069). Plaintiffs filed opposition to that motion at 6:25 p.m. on March 27, 2025, the evening before the return date of the motion (Da48–51), to which they attached the expert report of Lloyd M. Krieger, M.D. (Pa079–086). At oral argument, the trial court declined to consider Dr. Krieger's report in opposition to Defendants' motion, noting that its prior orders would not "mean anything" if it were to do so (T7:21 –9:3). It granted Defendants' motion, stating that "prior Orders have to be obeyed" and that it was "outrageous how long this case has gone on" (T12:23 –13:10).

For the reasons set forth below, the trial court correctly granted summary judgment in favor of Defendants. Plaintiffs violated multiple Rules of Court in attempting to rely upon a late expert report on the eve of the return date of the motion. The trial court's refusal to consider Plaintiffs' late expert report, and its corresponding decision to grant summary judgment in Defendants' favor due to Plaintiffs' failure to provide an expert report, was supported by case law and by the Rules. Contrary to Plaintiffs' argument on

appeal, there was no genuine issue of material fact, as the trial court properly refused to consider the late expert report.

a. Standard of Review

This Court conducts *de novo* review of the trial court's disposition of a motion for summary judgment. Bank v. Lee, 481 N.J. Super. 412,429 (App. Div. 2025). Thus, it applies "the same standard used by the" trial court. Ibid. That standard entitles the moving party to summary judgment if there is no genuine issue of material fact. R. 4:46. The Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520,540 (1995). The Brill Court explained that "the thrust" of its decision was "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

b. Summary Judgment is Required Because Plaintiffs' Late Expert Report Should Not Be Considered

The first key issue before this Court on appeal is whether Plaintiffs' late expert report of Dr. Krieger should be considered in opposition to Defendants' motion for summary judgment. If the late report should not be considered, it is plain that summary judgment is required, as a deviation from the standard of care by Defendants can only be established by way of expert testimony "by competent and qualified physicians." Estate of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454,469 (1999). The late expert report of

Dr. Krieger is the only report Plaintiffs relied upon in opposition to the motion; they did not identify any other experts who could testify against Defendants. Thus, if Dr. Krieger's report should not be considered, Plaintiffs have no expert who can testify against Defendants at trial, thereby requiring summary judgment.

Due to the Plaintiffs' violations of the Rules of Court as set forth below, coupled with case law interpreting those Rules in strikingly-similar circumstances, it is plain that the trial court was correct in not considering Dr. Krieger's report. This Court, too, should refuse to consider Dr. Krieger's report.

i. R. 4:24-1(c)

First, Plaintiffs failed to comply with the requirements of R. 4:24-1(c) to file a motion to extend discovery to accommodate the late expert report of Dr. Krieger. While the trial court's order of November 22, 2024 includes a provision stating that "[n]o further extensions shall be granted" (Pa060), the court, during oral argument on March 28, 2025, noted that Plaintiffs "didn't bother to even do a letter, never mind a motion to modify" their expert report deadline of February 15, 2025 (T12:7-22). The trial court later reiterated that Plaintiffs "didn't move to modify the prior Order" (T13:11-19).

This matter is controlled by Tynes v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 166 (App. Div.), cert. denied, 200 N.J. 502 (2009), a medical malpractice matter with a strikingly-similar procedural history to that of the present case, in which the defendants moved for summary judgment due to the plaintiffs' failure to serve expert

reports by the deadline set forth in the court's discovery order. The plaintiffs opposed those motions and filed a cross-motion to extend discovery pursuant to R. 4:24-1(c), arguing that that the delay in the service of their expert reports was caused by a delay in the completion of a particular deposition. Ibid. The trial court denied the plaintiffs' cross-motion to extend discovery and granted summary judgment in favor of all of the defendants. Id. at 167.

On appeal, this Court found that the plaintiffs had failed to provide "a convincing explanation as to why they could not produce their expert reports as to the alleged liability of the other defendants until after" the witness in question was deposed. Id. at 171. The Court noted that "Plaintiffs' counsel unilaterally elected not to comply with the trial court's October 14, 2007 order and chose not to serve expert reports by the date required by the order for what are said to be 'strategic' reasons." Ibid.

Additionally, the Court explained that "the age of the case and the extent to which the discovery end date has been extended" must also be considered in determining whether the plaintiffs had shown "good cause" for their requested discovery extension. Ibid. The Court noted that the case had 1,585 days of discovery, which it described as "more than enough time for plaintiffs to depose [the witness] and serve their expert reports." Id. at 172. Discovery had already "been extended several times and plaintiffs failed to offer convincing reasons for their failure to complete discovery by the prescribed discovery end date." Id. at 174-75.

Further, the Court considered the additional discovery that was left to be completed after the deposition and service of the plaintiffs' expert reports, including the service of defense expert reports and time for expert depositions, which, together, would require "more than a brief period of time" to complete all discovery. Id. at 172.

Finally, the Court found that the defendants would have been prejudiced by a discovery extension, noting that the claims against them had "been pending for several years and defendants ha[d] a strong interest in having this matter concluded," with any further delays potentially "compromis[ing] defendants' ability to defend against plaintiffs' claims." Ibid.

As a result, this Court affirmed the trial court's denial of the plaintiffs' cross-motion to extend discovery to permit service of expert reports and affirmed the trial court's grant of summary judgment due to the plaintiffs' failure to provide expert reports. Id. at 176.

For the reasons set forth below, Tynes controls the present appeal. It is directly on-point factually and its reasoning is equally-applicable to the present matter.

First, the present matter, like Tynes, involves defense motions for summary judgment due to the plaintiffs' failure to serve expert reports by the deadline set forth in the court's discovery order. Id. at 166. Here, in fact, Defendants filed three successive motions for summary judgment on this very issue: on April 17, 2024 (Da1 –14), October 21, 2024 (Da15 –28), and February 28, 2025 (Da29–45). There is no indication from

the Court's opinion in Tynes that any of the defendants therein filed more than one motion for summary judgment.

Second, as Plaintiffs do here, the plaintiffs in Tynes argued that the delay in the service of their expert reports was caused by a delay in the completion of a particular deposition. 408 N.J. Super. at 166. In the present matter, the deposition of Dr. Parcells was completed on August 15, 2024 (Pa048), six full months prior to the ultimate deadline for Plaintiffs' expert reports (Pa060). While Plaintiffs argue that the deposition of Dr. Ghusson was also required before expert review could be conducted, that deposition was completed on December 16, 2024 (Pa057 –058)—two months prior to Plaintiffs' expert report deadline—and, more importantly, Dr. Krieger did not even mention Dr. Ghusson in the body of his expert report, thereby indicating that her deposition was ultimately not even relevant to his opinions against Dr. Parcells (Pa079 –086).

Thus, as in Tynes, Plaintiffs herein failed to provide "a convincing explanation as to why they could not produce their expert report[] as to the alleged liability of [Dr. Parcells] until after" Dr. Ghusson's deposition was completed. 408 N.J. Super. at 171. Plaintiffs also failed to provide a "convincing explanation" as to why six months was not enough time for Dr. Krieger to complete his expert report following the deposition of Dr. Parcells.

Third, in Tynes, the Court placed significant weight on "the age of the case and the extent to which the discovery end date has been extended." Ibid. Here, as in Tynes,

there was more than ample discovery time and multiple discovery extensions were provided by the trial court. Tynes had 1,585 days of discovery, id. at 172, whereas the present case, according to its online docket, had 1,185 days of discovery. Tynes had "several" discovery extensions, ibid.; the online docket of the present case similarly lists four discovery extensions. Two of those prior extensions were provided when the trial court denied Defendants' two prior motions for summary judgment and gave Plaintiffs more time to serve expert reports.

Fourth, the Tynes Court found that to permit the discovery extension requested by the plaintiffs therein for their own expert reports would have required significant additional discovery time for the service of defense expert reports and the completion of expert depositions. Ibid. The same is true here. In addition to its February 15, 2025 deadline for Plaintiffs' expert reports, the trial court's November 22, 2024 order also included an April 15, 2025 deadline for defense expert reports and a May 30, 2025 deadline for expert depositions (Pa060). Dr. Krieger's expert report is dated March 27, 2025 and was attached to Plaintiffs' opposition to Defendants' motion for summary judgment filed on that date (Pa079). Defendants would have required a significant extension of the April 15, 2025 deadline for their expert reports to properly respond to Dr. Krieger's report. The deadline for expert depositions and, ultimately, the discovery end date itself also would have required extensions by at least the amount of time by which Dr. Krieger's report was late.

Fifth, the Tynes Court noted the prejudice to the defendants therein caused by exactly these sorts of discovery delays. The same is certainly true in the present case. As in Tynes, the present case—which was initiated in 2021—has been pending for several years and Defendants have a strong interest in seeing the matter concluded. Indeed, the online docket confirms that this matter had previously been scheduled for trial on February 18, 2025, before such date was adjourned on December 16, 2024 due to the fact that discovery had been extended again.

Further, as in Tynes, additional delays would have compromised Defendants' ability to defend this lawsuit. The Tynes Court noted that the memories of witnesses deposed in 2004 had already begun to fade with respect to events that took place in 2002. 408 N.J. Super. at 172. In the present matter, all of the treatment at issue by Dr. Parcells took place in 2019 (Pa081–083). Summary judgment was granted by the trial court in Tynes in 2008, six years after the treatment in question therein. Id. at 162-63; 167. Here, summary judgment was granted on March 28, 2025, which was also approximately six years after the treatment in question (Pa100).

Ultimately, therefore, this matter is controlled by Tynes. All of the key factors supporting the Court's decision in Tynes are also present herein. Plaintiffs herein, like the plaintiffs in Tynes, "unilaterally elected not to comply with the trial court's [orders] and chose not to serve expert reports by the date required by the order." 408 N.J. Super. at 171. Arguably, the facts of the present matter are even more egregious than those of

Tynes for two reasons: 1) Plaintiffs had already failed to meet multiple expert report deadlines, pursuant to which Defendants filed *three* motions for summary judgment, not just one, on this very issue, and 2) Plaintiffs, unlike the plaintiffs in Tynes, did not even move for an extension of their expert report deadline, as required by R. 4:24-1(c).

Of final note, Plaintiffs herein argue that Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), is controlling in this matter, along with "myriad other cases" that they do not name or cite. The plaintiffs in Tynes also relied upon Ponden. The Tynes Court rejected the plaintiffs' reliance on Ponden, explaining that "[t]he facts in this case are distinctly different from those in Ponden[,]" in which 1) the case had only been pending for about a year when the defendant moved for summary judgment, 2) discovery had only been extended once, and 3) "the plaintiff had been reasonably diligent in complying with the court's discovery orders." 408 N.J. Super. at 174. In fact, the plaintiff in Ponden actually served her expert report within the timeframe set forth in the trial court's order. Ibid.

As was the case in Tynes, the facts of the present case are nothing like those in Ponden, given that the present case was pending for several years when Defendants' motion for summary judgment was granted, discovery had already been extended four times, and Plaintiffs had failed to meet every deadline for expert reports that the trial court had set in multiple orders, resulting in three successive summary judgment motions filed

by Defendants. The present case is nothing like Ponden but, instead, is strikingly close to Tynes.

Tynes, alone, requires summary judgment on behalf of Defendants. Plaintiffs, however, also violated a number of other Rules of Court beyond R. 4:24-1(c). These violations further support summary judgment.

ii. R. 4:46

Second, Plaintiffs violated multiple provisions of R. 4:46. They violated R. 4:46-1, which requires that "opposing affidavits, certifications, briefs, and cross-motions for summary judgment, if any, shall be served and filed not later than 10 days before the return date" of the motion. The return date of the motion was March 28, 2025 (Pa069). Plaintiffs filed their opposition at 6:25 p.m. on March 27, 2025, less than a single day before the motion was to be argued (Da48 – 51). Pursuant to R. 4:46-1, Plaintiffs' opposition was due on March 18, 2025. They did not request an adjournment of the motion.

The trial court was not obligated to consider Plaintiffs' late opposition or the late expert report of Dr. Krieger attached to it. In Shulas v. Estabrook, 385 N.J. Super. 91, 102 (App. Div. 2006), this Court explained that, after the passage of the discovery end date, the "plaintiff was prohibited from offering his late expert report in opposition to defendants' motion for summary judgment and from offering expert testimony at the time of trial." While the discovery end date itself had not yet passed when Plaintiffs filed their

late opposition to Defendants' motion in the present case, the deadline for service of Plaintiffs' expert reports—which was arguably the equivalent of the discovery end date—had passed approximately a month and a half earlier (Pa060).

Therefore, as in Shulas, Plaintiffs herein should be prohibited from offering their late expert report in opposition to Defendants' motion. Indeed, Plaintiffs' attempt to oppose Defendants' motion for summary judgment by way of a late expert report herein was arguably more egregious than the Shulas plaintiff's attempt, as the Shulas plaintiff provided the late report in question on August 5, 2005—which was more than a month prior to the September 9, 2005 return date of the defendants' motion for summary judgment therein. 385 N.J. Super. at 93-94. Here, Plaintiffs provided Dr. Krieger's report with their opposition not a month prior to the return date but, rather, on the evening prior to the return date of the motion (Pa079–086).

Plaintiffs also violated R. 4:46-2(b) by failing to "file a responding statement either admitting or disputing each of the facts in the movant's statement." Paragraph seven of the statement of facts submitted in support of the motion for summary judgment simply states that "Plaintiff has filed [sic] to serve any expert reports" (Da34). Pursuant to R. 4:46-2(b), Plaintiffs' failure to file a responding statement to Defendants' statement of facts deemed its paragraphs to be admitted, including paragraph seven.

iii. R. 4:17-4(a) and–(e)

Third, Plaintiffs violated R. 4:17-4(a) and–(e). R. 4:17-4(a) provides that, if an interrogatory "requests the name of an expert . . . physician of the answering party or a copy of the expert's . . . report, the party shall comply with the requirements of" R. 4:17-4(e). That provision, in turn, provides that if an interrogatory "requires a copy of the report of an expert witness . . . as set forth in R. 4:10-2(d)(1), the answering party shall annex to the interrogatory an exact copy of the entire report or reports rendered by the expert." R. 4:17-4(e). Further, if a party answers such interrogatory by stating that the report(s) "will be supplied thereafter," the propounding party may "move for an order of the court fixing a day certain for the furnishing of that information by the answering party." Ibid.

Form A interrogatory #23 requires copies of the reports of expert witnesses. Plaintiffs violated R. 4:17-4(a) and –(e) by failing to amend their answers to interrogatories to include Dr. Krieger's report and by failing to ever actually serve that report on Defendants. Additionally—and, perhaps, most significantly—the trial court had already entered an order "fixing a day certain for the furnishing of" Plaintiffs' expert reports pursuant to R. 4:17-4(e). That "day certain" was February 15, 2025 (Pa060). Plaintiffs violated R. 4:17-4(e) by failing to provide Dr. Krieger's report by that "day certain."

This Court has described the "obvious purpose" of the disclosure requirement of R. 4:17-4(e) as meant "to promote fair advocacy and to discourage gamesmanship or unfair surprise at trial." Rice v. Miller, 455 N.J. Super. 90, 105 (App. Div. 2018). An expert report not served but, instead, attached as an exhibit to opposition to a motion for summary judgment—the evening before oral argument on that motion—constitutes "gamesmanship or unfair surprise." This is especially true where, as here, the motion in question was the third motion for summary judgment filed by Defendants for Plaintiffs' failure to serve an expert report critical of them by the deadline for same (Da1 –14, 15 – 28, 29–45).

iv. R.4:17-7

Fourth, Plaintiffs violated R. 4:17-7, which states that if any party who previously provided answers to interrogatories "thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period." Plaintiffs never provided amended answers with respect to Dr. Krieger's expert report, whether before or after the return date of Defendants' motion for summary judgment. Discovery ended on May 30, 2025 (Pa060). To this day, Dr. Krieger's report has never actually been served by Plaintiffs.

Additionally, although the discovery end date was May 30, 2025, Plaintiffs' expert reports, as noted above, were due by February 15, 2025 (Pa060). Pursuant to R. 4:17-7, the report of Dr. Krieger was provided in opposition to Defendants' motion after the

discovery period for same ended, thereby requiring Plaintiffs to submit the certification of due diligence required by R. 4:17-7 for late amendments. The certification must set forth that "the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date"—or, in this case, the deadline for Plaintiffs' expert reports. R. 4:17-7.

Plaintiffs never provided that certification. R. 4:17-7 expressly states that, "[i]n the absence of said certification, the late amendment shall be disregarded by the court and adverse parties."

v. R. 4:23-2(b)

Fifth, R. 4:23-2(b) provides courts with remedies in the event that "a party fails to obey an order to provide or permit discovery." Plaintiffs plainly violated the trial court's November 22, 2024 order by submitting an expert report with a late motion opposition nearly a month and a half after the February 15, 2025 deadline for service of their expert reports (Pa060). R. 4:23-2(b)(3) permits the entry of an "order . . . dismissing the action or proceeding or any part thereof with or without prejudice." While the trial court's order was a summary judgment order entered pursuant to R. 4:46, not an order for dismissal pursuant to R. 4:23-2(b)(3), the trial court would have also been within its discretion had it dismissed the complaint, with prejudice, pursuant to the latter provision. Indeed, Defendants' motion was already the third motion for summary judgment they had filed on the same issue. The first two motions were denied. The trial court was justified in

granting the third motion, noting that it was "outrageous how long this case has gone on" (T12:23 –13:10).

Among Plaintiffs' chief arguments is that dismissal of their claims against Defendants on summary judgment was too drastic a remedy, with less drastic sanctions available to the trial court. Plaintiffs did not suggest any such alternative sanctions beyond imposing the cost of Defendants' deposition of Dr. Krieger upon Plaintiffs or otherwise fining Plaintiffs' counsel. Such sanctions would have been essentially inconsequential.

R. 4:23-2(b)(3) confirms that the sanction of dismissal with prejudice is appropriate, notwithstanding that the present appeal involves a motion for summary judgment, not a motion to dismiss for failure to comply with an order. Case law instructs that dismissal with prejudice, whether via summary judgment or otherwise, is appropriate in scenarios exactly like the one presented here on appeal. Tynes is a perfect example: summary judgment, with prejudice, was affirmed due to the plaintiffs' inability to provide a timely expert report or support their application to extend discovery.

Rivers v. LSC Partnership, 378 N.J. Super. 68, 74-75 (App. Div.), cert. denied, 185 N.J. 296 (2005), is similarly instructive. The plaintiff's new counsel in Rivers moved to extend discovery, in part because prior counsel had failed to obtain an expert report; the trial court denied the motion, finding that "there had been 512 days of discovery" and "incomplete discovery and substitution of counsel alone did not constitute 'exceptional

circumstances.'" Ibid. The defendants then moved for summary judgment, based partially on the plaintiff's lack of expert support. Id. at 75. This Court affirmed the trial court's denial of the plaintiff's motion to extend discovery and its entry of summary judgment in favor of the defendants, stating that plaintiff's counsel "failed to exercise due diligence during the extended discovery period." Id. at 82. The Court refused "to second-guess the motion judge and subject defendants to further costs and unnecessarily prolong [the] litigation by further extending the discovery period." Id. at 82-83.

While Rivers was decided pursuant to the "exceptional circumstances" standard, id. at 82, that standard arguably applied herein, as a trial date was scheduled for February 18, 2025 before it was adjourned by the trial court on December 16, 2024. Trial had not yet been rescheduled at the time that Defendants' motion for summary judgment was decided on March 28, 2025. Nevertheless, given that a trial date had previously been fixed in this case and the "exceptional circumstances" standard of R. 4:24-1(c) applies "after an arbitration or trial date is fixed," the "exceptional circumstances" standard arguably would have applied to any motion to extend discovery filed by Plaintiffs during the time period in question.

Ultimately, regardless of whether the "good cause" standard, which applied in Tynes, or the "exceptional circumstances" standard, which applied in Rivers, was applicable here, it is clear that dismissal with prejudice on summary judgment was an appropriate—indeed, necessary—remedy in the present case. Plaintiffs had already

disregarded multiple orders setting deadlines for the service of their expert reports. The facts of the present case track almost exactly with those of Tynes, in which the same remedy was provided by the trial court as here.

vi. R. 4:10-2(d)(1)

Sixth, Plaintiffs violated R. 4:10-2(d)(1), which permits a party to require another party "to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness," by failing to disclose Dr. Krieger's name and address as required by Uniform Interrogatories, Form A, which were served on Plaintiffs. Form A interrogatory #23 requires this disclosure. Plaintiffs failed to amend their answers to Form A interrogatories and failed to serve Dr. Krieger's expert report on Defendants, which counsel for Plaintiffs admitted during oral argument on March 28, 2025 (T9:14 – 10:5). Indeed, to this day, Plaintiffs have never served Dr. Krieger's report, having instead only attached it as an exhibit to their opposition to the motion for summary judgment (T9:17-22). The ability of the defense to challenge Dr. Krieger's qualifications, which will undoubtedly be done, has been completely cut off as a result of the plaintiff's conduct in this case.

v. Concluding Remarks

As set forth above, Plaintiffs violated numerous Rules of Court in attempting to oppose a motion for summary judgment the evening before its return date, by way of an expert report that has still never been served on Defendants. The case law discussed

above makes clear that summary judgment, with prejudice, is the appropriate remedy. In strikingly-similar circumstances, this Court affirmed the trial court's grant of summary judgment in Tynes. This Court also decided similar issues in the same manner in both Rivers and Shulas.

Finally, on appeal, Plaintiffs also argue that 1) the sins of counsel should not be visited on their clients and 2) our courts have a strong preference for resolving disputes on their merits. Briefly, these arguments fail to appreciate this Court's decisions in Tynes, Rivers, and Shulas. Plaintiffs fail to recognize that errors of the exact kind present in this case have warranted the with-prejudice dismissal of other cases decided by this Court.

Defendants filed three motions for summary judgment because Plaintiffs failed to timely serve an expert report critical of Defendants on three separate occasions. In the first two instances, the trial court excused counsel's delay, extended discovery, and permitted the case to go forward on its merits. Eventually, though—as illustrated by the case law discussed in this section—a point is reached at which the sanction of dismissal becomes necessary. Here, after Plaintiffs disobeyed multiple orders of the trial court, summary judgment was finally granted. For all of the reasons set forth above, the trial court's decision was correct. This Court should affirm the trial court's order.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Appellate Division deny Plaintiffs' appeal and affirm the trial court's entry of an order dismissing the complaint on summary judgment, with prejudice.

Respectfully submitted,
s/ Jack E. Potash
JACK E. POTASH, ESQ.

Dated: September 8, 2025

Plaintiffs CELIA C. FERNANDEZ AND LUIS R. FERNANDEZ, HER HUSBAND vs. Defendants ALEXIS PARCELLS, M.D., KARYNA NEYRA, M.D., NOHA GHUSSON, M.D., MARJUT KOKKOLA-KORPELA, M.D., SPIRO PLASTIC SURGERY, LLC, INFECTIOUS DISEASE CENTER OF NEW JERSEY, LLC, ST. BARNABAS MEDICAL CENTER, RWJ BARNABAS HEALTH, INC., JOHN AND/OR JANE DOES, M.D., "A" THROUGH "Z" (FICTITIOUS NAMES AND PRESENTLY UNKNOWN), JOHN AND/OR JANE ROES, "A" THROUGH "Z" (FICTITIOUS NAMES AND PRESENTLY UNKNOWN), AND ABC CORPORATIONS "A" THROUGH "Z" (FICTITIOUS NAMES USED TO DESCRIBE UNKNOWN DEFENDANTS) INDIVIDUALLY, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2949-24 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY Docket No. ESX-L-6145-21 SAT BELOW: Hon. Robert H. Gardner, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS CELIA C. FERNANDEZ AND LUIS R. FERNANDEZ, HER HUSBAND

JAVERBAUM WURGAFT HICKS KAHN
WIKSTROM & SININS
505 Morris Avenue, Suite 200
Springfield, NJ 07081
Telephone: (973) 379-4200
Attorney for Plaintiffs/Appellants

Eric G. Kahn, Esq. (021031993)
ekahn@lawjw.com
Of Counsel

Annabelle M. Steinhacker, Esq. (021332007)
asteinhacker@lawjw.com
On The Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

PRELIMINARY STATEMENT

This Appeal presents a critical question: Did the trial court abuse its discretion by *sua sponte* dismissing Plaintiff's Complaint with prejudice, not for lack of merit, but solely because her expert reports (served with two months of discovery remaining and no trial or arbitration dates set) were served a few weeks after a Court-Ordered deadline.

The expert report submitted by the Plaintiff clearly stands as an undeniable shield to Defendant's summary judgment. However, the Court below circumvented that unmistakable truth, opting to adjudicate the Motion on a procedural technicality – one that the defense did not even raise. The dismissal occurred despite the absence of any pending Motion to exclude the expert report and without any finding of prejudice to Defendants.

Had the trial court considered Plaintiff's expert report, it would have found genuine disputes of material fact precluding summary judgment. The court's failure to do so contravenes well-settled New Jersey precedent which strongly disfavors dismissals on procedural grounds where cases can be resolved on their substantive merits. See Matter of Corbo, 238 N.J. 246, 254–55 (2019). Dismissal with prejudice is an extreme remedy, reserved for cases in which no lesser sanction would suffice. See Zaccardi v. Becker, 88 N.J. 245, 253 (1982). Here, there was no Motion for sanctions, no showing of willfulness or bad faith, and no effort by Defendants to

claim prejudice or seek remedial relief. Instead, they now attempt to benefit from a procedural technicality that cuts off Plaintiff's right to be heard.

Defendants' responding brief offers no rebuttal to Plaintiff's legal arguments. Rather than engage the substance of this appeal, Defendants resort to character attacks on Plaintiff's counsel, mischaracterizing the record and elevating alleged "rule violations" over the merits of the case. Tellingly, Defendants do not even assert that no genuine issue of material fact exists concerning their deviation from the standard of care. Their silence speaks volumes.

Defendants' gamesmanship—seizing upon a technical misstep to avoid adjudication—undermines the integrity of the judicial process. New Jersey courts have long emphasized the need to ensure meaningful access to justice, particularly where, as here, a faultless client risks being disenfranchised by counsel's procedural oversight. See Lopez v. Swyer, 62 N.J. 267, 274 (1973). Because there was no prejudice to Defendants, and because the record supports adjudication on the merits, this Court should reverse the trial court's dismissal with prejudice and remand for a decision on the merits.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT WAS IMPROPER WHERE GENUINE ISSUES OF MATERIAL FACT EXISTED (Pa59 to Pa61; T:passim)

In the Motion below, Defendants sought Summary Judgment solely based on the absence of an expert report. Once Plaintiff cured that deficiency by submitting an expert opinion raising genuine issues of material fact, the motion should have been denied. Yet, the Trial Court inexplicably disregarded Plaintiff's expert submission, terminating the case on a purely procedural technicality—despite no objection from Defendants on timeliness or prejudice grounds. This was reversible error under established New Jersey law.

On Appeal, Defendants persist in avoiding the merits. Rather than engage with the substance of Plaintiff's expert report, Defendants pursue a flawed procedural argument and malign Plaintiff's Counsel's conduct, in an attempt to distract this panel from the core issues before the Court. These tactics cannot withstand scrutiny. Defendants cite no rule, statute, or binding precedent supporting the exclusion of an expert report where, as here, the report was submitted **prior to the end of discovery**, without any demonstrated prejudice, surprise, or misconduct.

The Appellate Division's decision in Baldyga v. Oldman, 261 N.J. Super. 259 (App. Div. 1992), is controlling. There, the Court reversed a trial court's refusal to consider a late-submitted expert report that was critical to defeating summary judgment, even though it was filed **after** discovery had closed and the case was nearing trial. The Court emphasized that rigid adherence to procedural deadlines must yield to the overriding principle that summary judgment should not be granted

where a genuine issue of material fact exists: "[A] trial is a search for the truth, and . . . judge should approach summary judgment motions with a predisposition to acting only with all reasonably determinable information in hand." Id. at 268 (quoting Sholtis v. Am. Cyanamid Co., 238 N.J. Super. 8, 17-18 (App. Div. 1989)).

The Appellate Division further stated:

> A trial judge has discretion to permit supplemental affidavits to be submitted on summary judgment motions. But this discretion should be exercised to increase, not limit, the likelihood that the information before the court reflects the facts that could be adduced at trial. Even as late as trial, previously undisclosed witnesses may be produced where the failure to supply the witness' "name in answers to interrogatories was not the result of a design to mislead and where there is no surprise or prejudice to the opposing party if the testimony is allowed." If such latitude is to be afforded an erring party even at trial, this principle is even more applicable to affidavits submitted in response to a summary judgment motion.

Id. at 17-18; see also Tyler v. N.J. Automobile Full Ins., 228 N.J. Super. 463 (App. Div. 1988)("It is a mistaken exercise of judgment to close the courtroom doors to a litigant whose opposition papers are late but are in the court's hands before the return date for a motion which determines the meritorious outcome of a consequential lawsuit."). Accordingly, the Appellate Division reinstated plaintiff's complaint holding "strict adherence to the schedules established by the court for discovery and presentation of opposing papers would take too great a toll." Baldyga, supra, 261 N.J. Super. at 268-69.

Here, Plaintiff's expert report was served **with more than two months of discovery remaining**—far earlier than in Baldyga. There was no trial date pending, and no showing of surprise or prejudice. There is no contention or support for any suggestion that the expert report was submitted with a design to mislead. Defendants have not argued such, and Plaintiff's counsel can attest that this was not her intent. In fact, there is no benefit to producing the expert report after its court-mandated deadline – what occurred here is simply the result of the challenges faced when Defendants delay production of their clients, leaving the expert truncated time to review materials and write a report. Defendants did not even object to the report's timeliness before the trial court. Their argument now, raised for the first time on appeal, lacks both factual and legal support.

In their papers and at the Motion hearing, Defendants did not articulate **any** prejudice as a result of the five-week delay in producing the report. At oral argument, counsel for Defendants stated, "I mean, I don't think it's fair to my client." (**T:10:25**). "Fairness", however, is neither indicative nor the standard for finding prejudice. Defendants simply ask this court to "close the courtroom doors" to Plaintiff because her attorney was a few weeks beyond the date set for submission of an expert report. Notably, the facts in Baldyga are more egregious than those herein. The plaintiff in Baldyga submitted her expert report **after the close of discovery and with a pending trial date**. In the case *sub judice*, Plaintiff submitted

her report with over two (2) months of discovery remaining. Further, there was no trial or arbitration dates pending. Pursuant to the Appellate Division in Baldyga, "the trial judge should have granted a reasonable postponement to receive the full report [] and any reply certification by defendant." Id. at 268. The Appellate Division in Baldyga found the trial court's actions to be reversible error.

The thrust of Defendants' assertion that Plaintiff's claim should not see the light of day, even though the Trial Court's case management Order stated that no further discovery extensions would be considered, is that Plaintiff should have requested a discovery extension pursuant to R. 4:24-1(c). See Defendants' Brief, p. 11. This contention is mystifying because discovery had not run at the time Plaintiff submitted her expert report. Defendants do not cite any case or rule indicating that the submission of an expert report provided after a court-ordered date but **before** the end of discovery requires a discovery extension. Plaintiff attached her expert report to her opposition to Summary Judgment, providing it to Defendants with over two (2) months of discovery remaining. The only applicable court rule would be R. 4:17-7 which requires an expert report be served "not later than 20 days prior to the end of the discovery period." R. 4:17-7. Plaintiff complied with this rule. Beyond it, there is no basis in our law requiring that Plaintiff move for an extension.

Defendants' reliance on Tynes v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159 (App. Div. 2009), is misplaced. Unlike here, the plaintiff in Tynes failed to serve

expert reports, misleading the court about when they learned of a key witness. In Tynes, plaintiff's counsel asserted that he did not learn of a key witness until January 14, 2008. The court, however, found that plaintiff's counsel learned of the witness as early as February 2006. Id. at 170. **Critically, the Appellate Division's decision hinged on counsel's lack of candor**. This is present herein.

Plaintiff in this case diligently sought Defendant Ghusson's deposition for over a year, with multiple notices and re-schedulings. She was finally produced on December 16, 2024. The expert report followed shortly thereafter, with ample time left in discovery. No party was prejudiced. No one was misled. The deposition was necessary to allow the expert to issue a complete and accurate opinion as to standard of care—precisely what Baldyga and Sholtis encourage.

Defendants also assert that the Appellate Division noted that the strategic decision to wait to depose a witness in Tynes until **after** the discovery end date, thus disregarding the case management order, was not convincing. Tynes, supra, 408 N.J. Super. at 170. Again, the facts are distinguishable. Plaintiff's counsel did not wait to depose Ghusson until **after** the discovery end date. As indicated above, Plaintiff's counsel was diligent in trying to obtain co-Defendant Ghusson's deposition and was successful in doing so **prior** to the end of discovery.[1]

---

[1] It should also be noted that, while Defendant Parcells was produced, after four notices, on August 15, 2024, the delays the trial court attributed to only Plaintiff were, in actuality, facilitated by the Defendants' own failure to produce their clients

Importantly, Plaintiff's counsel waited to produce her expert report because, in evaluating all of the doctor's testimony, **the expert was able to hone his opinion and exonerate most of the defendants in this case.** Medical malpractice requires an expert to evaluate all of the decisions and actions of the entire medical team in order to determine which medical professional deviated and which did not. Defendants disingenuously accuse Plaintiff's Counsel of not needing the deposition of Defendant Ghusson because Dr. Krieger did not mention her in his report. See Defendants' brief, p. 14. This unsupported, incorrect accusation misleads this Court. In point of fact, the purpose of accumulating all of the relevant medical documentation and testimony is to clarify where the malpractice occurred. Pursuant to Dr. Krieger's report, the buck stops with Defendants Parcells and Spiro Plastic Surgery, LLC.[2]

Moreover, Defendants' argument that Plaintiff should have produced her expert report prior to providing all the relevant medical information would compromise Plaintiff's expert at trial. Had he issued an opinion without a full record,

---

in a timely manner. All Defendants played a role in the need for additional discovery extensions. Plaintiff's production of her expert report five (5) weeks after the court-ordered deadline was the result of the cumulative effects of **all** parties' discovery delays. Defendants conveniently ignore this salient fact and so did the Trial Court.

[2] This is further supported by the fact that, after receiving Dr. Krieger's report, Plaintiff's counsel voluntarily released six (6) co-Defendants from the case by not opposing their Motions for Summary Judgment. In turn, this simplified the claims for the Trial Court effectuating our system's preference for judicial economy.

Defendants would have devoured him on cross-examination. Defendants, who are responsible for some of the delays in discovery, ask this Court to force Plaintiff into presenting her case to their advantage. Such maneuvering smacks of gamesmanship.

Defendants also argue to this Court that the Tynes panel found the length of discovery to be significant. In support thereof, Defendants indicate that the discovery period in Tynes was 1,585 days, and defendants filed one Summary Judgment motion. In the case herein, Defendants argue that the 1,185 days of discovery and their three (3) Summary Judgment motions indicate that "[a]rguably, the facts of the present matter are even more egregious than those in Tynes." See Defendants' Brief, p. 16-17. The absurdity of these arguments cannot be overstated.

First, the discovery period in Tynes was over four (4) years long. The discovery period in the case *sub judice* was just over three (3) years. In other words, the discovery period in Tynes was 33% longer than the case herein. To suggest that there is some equivalency between the two is hyperbolic and ingenuine.

Second, the idea that the number of filed Summary Judgment motions has any bearing on whether an attorney is dilatory is beyond the pale. There is no correlation between the number of summary judgment motions a defendant chooses to file and an opposing counsel's diligence in pursuing discovery. A defendant could (and often does) file a Summary Judgment motion immediately after answering. Over the course of discovery, a defendant could file any number of Summary Judgment

motions. Just because a Summary Judgment motion is filed does not mean it is ripe or has merit. It is all too common that defendants file the motion just to have it denied as premature.[3] Accordingly, the number of motions filed does not somehow verify a lack of urgency on behalf of plaintiff's counsel. Such an argument lacks foundation and support.

Defendants also argue that they "would have required a significant extension of the April 15, 2025 deadline for their expert reports to properly respond to Dr. Krieger's report." See Defendants' Brief, p. 15. While Plaintiff has always taken the position that Defendants could take as much time as needed to respond, the reality of the Case Management Order is that Defendants were only owed a five (5) week extension. There can be very little argument that five weeks is anything but minimal in the life of a litigation.

Finally, Defendant argue, **for the first time**, that, like the defendants in Tynes, they would be prejudiced by the passage of time because the memory of witness' might start to fade. **This argument was never raised below.** Defendants' new claim of prejudice—i.e., fading witness memory—is speculative and unsupported by the record. It was never raised before the Trial Court and cannot justify dismissal now. Moreover, any such delay affects **both parties** equally. The only real prejudice here

---

[3] While Plaintiff makes no accusation against Defendants herein, the practice of filing unnecessary motions is fostered by the billing structure of many defense attorneys.

is to Plaintiff, who has now been deprived of her day in court despite having a qualified expert opinion supporting her claims.

POINT II

DEFENDANTS' RECITATION OF COURT RULES IN AN ATTEMPT TO IMPUGN PLAINTIFF'S COUNSEL'S REPUTATION DOES NOT ADDRESS THE ULTIMATE ISSUES BEFORE THIS COURT (Pa59 to Pa61; T:passim)

Defendants devote eight (8) pages of their brief to recounting Plaintiff's counsel's alleged rule violations. Notably, many of Defendants' complaints are not supported by law or fact. For example, Defendants rely upon Shulas v. Estabrook, 385 N.J. Super. 91 (App. Div. 2006) for the asserted proposition that "after the passage of the discovery end date, the 'plaintiff was prohibited from offering his late expert report in opposition to defendants' motion for summary judgment." See Defendants' Brief, p. 18. Notably, Shulas can be distinguished from the case within based on Defendants' own proffered summary. In Shulas, the plaintiff served his expert report **after** the discovery end date had passed. That is distinctly different than the case herein where Plaintiff served her expert report with more than two (2) months of discovery remaining. Defendants conveniently ignore this pertinent fact.

Further, in Shulas, the issue before the court was whether the trial judge erred in voluntarily dismissing an action and permitting the plaintiff to refile an almost identical action in an attempt to circumvent the discovery end date. Id. at 93. This is

simply not comparable to the facts within. In Shulas, the plaintiff's counsel was essentially accused of gamesmanship to gain an advantage. **There is no such allegation herein because Plaintiff's counsel has not engaged in any ethically questionable legal maneuvers to gain an advantage.** Producing her expert report five (5) weeks after the court-issued deadline is not commensurate with a counsel dismissing his case with the intention of evading a discovery end date. To suggest that this case is binding as precedent for the facts of the case *sub judice* is more than a stretch. In point of fact, Baldyga, supra, which is more analogous to the case within, holds that a late submission of an expert report should be considered if it will establish a "circumstantial link between defendant and the alleged injury. . . .Under these circumstances, the trial judge should have granted a reasonable postponement to receive the full report . . . [and] the exclusion of Dr. Feldman's report was in error." Baldyga, supra, 261 N.J. Super. at 268.

Defendants' remaining arguments all attempt to portray Plaintiff's Counsel as dilatory and irresponsible, but a review of the court rules cited by Defendants shows that they are simply trying to malign and impugn her reputation to prejudice this Court. For those reasons, Plaintiff will only deign to briefly address Defendants' "throw it at the wall and see what sticks" approach to this appeal.

R. 4:17-4 addresses the form, service and time for supplying Answers to Interrogatories. Defendants complain that Plaintiff did not name her expert in her

Answers to Interrogatories which were served in August of 2022 before any depositions or discovery had been exchanged. R. 4:17-4 does not contemplate any sanction for not including information that is unavailable to a party at the time of production. In point of fact, R. 4:18-1(a) indicates that a party need only produce discovery in its "possession, custody and control." At the notably early stage that Plaintiff produced her Answers to Interrogatories, Plaintiff's counsel did not know what expert would be used to support her claims. This is fairly standard.

Next, Defendants argue that Plaintiff should have amended her Anwers to Interrogatories with her expert report pursuant to R. 4:10-2(d)(1) and supplied a certificate of due diligence with it pursuant to R. 4:17-7. Obviously, given that Plaintiff produced the report in response to a Summary Judgment motion that was granted, dismissing her case with prejudice, there was no opportunity to amend. Moreover, Defendants' argument that Plaintiff should have attached a Certification of Due Diligence is simply incorrect. Plaintiff filed her expert report with more than two (2) months of discovery remaining, well within the twenty (20) days prior to the end of discovery required by R. 4:17-7. A certificate of due diligence is not required under our facts.

Defendants next argue that R. 4:23-2(b) permits a court to sanction a party for not abiding by a prior order. Defendants then complain to this Court that Plaintiff never proffered any lesser sanctions rather than dismissal to the trial court. The rules

do not require a Plaintiff to do so; nevertheless, Plaintiff's Counsel would be more than willing to conform to a sanction crafted by the court. Regardless, the motion before the Trial Court was for Summary Judgment. Defendants did not move to bar Plaintiff's expert report for being five (5) weeks late making an argument with regard to R. 4:23-2 misplaced and superfluous. In point of fact, the Trial Court *sua sponte* decided to disregard Plaintiff's expert report which, had the it been considered, would have raised genuine issues of material fact requiring denial of the Motion.

Defendants' application of Rivers v. LSC Partnership, 378 N.J. Super. 68 (App. Div.), cert. denied,185 N.J. 296 (2005) is also misplaced. In Rivers, after several motions to amend, the trial court's refusal to further extend discovery, and plaintiff's counsel's failure to respond to a summary judgment motion for one defendant, new counsel for plaintiff was obtained. The new plaintiff's counsel moved to amend the complaint and extend discovery by 120 days. At issue in the appeal was whether the court should have applied the exceptional circumstances test in denying the motion to extend. Id. at 73-74. Notably, this case is inapplicable herein because Plaintiff's counsel never moved to extend discovery as **discovery had not run**. Even if it had, Defendants concede there was no trial date listed at the time Plaintiff's Counsel produced the expert report. Accordingly, at most, Plaintiff's counsel would have had to show "good cause". Rivers is inapposite to the facts within.

Defendants' diversionary arguments ignore the meat of this appeal. Plaintiff's expert report was submitted with two (2) months of discovery remaining, and no arbitration or trial dates pending. The report causally related Defendants to Plaintiff's injuries. Equitable doctrines favored by our court system recognize that the "enforcement of procedural rules must always be exercised with an eye 'to secure a just determination' and maintain 'fairness in administration' of cases; not solely to secure a completed disposition." State v. Lawrence, 445 N.J. Super. 270 (App. Div. 2016)(quoting R. 1:1-2). For all the forgoing reasons, the Trial Court's dismissal with prejudice should be reversed, and Plaintiff should be permitted to have her medical malpractice action determined on the merits.

CONCLUSION

For the forgoing reasons, it is respectfully requested that the Trial Court Order granting Defendants' Summary Judgment Motion and Dismissing Plaintiff's Complaint with prejudice be reversed, and that Plaintiff be permitted to proceed to trial.

Respectfully submitted,

Eric G. Kahn

Dated: October 14, 2025