GARY A. MATUSOW, Plaintiff-Appellant, v. INSPIRA HEALTH NETWORK, INC. a/k/a SOUTH JERSEY HEALTH SYSTEM, INC., SOUTH JERSEY HOSPITAL, INC., GLADWYN D. BAPTIST, M.D., DAVID S. SHIELDS, M.D., THOMAS F. MITROS, M.D. and STEVEN C LINN, M.D., Defendants-Appellees.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003797-21 Civil Action Sat Below: Hon. James R. Swift, J.S.C. Superior Court of New Jersey Law Divison: Cumberland County Docket No. CUM-L-0216-19

BRIEF OF APPELLANT GARY A. MATUSOW

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PRELIMINARY STATEMENT

In a case involving the deceptively simple question of whether the Defendants violated a settlement agreement, the trial court erred on multiple levels when granting summary judgment in Defendants' favor. Its ruling disregarded the express language of the agreement, speculated wildly beyond the facts actually in the record, and ignored both the evidence before it and the unambiguous terms of a governing statute. Further, rather than determining whether there were any facts in dispute and then applying the law, the trial court appears to have substituted its own judgment for what in the agreement and then imposed its own idea of what Plaintiff-Appellant Gary A. Matusow "deserved." Upon reviewing the evidence and the law *de novo*, this Court should reverse the trial court's Order granting summary judgment and remand the matter for further proceedings.

PROCEDURAL HISTORY

On April 8, 2019, Plaintiff-Appellant Gary A. Matusow ("Dr. Matusow") filed the present action in the Superior Court of New Jersey, Cumberland County, against Inspira Health Network, Inc. a/k/a South Jersey Health System, Inc., South Jersey Hospital, Inc., Gladwyn D. Baptist, M.D., David S. Shields, M.D., Thomas F. Mitros, M.D. and Steven C Linn, M.D. (collectively, the "Hospital Defendants"). [Pa029-34[1]]. Dr. Matusow contended, among other things, that the Hospital Defendants had breached a prior settlement agreement by reporting certain information to the New Jersey Division of Consumer Affairs. The Hospital Defendants filed their Answer on June 20, 2019. [Pa035-40].

On May 11, 2022, the trial court signed and entered a Consent Order submitted by the parties allowing the Hospital Defendants to file a motion for summary judgment with certain documents relating to that motion filed under seal. [Pa041-42]. The stated rationale for this Order was the fact that the motion would include (among other things) reports made to the New Jersey Division of Consumer Affairs, which are considered confidential under New Jersey law. [Pa041-42].

On May 12, 2022, the Hospital Defendants filed a Motion for Summary Judgment. [Pa043-44]. Dr. Matusow filed an opposition to the Motion on June 14,

[1] "Pa___" refers to Plaintiff-Appellant's Appendix, filed herewith.

2022. [Pa295-317]. The Hospital Defendants then filed their reply papers on June 20, 2022. [Pa318-376].

On June 23, 2022, oral argument on the Hospital Defendants' Motion was held before the Hon. James R. Swift, J.S.C. At that hearing, Judge Swift granted summary judgment in the Hospital Defendants' favor, rendering an opinion from the bench. [T27-20 to 32-4[2]]. The Order granting summary judgment was entered on June 23, 2022. [Pa001-02].

Dr. Matusow filed his Notice of Appeal on August 10, 2022. [Pa003-08]. On the Appellate Division's instructions, Dr. Matusow filed an Amended Notice of Appeal correcting the name of one of the Hospital Defendants, on October 27, 2022. [Pa0016-28].

[2] Cites to "T__" refer to the transcript of the June 23, 2022 oral argument and decision on the Defendants' Motion for Summary Judgment.

STATEMENT OF FACTS

A. The Parties

Appellant Dr. Matusow is a physician with a specialty in gastroenterology. [Pa046; Pa106]. He is in the business of providing gastroenterology medical treatment to patients, as well as providing endoscopic procedures. [Pa106; Pa109].

South Jersey Health System, Inc., now known as Inspira Health Network, is a not-for-profit health system serving the southern counties of New Jersey. [Pa046]. South Jersey Hospital, Inc., now known as Inspira Medical Centers, Inc., is a hospital licensed by the New Jersey Department of Health and comprises part of the Inspira Health Network. [Pa046]. All of these entities will be referred to collectively as "the Hospital." The other Hospital Defendants are physicians with administrative responsibilities at the Hospital. [Pa106-108].

From the mid-1990s until approximately 2016, Dr. Matusow was a member of the medical staff of the Hospital and had staff privileges there. [Pa046; Pa110]. He also performed outpatient procedures at his own ambulatory surgical center. [Pa110].

B. Hospital Investigations And The 2008 Lawsuit

On June 4, 2007, Defendant Gladwyn D. Baptist, M.D. ("Dr. Baptist"), in his capacity as President of the Hospital's medical staff, convened an *ad hoc* committee to investigate several cases handled by Dr. Matusow that involved conscious

sedation.[3] [Pa190-191; Pa122-127]. In June of 2007, Dr. Baptist convened a second and distinct *ad hoc* committee to investigate complaints about Dr. Matusow's behavior in the workplace. [Pa200-201; Pa133-147]. In November of 2007, Dr. Baptist convened yet a third *ad hoc* committee to investigate Dr. Matusow's alleged failure to accurately complete his medical staff reappointment application. [Pa206; Pa150]. Even while these investigations were going on, Dr. Matusow continued to be re-appointed to the Hospital's medical staff. [Pa196; Pa210]. His privileges were not reduced or revoked during this time. [Pa204; Pa208].

On January 9, 2008, Dr. Matusow filed a lawsuit against the Hospital and various individual defendants in the New Jersey Superior Court, Cumberland County, bearing Docket No. CUM-L-38-08 ("the 2008 Lawsuit"). [Pa105-171]. In the 2008 Lawsuit, Dr. Matusow took issue with the investigations against him, the temporary removal of his clinical privileges, and other hostile actions by the various defendants. [Pa122-132] He also asserted the unfairness of the three investigations and *ad hoc* committee proceedings. [Pa122-127; Pa133-147]. Dr. Matusow alleged that the various defendants had engaged in a "witch hunt" and created a hostile work

[3] "Conscious sedation," as defined in N.J.A.C. 13:354A.3, is the administration of a drug or drugs in order to induce that state of consciousness in a patient which allows the patient to tolerate unpleasant medical procedures without losing defensive reflexes, adequate cardio-respiratory function and the ability to respond purposefully to verbal command or to tactile stimulation if verbal response is not possible as, for example, in the case of a small child or deaf person.

environment for him, and sought, among other things, injunctive relief and monetary damages. [Pa113; Pa122; Pa150; Pa152-170].

Meanwhile, in July 2008, the Hospital convened a fourth investigation of Dr. Matusow relating to his conscious sedation practices. [Pa212-217]. By letter dated December 12, 2008, the Hospital informed Dr. Matusow of its intention to revoke and suspend certain of his privileges and remove him from the medical staff. [Pa216-217].

Dr. Matusow then requested that the merits of the various allegations against him be adjudicated through the intra-Hospital Fair Hearing Process under the Hospital's Medical Staff Bylaws. [Pa052; Pa218-223]. A single Fair Hearing was convened, addressing all of the investigations and allegations against Dr. Matusow. [Pa048; Pa225-226]. Dr. Matusow disputed and vigorously defended against the allegations that gave rise to the investigations and the Fair Hearing. [Pa082].

C. The Settlement Agreement

On December 13, 2012, Dr. Matusow and the Hospital entered into a Settlement Agreement and General Release intended to resolve all of the investigations and allegations as well as the 2008 Lawsuit ("the Settlement Agreement"). [Pa045-46; Pa081-96]. At the time of the Settlement Agreement, the Fair Hearing process was still ongoing; in fact, Dr. Matusow had not yet finished his testimony. [Pa176; Pa177]. As a result of the Settlement Agreement, the Fair

Hearing process was ended without any determinations being made. [Pa186; *see also* Pa090]. No corrective action was taken against Dr. Matusow by the Hospital. [Pa235].

Under the Settlement Agreement, Matusow agreed to dismiss the 2008 Lawsuit with prejudice. [Pa082]. As consideration for dropping the 2008 Lawsuit, the Hospital and the various individual defendants agreed to several things [Pa085-88], including the following:

- The Hospital "shall grant Matusow Conscious Sedation ("CS") privileges," subject to certain conditions [Pa085-87];
- Dr. Matusow "will continue to retain CS privileges at the Hospital" [Pa088]; and
- The Settlement Agreement "fully resolves all of the Proposed Corrective Actions and other related Ad Hoc Proceedings and Fair Hearings involving Matusow." [Pa081-82; Pa090].

Neither Dr. Matusow's CS privileges or nor his other hospital privileges were revoked or suspended. [Pa235; Pa301]. Instead, under the terms of the Settlement Agreement, Dr. Matusow's use of CS privileges was subject to the condition that he not use those privileges at the Hospital. [Pa085-97; *see also* Pa186-187; Pa300]. The Hospital also agreed review his use of CS procedures elsewhere and determine whether to remove that condition in the future. [Pa085-87; *see also* Pa236]. The Settlement Agreement further specifically states that the Hospital makes "an

irrevocable commitment ... to grant such privileges to Matusow based upon his performance of CS" at other facilities.[4] [Pa086].

The Settlement Agreement also addresses reporting and disclosure issues with respect to Dr. Matusow's status at the Hospital. Section 3(e) states:

> The Hospital shall report the following to the National Practitioners Data Bank, and to all other circumstances where there is a reporting obligation:
>
> It was proposed that the practitioner be subject to corrective action for certain alleged clinical and behavioral issues. The hospital and the practitioner have agreed to resolve all matters and therefore no determinations were made by the Fair Hearing Committee with respect to the merits of such issues, and no corrective action was implemented.

[Pa087].

D. The Hospital Defendants' Improper Reporting

At some point in the spring of 2013, the Hospital Defendants decided that had a reporting obligation to the New Jersey Division of Consumer Affairs ("the DCA"). [*See generally* Pa247; Pa304-305]. On or about May 13, 2013, the Hospital submitted a Health Care Responsibility and Reporting Enhancement Form ("the DCA Form") to the DCA. [Ca001-03[5]]. The statements made on that form are the grounds for Dr. Matusow's present lawsuit and appeal.

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[4] In fact, Dt. Matusow continued to have privileges at the Hospital through approximately 2016. [Pa174].

[5] "CA___" refers to the Confidential Appendix, containing certain items filed under seal in the trial court, filed herewith.

On the DCA Form, Section B under "Additional Information" prompts the party filling out the Form to select a box that accurately describes "[t]he reportable action taken by the health care entity." Based on the terms of the Settlement Agreement, the Hospital could have and should have selected the box that reads as follows:

> ***Conditions or limitations placed on the exercise of clinical privileges or practice within the health care entity*** (including, but not limited to second opinion requirements, non-routine concurrent or retrospective review of admissions or care, non-routine supervision by one or more members of the staff, completion of remedial education or training).

[Ca003 (emphasis added)]. Instead, the Hospital checked the following boxes:

> Voluntary ***relinquishment*** by health care professional of any partial privileges or authorization to perform a specific procedure if:
>
> > The health care entity ***is reviewing*** the health care professional's patient care or reviewing whether, based upon its reasonable belief, the health care professional's conduct demonstrates an impairment or incompetence or is unprofessional, which incompetence or unprofessional conduct relates adversely to patient safety.

[*Id.* (emphasis added)].

However, as of May 13, 2013, when the DCA Form was signed and submitted to the DCA, the Hospital was no longer reviewing the allegations or Proposed Corrective Actions against Dr. Matusow. The Hospital Defendants had agreed that "all of the Proposed Corrective Actions and other related Ad Hoc Proceedings and Fair Hearings involving Matusow" were fully resolved and had ended with the

Settlement Agreement, signed in December 2012, some six months before the Hospital filed the DCA Form with the DCA. [Pa081-82; Pa090].

Further, under the terms of the Settlement Agreement, Dr. Matusow had not relinquished his CS privileges. Those privileges were subject to a condition under the terms of the Settlement Agreement, but Dr. Matusow still had them. [Pa085-88; Pa300-301]. In his deposition, Defendant Steven C. Linn, M.D. (Dr. Linn"), the Defendant who signed the DCA Form, acknowledged is a difference between relinquishing privileges at a hospital and having conditions set on the use of privileges. [Pa299]. Dr. Linn further confirmed that, pursuant to the Settlement Agreement, Dr Matusow had not relinquished his CS privileges, but merely had a condition placed on their use. [Pa237; Pa300].

The Hospital also failed to include the agreed-upon language from the Settlement Agreement stating that no determinations on the merits had been made as a result of the investigations and Fair Hearing process against Dr. Matusow. The Hospital instead erroneously stated on the DCA Form that the Hospital proposed that Dr. Matusow "be subject to corrective action for certain alleged ***criminal*** and behavioral issues." [Ca003 (emphasis added); *see also* Pa057; Pa251].

The Hospital submitted an Amended Form to the DCA on November 11, 2013 correcting the erroneous reference to criminal issues. [Ca004-06; *see also* Pa059; Pa251; Pa261]. However, this was the only correction made. [Ca004-06; Pa261].

Even the Amended Form continued to state (incorrectly) that Dr. Matusow had voluntarily relinquished his privileges and that the Hospital had recommended he be subject to corrective action, contrary to the Settlement Agreement. [Ca006; *see also* Pa268].

E. The Board of Medical Examiners' Investigation

As a result of the Hospital Defendants' submission of the DCA Form containing incorrect information, the New Jersey State Board of Medical Examiners ("the Board") acted. Specifically, in a subpoena dated August 27, 2013, the Board demanded all documents related to Dr. Matusow including all of the documents related to the allegations (or proposed Corrective Actions) that were the subject of the Hospital's investigations. [Pa264-265]. By letter dated February 4, 2014, counsel for Dr. Matusow advised the Board that the doctor had not relinquished his privileges and that the Hospital's reporting was inaccurate. [Pa267-69]. By that point, however, the damage had been done. The Board continued to investigate Dr. Matusow on the assumption that he had voluntarily relinquished his privileges at the Hospital. [Pa274-275; Pa277].

On October 28, 2016, Dr. Matusow voluntarily ceased practicing medicine pending the conclusion of the Board's investigation. [Pa278]. The investigation was resolved via a Consent Order on or about May 14, 2018. [Pa277-292]. Pursuant

to the Consent Order, among other things, Dr. Matusow's license to practice was suspended for a period of three years. [Pa279-280].

After Dr. Matusow completed various tasks required of him under the original Consent Order, he entered into a modified Consent Order with the Board on February 22, 2022. [Pa098-104]. Under the modified Consent Order, Dr. Matusow was permitted to return to solo medical practice, subject to the engagement of a "practice monitor" approved by the Board. [Pa100]. At the successful close of the period of practice monitoring set out in the modified Consent Order, Dr. Matusow may to petition the Board to request an unrestricted medical license. [Pa102; *see also* Pa187-188].

F. The Trial Court's Ruling

Dr. Matusow alleges that the Hospital Defendants breached the Settlement Agreement by improperly reporting false and inaccurate information, contrary to the agreed-upon language of the Settlement Agreement. In their Motion for Summary Judgment, the Hospital Defendants contended that they did not breach the Settlement Agreement because they were required to submit the DCA Form and because the information provided on the DCA Form was consistent with the agreed-upon language of the Settlement Agreement. In addition, the Hospital Defendants argued that they are immune from liability for their statements on the DCA Form.

The trial court's decision was rendered from the bench at the close of oral argument. [T27-20 to 32-4]. Judge Swift did not address the issue of the Hospital Defendants' legal immunity because he concluded that they did not breach the Settlement Agreement. [T27-20 to 32-4].

Judge Swift began by noting that, according to the Settlement Agreement, the Hospital was to report Dr. Matusow's status to the National Practitioner Data Bank as well as "all other circumstances where there is a reporting obligation." [T28-17 to -21]. He then found that the law required the Hospital to report whenever a healthcare practitioner "has a restriction placed upon their privileges at a hospital," [T28-22 to -25], and that this requirement applied in the case of the conditions on Dr. Matusow's exercise of his CS privileges set out in the Settlement Agreement. Judge Swift explained:

> You can call it what you want to call it, you can call it a voluntary relinquishment, you can call it a settlement, you can call it whatever you want, but, clearly, Dr. Matusow was stripped of his ability to use conscious sedation at the hospital as a result of this agreement. That was a limitation on his ability to practice at the hospital. The hospital has a reporting requirement consistent with State law, and – and consistent with this agreement. Because it says that they shall report where there is a reporting obligation. So I can't see how Dr. Matusow can in any way fault the hospital for reporting this to the DCA,

[T28-25 to T29-12].

Judge Swift also concluded that, even if the information on the DCA Form was inaccurate, that inaccuracy did not matter. Although the DCA Form incorrectly

stated that Dr. Matusow was investigated by the Hospital in connection with criminal, rather than clinical, issues, the Judge did not believe that this error had any adverse effect on Dr. Matusow. [T30-12 to -25]. Judge Swift also gave a great deal of weight to the fact that the Hospital corrected the DCA Form when the error was brought to its attention. [T31-1 to -12].

In concluding his oral opinion, Judge Swift stated:

> I see nothing wrong that the [Hospital Defendants] did. I think they did exactly what they were obligated to do under this agreement, and under law. And I see no basis whatsoever for a lawsuit in this case. I think it's borderline frivolous, to be honest with you, but that's a different issue altogether.

[T31-24 to T32-4].

LEGAL ARGUMENT

THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT IN THE HOSPITAL DEFENDANTS' FAVOR [T27-20 to T32-7]

The Appellate Division's review of the trial court's grant of summary judgment is *de novo*, using the same legal standard as the trial court. *See*, *e.g*., *Carl v. Johnson & Johnson*, 464 N.J. Super. 446, 453 (App. Div. 2020); *Avis Budget Grp., Inc. v. City of Newark*, 427 N.J. Super. 326, 337 (App. Div. 2012). Summary judgment is properly granted only if, viewing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact is in dispute. *R*. 4:46–2(c); *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995); *Carl*, 464 N.J. Super. at 453. The moving party bears the burden of affirmatively showing that no genuine factual dispute exists. *JPC Merger Sub LLC v. Tricon Enterprises, Inc*., 474 N.J. Super. 145, 170 (App. Div. 2022); *see also Judson v. Peoples Bank & Tr. Co*., 17 N.J. 67, 74 (1954) ("[A] party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.").

A genuine dispute of material fact exists if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. *R*. 4:46-2(c); *see also Grande v. Saint*

Clare's Health Sys., 230 N.J. 1, 24 (2017). Stated another way, the evidence must so one-sided that the moving party must prevail as a matter of law. *Petro-Lubricant Testing Lab'ys, Inc. v. Adelman*, 233 N.J. 236, 257 (2018); *Brill*, 142 N.J. at 533. As in the trial court, the Court's role "is merely to determine whether there is a genuine issue of material fact, but not to decide it." *JPC Merger Sub*, 474 N.J. Super. at 170, quoting *Fielder v. Stonack*, 141 N.J. 101, 127 (1995).

The trial court below did not hold the Hospital Defendants to their burden. Nor did it consider the facts in the light most favorable to Dr. Matusow and give him the benefit of all favorable inference, as *R*. 4:46-2(c) requires. Instead, in reaching the decision to grant summary judgment, the trial court overlooked evidence, ignored the plain language of the Settlement Agreement, and disregarded the terms of the governing statute and regulation. Given the statements made by Judge Swift during his oral opinion, this "overlooking" may well have been the result of a bias against Dr. Matusow.

A. The Trial Court Misapplied The Applicable Law And Incorrectly Concluded That Hospital Defendants Were Required To Report To The DCA [T28-22 to T29-12]

To determine whether the Hospital Defendants had an obligation to report the conditions on Dr. Matusow's CS privileges, the trial court had to interpret and apply a section of the Health Care Professional Responsibility and Reporting Enhancement Act (also known as "the Cullen Act"), N.J.S.A. 26:2H-12.2b, and its accompanying

regulations. On appeal, the Court owes no deference to the trial court's reading of a statute or regulation, or its application of that statute and regulation to the facts, but instead reviews the matter *de novo*. *See*, *e.g.*, *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."); *Cadre v. Proassurance Cas. Co*., 468 N.J. Super. 246, 257 (App. Div.) ("We owe no deference to the motion judge's legal analysis or interpretation of a statute."), *cert. denied*, 249 N.J. 338 (2021).

When interpreting a statute, the courts' goal is to give effect to the Legislature's intent. The best indicator of that intent is the language of the statute itself. *See*, *e.g.*, *W.S. v. Hildreth*, 252 N.J. 506, 518 (2023); *DiProspero v. Penn*, 183 N.J. 477, 492 (2005). Therefore, the words used in the statute should be given their ordinary meaning and significance, and all related provisions should be read together, in context. *W.S.*, 252 N.J. at 518; *DiProspero*, 183 N.J. at 492. A court should not "rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language." *O'Connell v. State*, 171 N.J. 484, 488 (2002); *see also W.S.*, 252 N.J. at 519; *DiProspero*, 183 N.J. at 492. In short, unless there is some fundamental ambiguity, courts are obligated to apply the statute as written.

Regulations are interpreted by courts in the same manner as statutes. *US Bank, N.A. v. Hough*, 210 N.J. 187, 199 (2012). As with a statute, the courts "cannot rewrite the regulation to achieve some other worthy purpose; [they] must enforce it as written, unless doing so would lead to an absurd result. *Id*. at 202.

The relevant section of the Cullen Act requires hospitals to notify the DCA in writing if a health care professional:

> ***voluntarily relinquishes any partial privilege or authorization to perform a specific procedure if***: (a) the health care entity ***is reviewing*** the health care professional's patient care or reviewing whether, based upon its reasonable belief, the health care professional's conduct demonstrates an impairment or incompetence or is unprofessional, which incompetence or unprofessional conduct relates adversely to patient care or safety; ***or*** (b) the health care entity, through any member of the medical or administrative staff, has expressed ***an intention to do*** such a review.

N.J.S.A. 26:2H-12.2b(a)(4) (emphasis added). No published New Jersey state or federal court cases have interpreted this particular section of the Cullen Act.

Similarly, the Cullen Act's implementing regulations require a health care entity to file a report with the DCA concerning a health care professional who "has clinical privileges granted by that health care entity .... if ... [t]he health care professional ***voluntarily relinquishes any partial clinical privilege or authorization to perform a specific procedure***" and the following conditions are met:

> i. Whether or not known to the health care professional, the health care entity ***is undertaking an investigation or a review*** of:

> (1) The quality of patient care rendered by the health care professional to determine if the care could have had adverse consequences to the patient;
>
> (2) Conduct by the health care professional that demonstrates an impairment;
>
> (3) Conduct by the health care professional that demonstrates incompetence that relates adversely to patient care or safety; or
>
> (4) Unprofessional conduct by the health care professional that relates adversely to patient care or safety; or
>
> ii. A body within the health care entity that has the authority to initiate an investigation that may lead to disciplinary action has expressed an intention, through any member of the medical or administrative staff, reflected in the records of the health care entity or expressed directly to the health care professional, to conduct such a review of the health care professional's patient care or conduct and the healthcare entity notifies the health care professional that the health care entity ***is conducting or intends to conduct*** the review or investigation.

N.J.A.C. 13:45E-3.l(a)(4) (emphasis added).

The trial court concluded that the Hospital Defendants were required to report under the Cullen Act and the applicable regulation. [T28-22 to T29-12]. This conclusion was in error for two reasons. First, the record contains clear evidence that Dr. Matusow's CS privileges at the Hospital were not "voluntarily relinquished" but merely had a condition placed on their use. Second, the Hospital was not presently conducting an investigation or review of Dr. Matusow at the time the report was made, nor did it intend to do so at that time, as required to create a reporting obligation under the Cullen Act and the implementing regulation.

With respect to the requirement that a physician's privileges have been "voluntarily relinquished," the trial court ignored the evidence in the record,

including the terms of the Settlement Agreement at issue. To "relinquish" something is to give it up voluntarily, usually in a permanent way. *See*, *e.g.*, Merriam-Webster Dictionary s.v. relinquish; *see also Country Chevrolet, Inc. v. N. Brunswick Twp. Plan. Bd.*, 190 N.J. Super. 376, 380 (App. Div. 1983) ("Waiver is traditionally defined as the voluntary relinquishment of a known right evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based."). Applying the plain meaning of the term, the Settlement Agreement and the testimony in the record do not show that Dr. Matusow voluntarily relinquished his CS privileges. The evidence shows that there was a condition placed on Dr. Matusow's use of his CS privileges, but ***not*** that he had given them up forever.

For example, the Settlement Agreement plainly states that the Hospital "shall grant Matusow Conscious Sedation ("CS") privileges" [Pa085] and that Dr. Matusow "will continue to retain CS privileges at the Hospital." [Pa088]. The Settlement Agreement further specifically states that the Hospital makes "an irrevocable commitment ... to grant such privileges to Matusow based upon his performance of CS" at other facilities. [Pa086].

That the Settlement Agreement placed a condition on Dr. Matusow's CS privileges, but did not remove them, is reinforced by the negotiated and agreed-upon disclosure language contained in that agreement. When required to report, the Hospital was supposed to report the following:

> It was proposed that the practitioner be subject to corrective action for certain alleged clinical and behavioral issues. The hospital and the practitioner have agreed to resolve all matters and therefore no determinations were made by the Fair Hearing Committee with respect to the merits of such issues, and no corrective action was implemented.

[Pa087]. If Dr. Matusow had "voluntarily relinquished" – that is, permanently given up – his CS privileges at the Hospital, the statement that "no corrective action was implemented" would make no sense. Reading the Settlement Agreement as a whole, it places conditions on Dr. Matusow's use of his CS privileges, and establishes conditions for his eventually having those conditions removed, but it does not remove them entirely and permanently. [Pa085-97; *see also* Pa186-187; Pa300].

Further, Dr. Linn testified that there was a difference between "voluntarily relinquishing" privileges and having conditions places on them. [Pa299]. He also agreed that Dr. Matusow continued to have CS privileges at the Hospital under the Settlement Agreement, subject to the condition that he did not use them at the Hospital until certain other conditions had been met. [Pa237]. Dr. Linn further testified that the exact phrasing of the conditions on Dr. Matusow's CS privileges in the Settlement Agreement was the subject of lengthy discussion and negotiation. [Pa236]. Witness testimony established that neither Dr. Matusow's CS privileges or nor his other hospital privileges were revoked or suspended. [Pa235; Pa301].

The trial court failed to give any weight at all to this undisputed evidence. Judge Swift concluded instead that having conditions placed on how Dr. Matusow

used his CS privileges was the same as giving them up entirely, disregarding all of the express statements in the Settlement Agreement to the contrary.

> You can call it what you want to call it, you can call it a voluntary relinquishment, you can call it a settlement, you can call it whatever you want, but, clearly, Dr. Matusow was stripped of his ability to use conscious sedation at the hospital as a result of this agreement. That was a limitation on his ability to practice at the hospital.

[T29-1 to -7]. In so finding, he overlooked entirely the clear statements throughout the Settlement Agreement that Dr. Matusow's CS privileges were limited, but not removed entirely. In particular, the Settlement Agreement expressly provides that the Hospital makes "an irrevocable commitment ... to grant such privileges to Matusow based upon his performance of CS" at other facilities. [Pa086]. Judge Swift paid no attention to this language at all. This blithe dismissal of the undisputed facts and the terms of the operative document that forms the grounds for the lawsuit was clearly in error.

The second error arises from a blatant misreading of the statutory and regulatory language. Both the Cullen Act and the implementing regulation contain a temporal component. The Cullen Act requires reporting to the DCA only when the physician voluntarily relinquishes privileges ***and*** "the health care entity ***is undertaking an investigation or a review***." N.J.S.A. 26:2H-12.2b(a)(4) (emphasis added). N.J.A.C. 13:45E-3.l(a)(4) requires likewise reporting to the DCA only when the "the health care entity ***is undertaking an investigation or a review***" or when "the

health care entity ***is conducting or intends to conduct*** the review or investigation." (emphasis added). Applying the Cullen Act and the regulation as written, the reporting requirement is intended to apply to relinquishment of privileges as the result of investigations currently in process, not those that took place in the past and were already concluded.

The record showed, and the trial court even agreed, that the investigation(s) of Dr. Matusow by the Hospital ended with the signing of the Settlement Agreement on December 13, 2012. [T17-6 to -18, T25-27 to -25]. The Settlement Agreement plainly and unambiguously states that it "fully resolves all of the Proposed Corrective Actions and other related Ad Hoc Proceedings and Fair Hearings involving Matusow." [Pa081-82; Pa090]. Thus, the investigations and Fair Hearings surrounding Matusow ceased on December 13, 2012. Again, even the trial court agreed on this point, stating "[t]here ***was*** an investigation ongoing, ***and it ceased at the time that they made this agreement. I agree with that***." [T25-19 to -21].

However, the Hospital Defendants' report to the DCA did not take place on or before December 13, 2012, when the investigations and Fair Hearing proceedings were actually ongoing. Instead, the Hospital Defendants decided that they had an obligation to report to the DCA about the terms of the Settlement Agreement and

sent the DCA Form on May 13, 2013, ***five months*** after all investigations of Dr. Matusow had been fully resolved. [Ca003; *see also* Pa261].

When concluding that the Hospital Defendants had a duty to report to the DCA, the trial ignored this key evidence of timing. Instead, Judge Swift focused on the fact that the Settlement Agreement was signed and the investigations resolved on the same day. [T26-4 to -6]. However, neither the Cullen Act nor the regulation support the conclusion the Hospital Defendants had a duty to make a report ***five months after*** the investigations of Dr. Matusow were "fully resolved" by the Settlement Agreement. As such, the trial court's decision to grant summary judgment cannot stand up to *de novo* review, and should be reversed on this ground.

B. The Trial Court Overlooked Evidence That Hospital Defendants Reported Incorrect Information To The DCA [T27-20 to T32-7]

Even if the Hospital's duty to report to the DCA were triggered, the question of whether the false statements on the DCA Form breached the Settlement Agreement should have been submitted to the jury because it also involves disputed questions of fact.

First, there is no dispute that errors was made on the DCA Form. The language that was supposed to be used, as expressly stated in the Settlement Agreement, was as follows:

> It was proposed that the practitioner be subject to corrective action for certain alleged ***clinical*** and behavior issues. The hospital and the practitioner have agreed to resolve all matters and therefore

> no determinations were made by the Fair Hearing Committee with respect to the merits of such issues, and no corrective action was implemented.

[Pa087 (emphasis added)]. However, it is also undisputed that, in filing the report with the DCA in May 2013, the word "criminal" was used in place of the word "clinical" on the form. Even the Hospital Defendants concede that reference to "criminal" issues involving Dr. Matusow was wrong.

In addition, the DCA Form reports that Dr. Matusow "voluntarily relinquished his privileges," which is inconsistent with the terms of the Settlement Agreement as a whole. The Settlement Agreement plainly shows that there was a condition placed on Dr. Matusow's use of his CS privileges, but ***not*** that he had given them up forever. The Settlement Agreement includes multiple statements on this issue, including:

- The Hospital "shall grant Matusow Conscious Sedation ("CS") privileges" [Pa085];
- Dr. Matusow "will continue to retain CS privileges at the Hospital." [Pa088]; and
- The Hospital makes "an irrevocable commitment ... to grant such privileges to Matusow based upon his performance of CS" at other facilities. [Pa086].

Further, if Dr. Matusow had indeed "voluntarily relinquished" his CS privileges at the Hospital, then the negotiated and agreed-upon reporting language that "no corrective action was implemented" would make no sense. The statement to the contrary on the DCA Form was incorrect based on the very language the Hospital Defendants had agreed to.

The trial court, however, ignored all of this evidence. Judge Swift instead gave great weight to the fact that the Hospital Defendants corrected the DCA Form later. [T31-1 to -12]. He overlooked the undisputed evidence showing that the Hospital did not take any action to correct the errors until nearly six months later, in November 2013. [Pa059; Pa261; *see also* Pa251]. Even then, the only correction was removing the reference to criminal issues. [Pa261]. Even the Amended Form continued to state (incorrectly) that Dr. Matusow had voluntarily relinquished his privileges and had corrective actions taken against him. [Pa268].

Additionally, Judge Swift concluded that the errors on the DCA Form had no effect on the Board's decision to investigate Dr. Matusow. [T30-16 to -18]. This conclusion has no basis in the record. No evidence was presented to the trial court about the Board's reasoning for beginning an investigation. At most, there is the August 5, 2015 letter to Dr. Matusow from the Board stating that the investigation was premised on the report to the DCA that he had voluntarily relinquished his CS privileges. [Pa274]. The initial Consent Order between the Board and Dr. Matusow also points to the April 2013 report, presumably to the DCA. [Pa277]. As Dr. Matusow had not, in fact, voluntarily relinquished his CS privileges or had criminal issues raised against him, the entire investigation was premised on an inaccurate report.

Moreover, Judge Swift concluded that the false mention of criminal issues on the DCA Form was not relevant because the Board was not investigating any criminal issues involving Dr. Matusow. [T30-19 to -25]. This conclusion also lacks any basis in the record. The summary judgment record contains a copy of the Subpoena that the Board issued to the Hospital, but it does not establish what the Board was looking for in the documents it requested. The May 14, 2018 Consent Order between Dr. Matusow and the Board merely states that the Board's investigation was prompted by the DCA Form. [Pa277]. That document says nothing about what part of the DCA Form spurred the Board to act. Giving Dr. Matusow the benefit of all favorable inferences from the record, an ordinary person could easily find that the reference to criminal issues caused the Board to initiate an investigation.

Reading these all of the evidence in favor of Dr. Matusow and giving him the benefit of all favorable inferences, a reasonable jury could conclude that the Hospital Defendants breached the Settlement Agreement. Summary judgment should not have been granted in the Hospital Defendants' favor and that Order should be reversed and the matter remanded for further proceedings.

C. Whether The Hospital Defendants Acted In Good Faith When Reporting To The DCA Should Be A Jury Issue [not addressed below]

In moving for summary judgment, the Hospital Defendants invoked the immunity provision of N.J.S.A. 26:2H-12.2b(g), which states in pertinent part

that a hospital that provides a report to the DCA under the Cullen Act "is not liable for civil damages in any cause of action arising out of the provision or reporting of the information" if the reporting was done "in good faith and without malice[.]" Although the trial court did not rule on this issue, even if it had, summary judgment would not have been warranted because the question of "good faith" is inherently one of fact.

The Cullen Act does not define either "good faith" or "malice" for the purposes of its immunity provision. The concept of "good faith" has generally been defined as "honesty of purpose and integrity of conduct with respect to a given subject." *Marley v. Palmyra*, 193 N.J. Super. 271, 293–94 (App. Div. 1983), quoting *Smith v Whitman*, 39 N.J. 397, 405 (1963). In the context of a similar immunity provided to hospital review committees under N.J.S.A. 2A:84A-22.10, *Hurwitz v. AHS Hosp. Corp*., 438 N.J. Super. 269 (App. Div. 2014), defined malice as acting "either with ill will, without just cause, or with a reckless disregard of the truth of the facts regarding the physician's quality of care." 438 N.J. Super. at 299–300. These definitions should inform the Court's analysis of immunity here.

Determining whether the Hospital Defendants acted in "good faith" or with "reckless disregard for the truth of the facts" requires an analysis of their state of mind. Such questions are uniquely unsuited for resolution on summary judgment. *See*, *e.g.*, *Gray v. Press Commc'ns, LLC*, 342 N.J. Super. 1, 12 (App. Div. 2001)

("[T]he issue of state of mind does not readily lend itself to summary disposition."); *Prudential Prop. & Cas. Ins. Co. v. Karlinski*, 251 N.J. Super. 457, 466 (App. Div. 1991) (explaining that "a motion for summary judgment should not ordinarily be granted where an action or defense requires determination of a state of mind").

There is evidence in the record from which a reasonable jury could conclude that the Hospital Defendants do not qualify for immunity because they acted with reckless disregard for the truth of what they were stating on the DCA Form. The Settlement Agreement expressly provides what could and could not be reported by the Hospital Defendants about Dr. Matusow (assuming such a report to the DCA was required). However, the DCA Form does not use the agreed-upon language of the Settlement Agreement. [Ca001-003]. Moreover, the Hospital Defendants accused Dr. Matusow of being involved in criminal issues [*see* Ca003], yet no one apparently noticed the error, despite multiple people (including attorneys) reviewing and signing off on the DCA Form. [Pa353-354]. Finally, no one noticed or corrected that glaring error for nearly six months. [Ca003-06]. Even when the Hospital Defendants corrected the DCA Form, they corrected only the reference to criminal issues, not the inaccurate statement that Dr. Matusow had relinquished his privileges and was subject to correct action by the Hospital. [Ca006; *see also* Pa059; Pa251; Pa261; Pa268].

Accordingly, a disputed question exists about whether the Hospital Defendants are entitled to immunity from liability based on their purported "good faith." A reasonable jury could find that the Hospital Defendants acted with reckless disregard for Dr. Matusow's rights by deviating from the Settlement Agreement language and accusing him of criminal conduct. The Hospital Defendants are not entitled to summary judgment in their favor on this issue.

D. The Trial Court Demonstrated A Bias Against Dr. Matusow That Appears To Have Affected Its Decision [not addressed below]

The trial court's blatant disregard for the actual record seems to have been driven by a decided hostility against Dr. Matusow unrelated to motion before it. The transcript from the hearing on the Motion for Summary Judgment reveals numerous negative comments from Judge Swift concerning Dr. Matusow that had nothing to do with the issues he was being asked to decide, including (1) his personal opinion regarding Dr. Matusow's competence as a medical doctor, or lack thereof [*see*, *e.g.*, T31-18 to -23]; (2) unfounded conclusions that Dr. Matusow hurt patients in the past and posed a risk to future patients [*see*, *e.g.*, T24-13 to -14; T29-11 to -18], (3) commentary that Dr. Matusow's suspension from practice should have occurred earlier than it did [*see*, *e.g.*, T24-3 to -12]; and (4) speculation unsupported by the record about whether Dr. Matusow had a narcotics habit. [T9-20 to T10-3; T24-18 to -22].

Judge Swift's conclusion that the Hospital Defendants had not done anything wrong seemed largely driven by his belief that, but for the report to the DCA, "Dr. Matusow could have continued to hurt patients. That -- that's troubling to me." [T24-13 to -14]. For example, he made the following disturbing remarks:

> I can't see how Dr. Matusow can in anyway fault the hospital for reporting this to the DCA, and, thank god they did, in my view. Because had they had not, Dr. Matusow could have continued to practice conscious sedation at his own ambulatory center, and risked -- and put patients at risk for the same risk that he was putting those patients under at the hospital."

[T29-11 to -20].

> And I don't think that the doctor should be able to get away with practicing bad medicine because he, you know, put language in an agreement that would somehow hide his conduct and shield it from his patients, number one, and from the public, and from the Board of Medical Examiners.

[T31-18 to -23]. These conclusions by Judge Swift find no support in the evidence. Nor were they in any way necessary to determine whether the terms of the Settlement Agreement had been breached.

For example, the fact that Dr. Matusow had his DEA license suspended was not in dispute, but nor was it relevant to the question of whether the Hospital Defendants violated the Settlement Agreement. In addition, contrary to Judge Swift's assumptions, the suspension was not due to the abuse of narcotics by Dr. Matusow. Dr. Matusow testified that his DEA license was suspended for allegedly self-prescribing Klonopin (an anxiety drug), Cymbalta (an anti-depressant), and

Proscar (a prostate medication). [Pa178]. None of these drugs are scheduled narcotics. [*Id*.]. Even more importantly, Dr. Matusow testified at his deposition that the allegations of self-prescribing these mediations were ultimately disproven. [*Id*.]. The only reason the Drug Enforcement Administration gave for not reinstating Dr. Matusow's license was that he wrote a prescription for one month of a weight loss drug for his nurse without documenting it on her patient chart. [*Id*.]

Further, there is no evidence that Dr. Matusow went to rehab for a narcotics problem, as Judge Swift assumed. Instead, the only evidence in the record is that he attended a program at the Caron Treatment Center on the recommendation of Physicians Assistance Program in order to disprove that he was improperly self-medicating with controlled substances. [Pa179].

As another example, Judge Swift took exception to the fact that, but for the filing of the DCA Form, Dr. Matusow would have been providing CS services at his ambulatory surgery center, which Judge Swift believed to be unsafe or harming patients (despite the lack of any evidence in the summary judgment record so showing). [T29-11 to -20]. However, the Settlement Agreement provided for, and was specifically intended to allow Dr. Matusow to continue performing such procedures outside of the Hospital and, in fact, conditioned the eventual return of unlimited CS privileges in the Hospital on a review of his performance elsewhere. [Pa085-87; *see also* Pa236]. Indeed, the Hospital made "an irrevocable

commitment" in the Settlement Agreement to grant CS privileges to Dr. Matusow based upon his performance of CS" at other facilities. [Pa086].

There are, obviously, multiple problems with Judge Swift's logic here. It supposes that the Hospital Defendants would have signed a Settlement Agreement allowing Dr. Matusow to put patients at risk. It ignores the evidence clearly set out in the record that Dr. Matusow continued to have practice privileges at the Hospital even while he was under investigation. Further, by deciding on his own that it was for the best that the Hospital Defendants breached the Settlement Agreement, Judge Swift essentially re-wrote a private agreement to say something other than its clear terms, something courts are not allowed to do. *See*, *e.g.*, *Longobardi v. Chubb Ins. Co. of New Jersey*, 121 N.J. 530, 537 (1990); *Kampf v. Franklin Life Ins. Co*., 33 N.J. 36, 43 (1960).

Judge Swift's comments during the hearing, his unsupported conclusions about Dr. Matusow, and his disregard for the clear and unambiguous terms of the Cullen Act, the implementing regulation and the Settlement Agreement all combined to create a toxic (and reversible) mix. His decision that the Hospital Defendants did nothing wrong appears more driven by his belief that Dr. Matusow was a bad doctor who did bad things than anything in the law or in the record. Faith in the impartiality of judges is one of the cornerstones of the judicial system. *See generally In re Advisory Letter No. 7-11 of Supreme Ct. Advisory Comm. on*

Extrajudicial Activities, 213 N.J. 63, 70 (2013) ("The mere appearance of bias in a judge—however difficult, if not impossible, to quantify—is sufficient to erode respect for the judiciary."); *Matter of Seaman*, 133 N.J. 67, 96 (1993) ("It is obvious from the canons of the Code of Judicial Conduct that integrity – in both actuality and appearance—can be maintained only if judges demonstrate probity, impartiality, and diligence."). Under the circumstances, if this Court reverses and remands the matter, it should be with the condition that it is not re-assigned to Judge Swift for further proceedings. Judge Swift's demonstrated bias against Dr. Matusow and his belief that this case is frivolous will make it difficult to obtain a fair adjudication on the merits.

CONCLUSION

For the foregoing reasons, the trial court's Order granting summary judgment in the Hospital Defendants' favor should be reversed, and the matter remanded with instructions that it be assigned to a judge other than Judge Swift.

Respectfully submitted,

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Attorneys for Appellant Gary A. Matusow

By: */s Alissa Pyrich*
ALISSA PYRICH

Dated: April 10, 2023

GARY A. MATUSOW, Plaintiff-Appellant, vs. INSPIRA HEALTH NETWORK, INC. a/k/a SOUTH JERSEY HEALTH SYSTEM, INC., SOUTH JERSEY HOSPITAL, INC., GLADWYN D. BAPTIST, M.D., DAVID S. SHIELDS, M.D., THOMAS F. MITROS, M.D. and STEVEN C. LINN, M.D., jointly, severally and in the alternative, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003797-21 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION CUMBERLAND COUNTY DOCKET NO. CUM-L-216-19 SAT BELOW: HON. JAMES R. SWIFT, J.S.C. Civil Action

BRIEF AND APPENDIX (Da1) ON BEHALF OF DEFENDANTS-RESPONDENTS, INSPIRA HEALTH NETWORK, INC. a/k/a SOUTH JERSEY HEALTH SYSTEM, INC., GLADWYN D. BAPTIST, M.D., DAVID S. SHIELDS, M.D. and STEVEN C. LINN, M.D.

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On the Brief: Jennifer Barr, Esq. and Brittany A. Bonetti, Esq. (NJ130022014)
Amended brief and appendix submitted June 13, 2024

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PRELIMINARY STATEMENT

Plaintiff's appeal questions whether a hospital can somehow breach a settlement agreement by filing a report required by law. The hospital's reporting obligation is statutorily mandated when the physician has given up hospital privileges while under an internal investigation at the hospital, as in the instant matter. Plaintiff has completely failed to proffer any evidence whatsoever to support the allegations of breach of contract in his frivolous complaint.

Plaintiff-Appellant Dr. Gary Matusow ("Plaintiff") and Defendants-Respondents, Inspira Health Network, Inc. a/k/a South Jersey Health System, Inc., Gladwyn D. Baptist, M.D., David S. Shields, M.D. and Steven C. Linn, M.D. (collectively the "Hospital Defendants" or "Defendants") entered into a settlement agreement (the "Settlement Agreement"), which terminated an ongoing investigation into Plaintiff's professional misconduct. As part of the Settlement Agreement, Plaintiff agreed that he would no longer perform conscious sedation ("CS") at the hospital. The Settlement Agreement contemplated a report to the NPDB and "all other circumstances where there is a reporting obligation."

Plaintiff's voluntary relinquishment of his ability to perform CS during the pendency of the investigation triggered two reporting obligations for the

licensed hospital. Federal legislation required the hospital to report the Plaintiff's relinquishment of his CS privileges to the National Practitioner Data Bank (the "NPDB"). Additionally, the New Jersey Health Care Professional Responsibility and Reporting Enhancement Act (the "Act") required the hospital to report the relinquishment to the Division of Consumer Affairs (the "DCA"). The hospital filed both reports with respect to Plaintiff's status at the hospital after he voluntarily relinquished his ability to perform CS.

In this appeal, the Plaintiff does not challenge the hospital's NPDB report. Rather, the Plaintiff contends that the hospital breached the Settlement Agreement by filing the DCA report. As a matter of law, the hospital had an obligation under the Act to submit a DCA report with respect to Plaintiff's status at the hospital. The Settlement Agreement does not, and cannot, in any way, abrogate the hospital's statutory reporting obligations under the Act.

DCA reports serve important patient safety functions, as they are the mechanism through which the State licensing board becomes aware of physicians who may have exhibited impairment, incompetence, or misconduct. Under the Act, hospitals must file DCA reports when a physician voluntarily relinquishes any partial clinical privilege or authorization to perform a specific procedure if the hospital is undertaking an investigation or review of the physician's competence or conduct that relates adversely to patient care or

safety. Without this reporting requirement, physicians who have engaged in professional misconduct could simply give up their privileges in exchange for discontinuing an ongoing hospital investigation and thereby evade detection by the State licensing board.

By Plaintiff's own admission, the investigation into Plaintiff's clinical competence and professional conduct had not reached its conclusion when, through the Settlement Agreement, he decided to give up his ability to perform CS at the hospital. The DCA reporting framework was designed to notify licensing boards when these exact types of situations occur so that the licensing board can conduct its own investigation.

Because the hospital's DCA report was required under the Act, it cannot form the basis of Plaintiff's breach of contract claim. In fact, the hospital would have been subject to fines if it failed to file the DCA report. Not only was the hospital required to submit the DCA report, but it is also entitled to immunity under the Act from Plaintiff's breach of contract claim with respect to the filed report.

Defendants respectfully request that the Appellate Division affirm the opinion of the trial court below granting summary judgment to Defendants.

PROCEDURAL HISTORY

Defendants incorporate the procedural history set forth in Plaintiff's brief (Pb2).[1] Defendants add the following.

Plaintiff filed a deficient notice of appeal on August 10, 2022, which was not corrected until October 27, 2022. Plaintiff filed a brief and a deficient appendix on April 10, 2023. Plaintiff failed to correct the deficiencies despite two notices, and the appeal was dismissed for failure to prosecute on May 18, 2023. Approximately one year later, Plaintiff uploaded the corrected appendices along with a motion to reinstate the appeal. Over Defendants' vigorous objections, the motion panel granted Plaintiff's motion to reinstate. The motion panel's order states, however, that Plaintiff will not be granted any additional extensions of time, and if Plaintiff fails to comply with any future schedule or directive from this court, his appeal will be dismissed with prejudice.

STATEMENT OF FACTS

Background

[1] Pb – Plaintiff's Brief
Pa – Plaintiff's Appendix
Pca – Plaintiff's confidential appendix
Da – Defendants' appendix
1T – Transcript dated June 23, 2022 (summary judgment hearing)

South Jersey Health System, Inc. ("SJHS"), now known as Inspira Health Network, Inc., is a not-for-profit health system serving the southern counties of New Jersey. Defendant South Jersey Hospital, Inc. (the "Hospital")[2] is a hospital licensed by the New Jersey Department of Health and comprised part of SJHS network. South Jersey Healthcare Regional Medical Center ("RMC"), which is referenced in the Settlement Agreement, now known as Inspira Medical Center Vineland, is a division of the Hospital. (Pa106).

Plaintiff is a physician who holds a restricted license to practice medicine in the State of New Jersey and practices in the field of gastroenterology. (Pa102; Pa106. Plaintiff held privileges to practice at the Hospital from approximately the mid-1990s until approximately 2016. (Pa174).

Defendant Dr. Steven C. Linn is a doctor of medicine licensed in the State of New Jersey, and at all relevant times served as Chief Medical Officer of the Hospital. Defendants Dr. Gladwyn D. Baptist and Dr. David S. Shields are doctors of medicine licensed in the State of New Jersey. Dr. Baptist was President of the Hospital's Medical Staff at all relevant times. (Pa107).

[2] The caption in this matter includes South Jersey Hospital, Inc., which is now known as Inspira Medical Centers, Inc., as well as Thomas F. Mitros, M.D. These two parties were dismissed without prejudice.

First Ad Hoc Committee – Conscious Sedation

In March of 2007, the Hospital undertook a review of multiple cases handled by Plaintiff within the prior three-year period that involved CS. (Pa122). CS is the administration of a drug or drugs in order to induce that state of consciousness in a patient which allows the patient to tolerate unpleasant medical procedures without losing defensive reflexes, adequate cardio-respiratory function, and the ability to respond purposefully to verbal command or to tactile stimulation if verbal response is not possible as, for example, in the case of a small child or deaf person. (Pa85).

On or about June 4, 2007, Dr. Baptist, in his capacity as President of the Hospital's Medical Staff, determined that an investigation into Plaintiff's CS practices was warranted, and convened an ad hoc committee (the "First Ad Hoc Committee") to conduct the investigation. (Pa124; Pa189). The First Ad Hoc Committee's investigation consisted of a review of seven cases. Plaintiff appeared before the First Ad Hoc Committee. (Pa125).

In a letter from Dr. Baptist dated August 30, 2007, following completion of the First Ad Hoc Committee's investigation, the Medical Executive Committee ("MEC") of the Hospital's Medical Staff determined that Plaintiff had "engaged in professional conduct which may have affected the delivery of

patient care and which does not conform to professional standards as determined by the Medical Staff." (Pa126; Pa193).

June 2007 Reappointment

Prior to the MEC's recommendation with respect to the First Ad Hoc Committee investigation, Plaintiff was reappointed as a member of the Hospital's Medical Staff in or around June of 2007 for a period of one year instead of the customary two-year term. (Pa128; Pa130). On or about June 29, 2007, a letter to Plaintiff from Chester B. Kaletkowski, then President and Chief Executive Officer of the Hospital, advised that "Your reappointment is valid from June 30, 2007 through June 30, 2008." (Pa195).

Second Ad Hoc Committee – Behavior

Prior to Plaintiff's one-year reappointment, Dr. Linn wrote to Dr. Baptist on or about May 8, 2007 detailing allegations of Hospital employee complaints concerning Plaintiff's behavior, including "rude, degrading and intimidating," as well as "alleged inappropriate behavior toward the nurse and a patient's family." (Pa198).

In June 2007, an investigation by an ad hoc committee of the Hospital (the "Second Ad Hoc Committee") was formed to review complaints concerning Plaintiff's behavior in April and May of 2007. (Pa133). Correspondence dated June 28, 2007 from Dr. Baptist to Plaintiff indicates, "I

believe that the April 4, 2007 incident…and the April 18, 2007 and May 11, 2007 matters…warrant investigation by an ad hoc committee…as possible violations of the Medical Staff's Disruptive Behavior Policy and the Code of Conduct. This investigation will be in addition to and distinct from the other investigation in which you are involved that is already underway." (Pa200). The Second Ad Hoc Committee interviewed Plaintiff on or about July 26, 2007. (Pa140).

On or about August 30, 2007, Dr. Baptist wrote to Plaintiff advising that the MEC reviewed the Second Ad Hoc Committee's Report and determined that Plaintiff "engaged in professional conduct which may have affected the delivery of patient care and which does not conform to professional standards as determined by the Medical Staff." (Pa203).

Third Ad Hoc Committee – Reappointment Application

On or about November 23, 2007, the Hospital formed another ad hoc committee (the "Third Ad Hoc Committee") to investigate Plaintiff's alleged failure to accurately complete his Medical Staff reappointment application. (Pa206).

Correspondence dated November 23, 2007 from Dr. Baptist to Plaintiff advised that the MEC determined to institute corrective action for Plaintiff's

alleged failure to accurately complete his reappointment application, and that an ad hoc committee had been appointed to investigate the matter. (Pa206).

Correspondence dated September 18, 2008 from Mark Gelernt, M.D., then President of the Medical Staff, to Plaintiff states, "At its meeting on September 11, 2008, the Medical Executive Committee considered the corrective action against you for your alleged failure to accurately complete your reappointment application. As a result of this meeting the Medical Executive Committee determined to issue you this letter of caution and reprimand." (Pa208).

Plaintiff's 2008 Complaint

On January 10, 2008, Plaintiff filed a complaint in the Superior Court of New Jersey, Chancery Division, Cumberland County, Docket No. C2-08 (the "2008 Litigation"). The complaint alleged ten counts for breach of contract, business torts, defamation, and other claims. (Pa106).

June 2008 Reappointment

Plaintiff was once again reappointed to the Hospital Medical Staff for a one-year period instead of the customary two-year term. Prior to the MEC's recommendation with respect to the Third Ad Hoc Committee investigation, on or about July 31, 2008, a letter to Plaintiff from Hospital President and CEO

Kaletkowski, advised Plaintiff, "Your reappointment is valid from 6/30/2008 through 6/30/2009." (Pa210).

Fourth Ad Hoc Committee – Patient Safety

Correspondence dated July 16, 2008 to Plaintiff from Dr. Gelernt, Medical Staff President, states that the MEC had previously "expressed concerns" regarding the "appropriateness of treatment in certain settings," which concerns resulted in prior corrective action. The letter states that a "recent perforation reportedly occurring on a patient at [Plaintiff's] surgery center and later admitted to the hospital has renewed this concern." (Pa212).

Correspondence dated September 18, 2008 to Plaintiff from Dr. Gelernt stated that the MEC recommended corrective action, and that Plaintiff's "activities are or are likely to be detrimental to patient safety or to the delivery of quality patient care, disruptive to Hospital operations, an impairment of the community's confidence in the Hospital, lower than the standards of the Staff, or in violation of the Medical Staff or Hospital Bylaws, rules or regulations." The correspondence further advised of Dr. Gelernt's forthcoming appointment of an ad hoc committee to investigate the matters (the "Fourth Ad Hoc Committee"). (Pa214).As a result of the Fourth Ad Hoc Committee's findings, President and CEO Kaletkowski wrote to Plaintiff on or about December 12, 2008, informing Plaintiff that the MEC recommended the following:

> 1. To revoke your conscious sedation privileges;
> 2. To suspend your procedural and endoscopic privileges pending your completion of an ACGME or equivalent program…
> 3. To remove you from the Department of Medicine call schedule…
>
> The MEC's recommendations #1 and #2 above entitle you to a Fair Hearing pursuant to…the Medical Staff Bylaws…Therefore, recommendations #1 and #2 shall not be effective until approved by the Board…The MEC made these recommendations based upon its review of the report from National Peer Review…and its review of the [Fourth] Ad Hoc Investigative Committee's report…and its concern for patient safety.
>
> [Pa217.]

Fair Hearing

On or about December 29, 2008, Plaintiff requested a Fair Hearing ("Fair Hearing Request One") with respect to his one-year rather than two-year reappointments. (Pa219). Fair Hearing Request One also stated that "issues in what were colloquially referenced as Ad Hoc I and Ad Hoc II" as well as "the issues relating to Ad Hoc III" would be part of the Fair Hearing. (Pa220). On or about January 9, 2009, Plaintiff requested a second Fair Hearing, specifically in response to the December 12, 2008 correspondence from the Hospital CEO relating to the Fourth Ad Hoc Committee ("Fair Hearing Request Two"). (Pa222).

Fair Hearing Request One and Fair Hearing Request Two were combined into a single Fair Hearing. (Pa225). The combined Fair Hearing took place in 2011 and 2012. (Pa233).

Plaintiff acknowledged that the allegations forming the basis for the Fair Hearing were "Patient-related issues, standard of care being questioned and I guess interaction with nurses." (Pa177). Dr. Linn confirmed that the Fair Hearing followed the investigation of Plaintiff's cases. Linn testified that Plaintiff requested a Fair Hearing after "several cases of concern" were investigated and reported to the MEC. (Pa233).

When Dr. Linn was asked by Plaintiff's counsel, "Do you recall that the litigation and fair hearing culminated in a settlement?" Dr. Linn replied, "Yes." (Pa233). Plaintiff testified that the Fair Hearing "was aborted" at the time of entry into the Settlement Agreement. (Pa176). When asked, "[H]ad the fair hearing concluded before you entered into the settlement agreement?" Plaintiff responded "No." (Pa176).

The Settlement Agreement

On December 13, 2012, Plaintiff and Defendants executed the at-issue Settlement Agreement. (Pa81).

Regarding Plaintiff's relinquishment of CS privileges at the Hospital, Plaintiff agreed in the Settlement Agreement not to perform CS at the Hospital

under any circumstances. The specific provision of the Settlement Agreement states:

> [Plaintiff] agrees, consistent with the practice of other Gastroenterologists at the Hospital on the Medical Staff, to utilize the services of Anesthesia for the procedures he conducts at the Hospital and to **not utilize CS at the Hospital under any circumstances**.
>
> [Pa86 (emphasis added).]

Plaintiff further agreed "that he will not at any time exercise his CS privileges at South Jersey Healthcare Regional Medical Center," which was a medical treatment center affiliated with the Hospital, absent a written agreement of the Hospital and Plaintiff to the contrary. (Pa87).

The Settlement Agreement states that "[t]he Hospital shall grant [Plaintiff] Conscious Sedation ('CS') privileges based upon his performance of Conscious Sedation at a New Jersey licensed or Medicare certified ambulatory surgical center…. Such privileges shall be conditioned upon the Hospital's review of all cases of CS performed at any such [surgical center]." (Pa85). Stated differently, the CS privileges referenced in that particular paragraph would be granted only after the Hospital's review.

Plaintiff admitted that he relinquished his CS privileges at the Hospital when he testified: "I agreed not to do the procedures, the conscious sedation at the hospital." (Pa182). Linn confirmed that, after the Settlement Agreement

was executed, Plaintiff had no "conscious sedation privileges with conditions" at the Hospital. (Pa237). When asked whether following entry into the Settlement Agreement Plaintiff had "conscious sedation privileges with conditions" Linn testified in response, "Not at the hospital." (Pa237).

Plaintiff agreed in the Settlement Agreement to dismiss the 2008 Litigation with prejudice, and the parties would sign a stipulation that would "completely terminate The Litigation and all claims between the Parties." (Pa82). The Settlement Agreement clearly states that it was executed "in mutual consideration of the termination of The Litigation and the Fair Hearing." (Pa82). The Settlement Agreement fully "resolve[d] all of the Proposed Corrective Actions and other related Ad Hoc Proceedings and Fair Hearings involving [Plaintiff]." (Pa90).

Under the Settlement Agreement, in a section entitled "Reporting," the parties agreed:

> The Hospital ***shall report*** the following to the National Practitioner Data Bank, ***and to all other circumstances where there is a reporting obligation***:
>
> > It was proposed that the practitioner be subject to corrective action for certain alleged clinical and behavioral issues. The hospital and the practitioner have agreed to resolve all matters and therefore no determinations were made by the Fair Hearing Committee with

> respect to the merits of such issues, and no corrective action was implemented.
>
> [Pa87 (emphasis added).]

NPDB & DCA Reporting

As contemplated in the Settlement Agreement, the Hospital was required to file certain reports with the NPDB and in any other circumstances where there is a reporting obligation. (Pa87). Federal and State reporting procedures required the individual filling out the report to complete a standardized form, primarily comprised of pre-worded descriptions that the individual would select by checking a box, as well as another section where the individual would provide a short narrative. (Pca2).

On or about May 1, 2013 Attorney[3] Sarah Beth Johnson, counsel to the Hospital, provided instruction to Brenda Benton on how to complete the National Practitioner Data Bank report ("NPDB Report") as required by the federal Health Care Quality Improvement Act regarding the Plaintiff, as well as how to complete the New Jersey Health Care Responsibility and Reporting Enhancement Form (the "DCA Report") regarding Plaintiff as required by the Act. (Pa239). Ms. Benton was, at that time, the Medical Staff Services Director for the Hospital. (Pa245).

[3] Sarah Beth Johnson is now a Superior Court Judge in Atlantic County.

Regarding the NPDB Report, in an email dated May 1, 2013, Attorney Johnson provided instructions to assist Ms. Benton. Ms. Benton filed the NPDB Report for Plaintiff on or about May 9, 2013. (Pa246 to Pa247).[4]

Regarding the DCA Report, Attorney Johnson's email to Ms. Benton on May 1, 2013 instructs Ms. Benton to check off the box for "professional misconduct which relates adversely to patient care or safety" for part A of the DCA Report, and for part B of the DCA Report check "'voluntary relinquishment' (not resignation) and the first option, while the health care entity was reviewing, etc." (Pa238).

Attorney Johnson further instructed Ms. Benson, "Where [the DCA Report] indicates 'details of the professional's conduct,' use the same language from the settlement agreement" which is reproduced in the May 1, 2013 email:

> It was proposed that the practitioner be subject to corrective action for certain alleged clinical and behavioral issues. The hospital and the practitioner have agreed to resolve all matters and therefore no determinations were made by the Fair Hearing Committee with respect to the merits of such issues, and no corrective action was implemented.
>
> [Pa239.]

[4] The confidential NPDB Report filed on May 9, 2013 was submitted to the trial court below as Exhibit W, but, as noted in the table of contents to the appendix, was omitted from Plaintiff's appellate appendix as "not relevant." (Pa256; Paiv).

Ms. Benton confirmed that she worked with Attorney Johnson for the exact wording of the DCA Report (Pa247), and that Ms. Benton did not make determinations as to the necessity or content of the DCA Report. (Pa248 to Pa249; Pa253 to Pa254).

Ms. Benton completed the DCA Report regarding Plaintiff by hand on or about May 13, 2013, checking the boxes as instructed by Attorney Johnson. (Pca2; Pa250). In Part B of the DCA Report, Ms. Benton checked boxes to indicate "voluntary relinquishment by health care professional of any partial privilege or authorization to perform a specific procedure if: The health care entity is reviewing the health care professional's patient care or reviewing whether based upon its reasonable belief, the health care professional's conduct demonstrates an impairment or incompetence or is unprofessional, which incompetence or unprofessional conduct relates adversely to patient safety." (Pca3).

However, within the section of the DCA Report pertaining to "details of the professional conduct," Ms. Benton used the narrative as instructed by Attorney Johnson, but hand wrote "alleged ***criminal*** and behavioral issues," instead of "alleged ***clinical*** and behavioral issues." (Pca3 (emphasis added)). Ms. Benton testified that the use of the word "criminal" as opposed to "clinical" within the DCA Report was "a human error." (Pa251).

Ms. Benton testified that she left the completed DCA Report in Dr. Linn's office for him to sign. (Pa255). Dr. Linn signed the DCA Report prepared by Ms. Benton. (Pa234 to Pa235). The DCA Report was then sent via certified mail, to Plaintiff's business address, and a confirmation of delivery was signed May 16, 2013. (Pa180; Pa259).

Ms. Benton testified that in November of 2013 she became aware of the error within the DCA Report regarding use of the word "criminal" as opposed to "clinical." (Pa251). Thereafter, on or about November 11, 2013, Ms. Benton sent correspondence to Francine Widrich within the New Jersey Division of Consumer Affairs stating:

> It was brought to my attention this morning that a mistake was made on an initial filing which we made on May 13, 2013…. As you can see, we mistakenly wrote the word "criminal" where the word "clinical" should have appeared under paragraph number 4 "Details of the health care professional's conduct." This was a mistake made by me in transcribing over the same wording which had been supplied to the National Practitioner Data Bank.
>
> [Pa261.]

Ms. Benton attached an amended handwritten Health Care Professional Responsibility and Reporting Enhancement Act Reporting Form (the "Revised DCA Report") and requested that Ms. Widrich "substitute this amended document for the first submission." (Pa261; Pca4). The Revised DCA Report

and initial DCA Report included the same information in parts A and B, but the Revised DCA Report changed the word "criminal" to "clinical" within the section pertaining to "details of the health care professional's conduct." (Pca4).

Plaintiff admitted he was aware that the Hospital would be required to report to the State. Plaintiff testified, "There was going to be reporting of the language that was pre-agreed upon, which I know was going to be voluntarily submitted by my attorney as they requested to the New Jersey Board of Medical Examiners and I knew that this would – that same wording would be reported to the New Jersey Data Bank – or the National Data Bank." (Pa185).

Importantly, Plaintiff acknowledged that the term "relinquishment" means "to give up." (Pa183).

Board of Medical Examiners Investigation and Consent Order

On or about August 27, 2013, Dr. Linn was served with a subpoena duces tecum issued by the Office of the Attorney General seeking the provision of information and documents concerning Plaintiff, including complaints, incident reports, and information relating to disciplinary proceedings. (Pa264). On or about February 4, 2014, Plaintiffs attorney at that time, Steven Sacharow, Esq., wrote to the Medical Practitioner Review Panel ("MPRP") of the State Board of Medical Examiners ("BME") requesting

withdrawal of the August 27, 2013 subpoena. (Pa267). On or about April 8, 2014 the Hospital furnished documents responsive to the subpoena. (Pa271). Thereafter, the MPRP undertook an investigation into information received from the Hospital pertaining to Plaintiff's patient care. (Pa274).

As a result of the patient records gathered by the MPRP in the course of its investigation of Plaintiff, the BME "retained an expert who concluded that [Plaintiff] grossly deviated from the accepted standard of care when treating C.A and L.W. and that he deviated from the standard of care when treating E.B." (Pa277 to Pa278). In April of 2016 the BME received an additional quality of care complaint regarding Plaintiff and the BME's expert concluded that Plaintiff deviated from the standard of care when treating another patient, R.C. (Pa278).

On October 28, 2016 Plaintiff voluntarily ceased practicing medicine pending the conclusion of the BME's investigation. Plaintiff admitted that after voluntarily agreeing to cease practicing, he renewed several of his patients' prescriptions, and also called in prescriptions for controlled substances for himself using his partner's name. (Pa278). On July 6, 2017, Plaintiff surrendered his federal Drug Enforcement Administration ("DEA")

registration,[5] which surrender was deemed by the DEA to be "for cause." (Pa278).

On January 9, 2018, the Office of the Attorney General received a submission from Plaintiff's then-counsel Mr. Sacharow, including a report from Plaintiff's expert. (Pa278). Plaintiff's submission also documented that Plaintiff completed a five-day inpatient assessment at Caron Treatment Center in Pennsylvania ("Caron") to address his inappropriate self-prescribing. (Pa278). According to Plaintiff, Caron is "a place where you have addicts and alcohol abuse disorder patients." (Pa179). Caron recommended that Plaintiff attend the Breakthrough Program and two professional boundaries classes, which Plaintiff completed. (Pa278 to Pa129). The boundaries classes recommended by Caron are classes on prescribing and ethics of prescribing. (Pa179).

The BME ultimately found cause for disciplinary sanctions against Plaintiff pursuant to N.J.S.A. 45:1-21(c) and (e), and found that Plaintiff "deni[ed] all allegations of wrongdoing." (Pa279). However, the BME and Plaintiff resolved the matter without the need for additional administrative

[5] Federal DEA registrations and New Jersey CDS registrations are required for New Jersey practitioners to prescribe, dispense, and administer drugs which are classified as controlled dangerous substances ("CDS"). (Pa178).

proceedings via a Consent Order ("First Consent Order") which was entered on or about May 14, 2018. (Pa277 to Pa292).

The First Consent Order suspended Plaintiff's license to practice medicine for a period of three years, some of which was deemed already served as of October 18, 2016, the date on which Plaintiff voluntarily ceased practicing medicine, and some of which would be served in a probationary period. The First Consent Order also provides that Plaintiff, upon return to active practice, was required to be proctored by another physician pre-approved by the BME, and sets forth periods of review by the BME. (Pa277 to Pa292). Per the First Consent Order, Plaintiff could not personally administer CS pending further order of the BME. (Pa282).

The First Consent Order was modified through a petition filed by Plaintiff. (Pa294). On February 22, 2022, the BME entered a second consent order (the "Second Consent Order"), which superseded the First Consent Order. (Pa98). Under the Second Consent Order Plaintiff was permitted to return to solo practice and perform endoscopic procedures, subject to continued engagement of a practice monitor pre-approved by the BME. Under the Second Consent Order Plaintiff cannot personally administer CS pending further order of the BME. (Pa102).

The Instant Litigation

Plaintiff filed the instant complaint on April 8, 2019 alleging a single count of breach of contract, specifically, the reporting provision of the Settlement Agreement. (Pa29 to Pa30). The complaint alleges that the Settlement Agreement "contained a particular provision which exclusively controlled any and all reporting with regard to certain allegations made the subject of proceedings before a fair hearing committee." (Pa30). The complaint alleges that Defendants "expressly agreed that they maintained a singular reporting obligation" to report only the agreed-upon language. (Pa30).

After discovery concluded, Defendants moved for summary judgment before the trial court. In an order dated June 23, 2022, the Honorable James R. Swift granted Defendants' summary judgment motion and dismissed Plaintiff's complaint in its entirety against all Defendants, with prejudice. (Pa2).

Judge Swift succinctly explained his decision on the record in an oral opinion. He began by noting that there were "serious concerns" about Plaintiff's care of patients that gave rise to the investigations. (T28-2 to 3). The court stated that Plaintiff's claim for breach of contract was directed only to the Hospital's reporting to the DCA. (T28-13 to 16). He then explained how it was "unfortunate" that the Hospital employee accidentally wrote down "criminal instead of clinical" but that it did not have "any effect on what the

Board of Medical Examiners did" thereafter. (T30-12 to 18). He noted the importance of the employee filing a corrected report when it was brought to her attention and "admitted they made a clerical mistake." (T31-3 to 12).

The court explained that Plaintiff should not "be able to get away with practicing bad medicine because he...put language in an agreement that would somehow hide his conduct and shield it from his patients, number one, and from the public, and from the [BME]." (T31-18 to 23). The court concluded that he saw "nothing wrong with [what] the [H]ospital did. [He thought] they did exactly what they were obligated to do under this agreement, and under law. And [he saw] no basis whatsoever for a lawsuit in this case." (T31-24 to 32-2).

LEGAL ARGUMENT

POINT I
AS A MATTER OF LAW THE HOSPITAL WAS REQUIRED TO SUBMIT THE DCA REPORT REGARDING PLAINTIFF'S VOLUNTARY RELINQUISHMENT OF HIS CONSCIOUS SEDATION PRIVILEGES AND, THEREFORE, THE HOSPITAL DID NOT BREACH THE SETTLEMENT AGREEMENT.

A. DCA REPORTING FRAMEWORK

Under the New Jersey Health Care Professional Responsibility and Reporting Enhancement Act (the "Act"), hospitals must file reports with the DCA Clearinghouse Coordinator if a privileged physician

> voluntarily relinquishes any partial privilege or authorization to perform a specific procedure if: (a) the health care entity is reviewing the health care professional's patient care or reviewing whether, based upon its reasonable belief, the health care professional's conduct demonstrates an impairment or incompetence or is unprofessional, which incompetence or unprofessional conduct relates adversely to patient care or safety; or (b) the health care entity, through any member of the medical or administrative staff, has expressed an intention to do such a review.
>
> [N.J.S.A. 26:2H-12.2b(a)(4).]

The Clearinghouse Coordinator forwards the DCA reports to the appropriate licensing board. N.J.S.A. 45:1-40. The Act's implementing regulations likewise provide

> a health care entity shall file a report with the Clearing House Coordinator concerning a health care professional who…has clinical privileges granted by that health care entity…if…[t]he health care professional voluntarily relinquishes any partial clinical privilege or authorization to perform a specific procedure if:
>
> i. Whether or not known to the health care professional, the health care entity is undertaking an investigation or a review of:
>
> (1) The quality of patient care rendered by the health care professional to determine if the care could have had adverse consequences to the patient;
>
> (2) Conduct by the health care professional that demonstrates an impairment;

> (3) Conduct by the health care professional that demonstrates incompetence that relates adversely to patient care or safety; or
> (4) Unprofessional conduct by the health care professional that relates adversely to patient care or safety; or
>
> ii. A body within the health care entity that has the authority to initiate an investigation that may lead to disciplinary action has expressed an intention, through any member of the medical or administrative staff, reflected in the records of the health care entity or expressed directly to the health care professional, to conduct such a review of the health care professional's patient care or conduct and the healthcare entity notifies the health care professional that the health care entity is conducting or intends to conduct the review or investigation.
>
> [N.J.A.C. 13:45E-3.1(a)(4).]

The initiation of an investigation must have been reflected contemporaneously in the records of the hospital. N.J.A.C. 13:45E-3.1(b).

"Conduct relating adversely to patient care or safety" as defined in the regulations means

> conduct that a prudent health care professional reasonably would believe could put a patient in jeopardy of physical or emotional harm. Personal conduct such as tardiness, insubordination or other similar behavior that a prudent person reasonably would believe does not have the capacity to cause physical or emotional harm to a patient shall not be deemed to be conduct relating adversely to patient care or safety. Disruptive conduct that a prudent health care professional reasonably would believe is likely to adversely affect the ability of another health

> care professional to safely render patient care for which he or she is responsible shall be deemed to be conduct relating adversely to patient care or safety.
>
> [N.J.A.C. 13:45E-2.1.]

Under the regulations, "clinical privileges or practice" means "the job responsibilities, involving patient care, treatment or diagnosis, that a health care professional is authorized and expected to perform at a health care entity." Ibid.

Following receipt of a DCA report, the Act requires the applicable licensing board to "initiate an investigation concerning the information received and obtain any additional information that may be necessary in order to determine if disciplinary charges should be pursued or if an application to temporarily suspend or otherwise limit the health care professional's license or other authorization to practice should be initiated." N.J.S.A. 45:1-38(a). The Medical Practitioner Review Panel is the division within the BME that is responsible for receipt and investigation of information received through DCA reports. N.J.S.A. 45:9-19.9.

Use of the DCA reporting form is not optional under the Act. In fact, the DCA reporting form itself is codified within the Act's implementing regulations. N.J.A.C. 13:45E, Appx. It is clear that "[t]he report form is attached as the chapter Appendix and incorporated [into the Act's

implementing regulations] by reference." N.J.A.C. 13:45E-2.1. The regulations further provide, "[r]eports to the Clearing House Coordinator shall be on the form annexed to this chapter as the Appendix and incorporated herein by reference." N.J.A.C. 13:45E-5.1(a).

In the DCA's own words, the Act, which forms the basis for DCA reporting, "was designed to strengthen patient protections by assuring that health care professionals who have demonstrated impairment or incompetence or engaged in professional misconduct become known to their licensing boards." 42 N.J.R. 2577(a) (Nov. 1, 2010).

A settlement agreement cannot abrogate a hospital's reporting responsibilities under the Act. See Weisman v. N.J. Dep't of Human Servs., 593 Fed. Appx. 147 (3d. Cir. 2014). For instance, in Weisman, a hospital made a report to the Board of Nursing concerning a former employee, which the hospital was then required to provide to a querying hospital under the Act. The hospital had also entered into a settlement agreement with the former employee indicating that her departure was a resignation in good standing, which the employee erroneously interpreted to mean that the hospital would not disclose the report to any querying prospective employers. The Third Circuit Court of Appeals in Weisman found that "nothing in the settlement reveals [the hospital's] agreement to revoke its letters to the Board of Nursing,

or to omit reference to them upon any inquiry by a prospective employer…Nor could [the hospital] bargain away this statutory obligation." Id. at 150.

A hospital that fails to submit a required DCA Report is subject to penalties. N.J.S.A. 26:2H-12.2b(f).

B. PLAINTIFF VOLUNTARILY RELINQUISHED HIS CONSCIOUS SEDATION PRIVILEGES THROUGH THE SETTLEMENT AGREEMENT.

Plaintiff voluntarily agreed to relinquish his CS privileges at the Hospital as part of the Settlement Agreement. Through the Settlement Agreement, Plaintiff agreed not to exercise his CS privileges at the Hospital under any circumstances. The Settlement Agreement specifically states:

> [Plaintiff] agrees, consistent with the practice of other Gastroenterologists at the Hospital on the Medical Staff, to utilize the services of Anesthesia for the procedures he conducts at the Hospital and **to not utilize CS at the Hospital under any circumstances**.
>
> [Pa86 (emphasis added).]

Under the Settlement Agreement, Plaintiff further agreed "that he will not at any time exercise his CS privileges at South Jersey Healthcare Regional Medical Center,"[6] absent a written agreement of the Hospital and Plaintiff to the contrary. (Pa87).

[6] As noted above, South Jersey Healthcare Regional Medical Center ("RMC") is a division within the Hospital. (Pa106).

It is irrelevant that the Settlement Agreement contains a provision wherein the Hospital agreed to grant Plaintiff CS privileges upon satisfaction of certain conditions. This is because, as of his entry into the Settlement Agreement, Plaintiff voluntarily gave up authorization to perform CS at the Hospital. Plaintiff does not dispute this fact.

Specifically, the Settlement Agreement states that "[t]he Hospital shall grant [Plaintiff] Conscious Sedation ('CS') privileges based upon his performance of Conscious Sedation at a New Jersey licensed or Medicare certified ambulatory surgical center.... Such privileges shall be conditioned upon the Hospital's review of all cases of CS performed at any such [surgical center]." (Pa85). Stated otherwise, the CS privileges referenced in that particular paragraph would be granted only after the Hospital's review. Dr. Linn testified that it was his understanding that Plaintiff "was still going to do conscious sedation at the center, and that we would be reviewing those cases for performance to determine...if for example, he wanted to do conscious sedation procedures again at the [H]ospital." (Pa343).

Even so, as of his entry into the Settlement Agreement, Plaintiff clearly did not have the ability to practice CS at the Hospital, which he relinquished through the Settlement Agreement. (Pa344). By his own admission, Plaintiff confirmed that "I agreed not to do the procedures, the conscious sedation at the

hospital." (Pa182). Consistent with Plaintiff's admission, Dr. Linn also testified that, after the Settlement Agreement was executed, Plaintiff had no "conscious sedation privileges with conditions" at the Hospital. (Pa237). In his brief, Plaintiff again reaffirmed that under the terms of the Settlement Agreement Plaintiff would "not use [CS] privileges at the Hospital." (Pb7).

The Act does not define the term relinquish, therefore it takes on its ordinary meaning. State v. Lenihan, 219 N.J. 251, 262-63 (2014). Plaintiff acknowledged that the term "relinquishment" means "to give up." (Pa183). The Merriam-Webster Dictionary likewise confirms that the definition of "relinquish" is to "give up."[7]

Clinical privileges are the authorization to perform treatment and diagnosis duties at the hospital. See N.J.A.C. 13:45E-2.1. The parties do not dispute that Plaintiff, through his entry into the Settlement Agreement, voluntarily gave up authorization to perform CS at the Hospital.

C. PLAINTIFF WAS UNDER INVESTIGATION OR REVIEW BY THE HOSPITAL FOR CONDUCT OR INCOMPETENCE ADVERSE TO PATIENT CARE WHEN HE VOLUNTARILY RELINQUISHED HIS CONSCIOUS SEDATION PRIVILEGES.

At the time that Plaintiff relinquished his CS privileges at the Hospital – that is, at the time Plaintiff signed the Settlement Agreement – the Fair Hearing had not concluded. There is no dispute that the Fair Hearing was a

[7] Merriam-Webster Dictionary Online.

continuation of the ad hoc investigations into Plaintiff's clinical competency and professional conduct issues impacting patient care. During oral argument, Plaintiff's counsel acknowledged that "the investigation was the fair hearing." (T17-8 to 9). In his brief, Plaintiff confirms, "[a]t the time of the Settlement Agreement, the Fair Hearing process was still ongoing; in fact, [Plaintiff] had not yet finished his testimony." (Pb6). The fact that no final determinations were made by the Fair Hearing Committee or Hospital Board does not in any way negate the fact that an investigation took place and had not reached its natural conclusion at the time the Plaintiff and Defendants entered into the Settlement Agreement.

D. THE NEW JERSEY'S HEALTH CARE PROFESSIONAL RESPONSIBILITY AND REPORTING ENHANCEMENT ACT REQUIRED THE HOSPITAL TO FILE A DCA REPORT.

The Hospital was required to file a DCA report indicating that Plaintiff voluntarily relinquished his privilege or authorization to perform CS at the Hospital because such relinquishment took place prior to the conclusion of the Fair Hearing, in which the Hospital and Plaintiff were continuing the adjudication and review of Plaintiff's clinical competency and professional conduct issues impacting patient care. N.J.A.C. 13:45E-3.1(a)(4) (hospitals must file DCA reports if a privileged physician "voluntarily relinquishes any partial clinical privilege or authorization to perform a specific procedure

if…the health care entity is undertaking an investigation or a review of...[t]he quality of patient care… [c]onduct by the health care professional that demonstrates incompetence…[or] [u]nprofessional conduct by the health care professional that relates adversely to patient care or safety"). Without the requirement to file a DCA report for voluntary relinquishment of privileges while under investigation, physicians who have engaged in professional misconduct could simply give up their privileges in exchange for discontinuing an ongoing hospital investigation and thereby evade detection by the licensing board.

Each of Plaintiff's arguments challenging the Hospital's DCA reporting obligation are without merit. Plaintiff asserts that the DCA report was not required because "the Hospital was not presently conducting an investigation or review of [Plaintiff] at the time ***the report was made***." (Pa19 (emphasis added)). There is no language in the Act or regulations to support Plaintiff's contention that the report itself must be filed during the pendency of the investigation. This is certainly not the law. Pursuant to the plain language of the Act and implementing regulations, if a hospital is conducting an investigation into clinical competency, and the physician voluntarily relinquishes privileges prior to the conclusion of that investigation, as was the case here, then the hospital must report the same to the DCA. N.J.A.C. 13:45E-

3.1(a)(4); N.J.S.A. 26:2H-12.2b(a)(4). Plaintiff' interpretation of the DCA reporting requirements finds no support in the Act or regulations and would yield an absurd result that does not align with the Act's purpose, which is to strengthen patient protections.

Additionally, without citing any authority within the Act or regulations, Plaintiff essentially asserts, in order for a privilege relinquishment to occur, Plaintiff would have had to give up those privileges permanently. Simply put, there is no provision in the Act or implementing regulations that requires the relinquishment of privileges to be permanent or in place for any minimum period of time in order to trigger a DCA reporting obligation.

Plaintiff further argues that "[Plaintiff's] CS privileges at the Hospital were not 'voluntarily relinquished' but merely had a condition placed on their use." (Pb10). Plaintiff contends that "Dr. Linn further confirmed that, pursuant to the Settlement Agreement, [Plaintiff] had not relinquished his CS privileges, but merely had a condition placed on their use." (Pb10). Plaintiff's characterization of Dr. Linn's testimony on this matter is misleading. When asked whether following entry into the Settlement Agreement Plaintiff had "conscious sedation privileges with conditions," Dr. Linn testified in response, "Not at the hospital." (Pa237). In addition to Dr. Linn's testimony, Plaintiff's own testimony confirms that Plaintiff gave up his ability to perform CS at the

Hospital. (Pa182 (Plaintiff testified "I agreed not to do the procedures, the conscious sedation at the hospital")). Stated differently, as of his entry into the Settlement Agreement, Plaintiff could not use CS under any conditions at the Hospital. The language in the Settlement Agreement is clear in this regard. (Pa86 ("[Plaintiff] agrees…to not utilize CS at the Hospital ***under any circumstances***" (emphasis added))).

When interpreting what "conditions" on clinical privileges means, the court should look at the illustrative list of conditions given within the Act and implementing regulations. The examples include "second opinion requirements, non-routine concurrent or retrospective review of admissions or care specifically tailored after a preliminary review of care, non-routine supervision by one or more members of the staff, or the completion of remedial education or training." N.J.A.C. 13:45E-3.1(a)(2). These are examples of conditions that must be satisfied in order for a health care professional to exercise his or her privileges. In other words, the health care professional retains the ability to exercise or use his or her privileges, but that ability is conditioned upon satisfaction of certain criteria. This was not the case for Plaintiff. Following the Settlement Agreement, Plaintiff did not have any ability (upon satisfaction of any condition or otherwise) to use CS at the Hospital.

Plaintiff also argues that "the Hospital could have and should have selected the box [on the DCA report] that reads as follows: Conditions or limitations placed on the exercise of clinical privileges or practice within the health care entity (including, but not limited to second opinion requirements, non-routine concurrent or retrospective review of admissions or care, non-routine supervision by one or more members of the staff, completion of remedial education or training)." (Pb 9). Here, Plaintiff seems to concede that a DCA Report was in fact required, but alleges that the Hospital checked off the incorrect box on the reporting form.

The DCA reporting form includes a finite list of reportable actions to select from, which track the language in the Act and its implementing regulations. The box suggested by Plaintiff concerning "conditions" on his CS privileges comes from the DCA regulations requiring hospitals to file DCA reports when the hospital "***places*** conditions or limitations on the health care professional's exercise of clinical privileges or practice…for reasons relating to the health care professional's impairment, incompetency or professional misconduct, which incompetency or professional misconduct relates adversely to patient care or safety, including, but not limited to, second opinion requirements, non-routine concurrent or retrospective review of admissions or care specifically tailored after a preliminary review of care, non-routine

supervision by one or more members of the staff, or the completion of remedial education or training." N.J.A.C. 13:45E-3.1(a)(2) (emphasis added). There is nothing in the record to indicate that the Hospital unilaterally placed conditions or limitations on any of Plaintiff's privileges. The reason why Plaintiff did not have CS privileges at the Hospital was because Plaintiff voluntarily agreed to give up those privileges as part of the Settlement Agreement.

The box suggested by Plaintiff does not include any language to indicate the voluntary nature of the change in Plaintiff's privilege status. Rather, the box suggested by Plaintiff would have indicated to the BME that the Hospital actually took corrective action on Plaintiff's privileges which was not voluntary; however, it is undisputed that "no corrective action was implemented" by the Hospital. (Pa87). It is unclear why Plaintiff is advocating for completion of the DCA Report in a manner that would suggest corrective action was taken against him and contradict the agreed-upon narrative in the Settlement Agreement.

Ultimately, as a matter of law, the pendency of the Fair Hearing at the time that Plaintiff voluntarily relinquished his CS privileges triggered a reporting obligation under the Act, which the Hospital fulfilled through submission of the DCA Report.

E. THE HOSPITAL'S SUBMISSION OF THE DCA REPORT DID NOT AND COULD NOT FORM THE BASIS FOR A BREACH OF THE SETTLEMENT AGREEMENT.

Nothing in the Settlement Agreement indicates that the Hospital would be precluded from fulfilling its statutory reporting obligations under the Act. As in Weisman, supra, where a settlement agreement could not operate to bargain away a hospital's statutory reporting obligations under the Act, so too is the case here.

Furthermore, the Settlement Agreement unquestionably contemplates the Hospital's submission of reports "in all other circumstances where there is a reporting obligation." (Pa87). The Hospital clearly was required by the Act to submit a DCA Report, disclosing Plaintiff's voluntary relinquishment of his CS privileges while the Hospital was reviewing conduct that allegedly demonstrated incompetence or that allegedly was unprofessional and related adversely to patient care or safety.

The Hospital, utilizing the required form, checked off the most appropriate boxes in the DCA Reports ("voluntary relinquishment by health care professional of any partial privileges or authorization to perform a specific procedure if…[t]he health care entity is reviewing the health care professional's patient care or reviewing whether, based upon its reasonable belief, the health care professional's conduct demonstrates an impairment or

incompetence or is unprofessional, which incompetence or unprofessional conduct relates adversely to patient safety"). (Pca3).

POINT II
PLAINTIFF WILL BE UNABLE TO SHOW THAT THE DCA REPORT CAUSED ANY DAMAGE.

In order to prevail on his breach of contract claim, Plaintiff must prove that the DCA Report caused Plaintiff to sustain damages. Plaintiff cannot show that the clerical error or the box selection (for the reportable event within the DCA Report) caused the BME's investigation or any resulting alleged contractional damages because: (1) the BME, through the MPRP, has a statutory obligation to investigate information received on any DCA report regardless of the reference to "criminal" conduct and regardless of which box the Hospital selected on the reporting form; (2) the BME automatically receives NPDB reports; (3) Plaintiff has failed to show that the initial DCA Report was furnished to any other facilities; and (4) there is no indication in the record that the BME's investigation and resulting Consent Orders were the result of the reference to "criminal" conduct in the initial DCA Report.

A. THE BME IS REQUIRED BY STATUTE TO INVESTIGATE DCA REPORTS.

The MPRP of the BME "shall receive…[n]otice from a health care entity, provided through the Division of Consumer Affairs in the Department of Law and Public Safety, pursuant to section 2 of P.L.2005, c.83 (C.26:2H-

12.2b)." N.J.S.A. 45:9-19.9(a). Upon receipt of such notice, "the review panel shall investigate the information received, obtain any additional information that may be necessary in order to make a recommendation to the board, and make that recommendation within 90 days after receipt of the referral." N.J.S.A. 45:9-19.9(c). As detailed above, the Hospital was mandated by the Act to submit a DCA Report of Plaintiff's voluntary relinquishment of privileges while under investigation. Thereafter, the MPRP was required to investigate the information received within the DCA Report, regardless of whether the description referenced "criminal" or "clinical" conduct in the initial DCA Report. There is nothing in the record to indicate that the MPRP's investigation stemmed from anything other than its general statutory obligation to investigate DCA reports. The record shows that the MPRP's investigation was centered on Plaintiff's clinical care of patients.

Additionally, even if the Hospital, when completing the DCA report, selected the box for "conditions or limitations placed on the exercise of clinical privileges or practice," the MPRP still would have had the statutory obligation to investigate the actions giving rise to the report. In other words, regardless of the box selected, the MPRP would still have become aware Plaintiff's patient care issues.

B. THE BME IS REQUIRED BY STATUTE TO ENSURE RECEIPT OF NPDB REPORTS CONCERNING LICENSED PHYSICIANS.

The BME, as a New Jersey professional licensing board, is required to ensure that it receives alerts of NPDB reports at the time that the reports are submitted via the NPDB's continuous query function. Specifically, "A professional and occupational licensing board within the Division of Consumer Affairs in the Department of Law and Public Safety that regulates the practice of a health care professional shall…utilize the continuous query function of the National Practitioner Data Bank for each person issued a license or authorization to practice as a health care professional." N.J.S.A. 45:1-32.1(a)(2). According to the NPDB, "24 hours a day, 365 days a year, Continuous Query keeps you informed about your enrolled practitioners. You will receive email notifications within 24 hours of a report received by the NPDB."[8] Given the foregoing, the BME was required to receive notification of the Hospital's NPDB Report that was submitted on May 9, 2013, four days before Ms. Benton completed the initial DCA Report regarding Plaintiff. Significantly, the NPDB Report makes no reference to "criminal" conduct and contains the correct narrative agreed upon within the Settlement Agreement. Plaintiff does not challenge the filing of the NPDB Report.

[8] National Practitioner Data Bank Continuous Query webpage. (Da1).

C. PLAINTIFF HAS FAILED TO PRODUCE ANY EVIDENCE THAT THE INITIAL DCA REPORT WAS FURNISHED TO OTHER FACILITIES RESULTING IN CONTRACTUAL DAMAGES.

DCA reports are not available to the general public. The applicable regulations specify that DCA reports "shall not be considered government records under the Open Public Records Act." N.J.A.C. 13:45E-5.1(b). Under N.J.S.A. 26:2h-12.2c(a), health care entities must disclose, within the seven years preceding the inquiry, whether the entity has filed a DCA or MPRP report, and must then furnish the inquiring health care entity with a copy of such reports. However, Plaintiff has not provided any evidence indicating that the initial DCA Report was disclosed to any health care entity resulting in contractual damages.

D. THERE IS NOTHING IN THE RECORD TO INDICATE THAT THE WORD "CRIMINAL" WITHIN THE INITIAL DCA REPORT HAD ANY BEARING ON THE BME INVESTIGATION OR RESULTING CONSENT ORDERS.

Plaintiff has failed to produce any evidence that the BME focused its investigation on any "criminal" conduct. Instead, all evidence available in the record confirms that the BME focused its investigation on Plaintiff's clinical care of patients. There is no mention of "criminal" acts or conduct in either the initial Consent Order or the Second Consent Order entered by the BME. (Pa97; Pa276). Correspondence from the MPRP and the Consent Orders focus on

Plaintiff's clinical care of patients. Notably, in its correspondence of August 5, 2015, the MPRP directed Plaintiff to appear at the BME administrative office, and indicated its desire "to discuss issues related to the information reported by Inspira and regarding your care of the four patients." (Pa273). The initial Consent Order provides that the BME "retained an expert who concluded that [Plaintiff] grossly deviated from the accepted standard of care when treating C.A and L.W. and that he deviated from the standard of care when treating E.B." (Pa276). Accordingly, Plaintiff will be unable to show as a matter of law that the reference to "criminal" conduct in the initial DCA Report was a reasonably certain consequence of any damages suffered by Plaintiff.

POINT III
UNDER NEW JERSEY'S HEALTH CARE PROFESSIONAL RESPONSIBILITY AND REPORTING ENHANCEMENT ACT, DEFENDANTS ARE IMMUNE FROM PLAINTIFF'S BREACH OF CONTRACT CLAIM ARISING OUT OF SUBMISSION OF THE DCA REPORT.

At the hearing below, the trial court granted summary judgment to Defendants based upon the lack of evidence in the record to support Plaintiff's breach of contract claim. The trial court properly granted summary judgment, as argued above. However, Defendants also argued that Defendants are immune from liability for breach of contract, as acknowledged by Plaintiff (Pb27), although the trial court did not reach Defendants' immunity argument. It is well settled that, if a trial court arrives at the right decision for the wrong

reason, affirmance is warranted. Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (citing Isko v. Planning Bd., 51 N.J. 162, 175 (1968)).

Under the Act, "a health care entity, or any employee thereof, which provides information to the division, the board, the Medical Practitioner Review Panel, a health care services firm or staffing agency, or the Department of Health, in good faith and without malice, regarding a health care professional pursuant to the provisions of [the Act] is not liable for civil damages in any cause of action arising out of the provision or reporting of the information." N.J.S.A. 26:2H-12.2b(g). The following case is the only one which discusses this particular immunity afforded under the Act at the summary judgment stage.

In Gasperetti v. Heart, 2017 N.J. Super. Unpub. LEXIS 2921 (App. Div. Nov. 22, 2017), the Appellate Division found that a health care entity acted "in good faith and without malice," and discerned no reason to reverse the grant of summary judgment where the entity filed a report with the Division of Consumer Affairs for clinical deficiencies after facilitating an internal and third party review of the physician's patient care. The physician resigned from the medical staff while under investigation, which required reporting under N.J.S.A. 26:2H-12.2b(a)(3). The Appellate Division explained "although the terms 'good faith' and 'malice' were not defined in the [the Act], good faith

has been defined as 'honesty of purpose and integrity of conduct with respect to a given subject.' Good faith equates 'with fidelity, loyalty[,]...bona fides[,]' and 'honesty of intention and freedom from knowledge of circumstances which ought to put the holder upon inquiry.' The inquiry is not, however, limited to defendants' subjective belief. '[T]he applicable standard of good faith involves both 'objective' and 'subjective' elements.'" Id. at *23 (internal citations omitted). The Appellate Division continued, noting that in Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 103 A.3d 285 (App. Div. 2014), the court "defined malice in the context of the immunity provided to members of hospital review committees…[The Appellate Division] stated that 'the conventional meaning of that term suggests that the sanctioned physician must prove that the hospital defendants acted, in essence, either with ill will, without just cause, or with a reckless disregard of the truth of the facts regarding the physician's quality of care.'" Id. at 24 (internal citation omitted).

As indicated above, the Hospital was required to file a DCA Report disclosing Plaintiff's voluntary relinquishment of CS privileges. There is nothing in the record to show that the Hospital filed the initial or Revised DCA Reports with ill will, without just cause, or with a reckless disregard of the truth. Instead, the record is amply supported with uncontroverted evidence that

Ms. Benton's mistake within the initial DCA Report was nothing more than a clerical human error, which was corrected in a transparent manner. (Pa260).

The record shows that Ms. Benton worked closely with Hospital counsel to prepare and submit the DCA Report. (Pa238). As shown in the correspondence from Hospital counsel, Ms. Benton was instructed to "use the same language from the settlement agreement" in the section of the DCA Report pertaining to "details of the professional conduct." (Pa238) Hospital counsel had instructed Ms. Benton to use the following narrative:

> The hospital and the practitioner have agreed to resolve all matters and therefore no determinations were made by the Fair Hearing Committee with respect to the merits of such issues, and no corrective action was implemented.
>
> [Pa238.]

Notably, this narrative does not instruct Ms. Benton to file anything regarding criminal issues. Additionally, the record shows that Ms. Benton explicitly notified the DCA of her mistake in writing "criminal" instead of "clinical" in the initial DCA Report and supplied the Revised DCA Report. (Pa260).

Plaintiff argues that the issue of whether the Hospital acted in good faith when reporting to the DCA is a jury issue. To the contrary, in the context of immunity afforded for DCA reporting, the Appellate Division has explained, "A bare allegation of malice is insufficient to defeat immunity if the defendant

acted in an objectively reasonable manner." Gasperetti v. Heart, supra. The Appellate Division in Gasperetti affirmed summary judgment in favor of the defendant hospital that had submitted a DCA report where the plaintiff physician "failed to show actual malice, as required by the statute." Ibid.

Because the record does not contain any evidence that the DCA Reports were drafted with ill will, without just cause, or with a reckless disregard of the truth, the Defendants are entitled to immunity from Plaintiff's breach of contract claim arising out of the submission of the DCA Reports.

POINT IV
EVEN IF THE COURT DOES NOT GRANT SUMMARY JUDGMENT FOR ALL DEFENDANTS, SUMMARY JUDGMENT MUST BE GRANTED IN FAVOR OF DEFENDANTS SHIELDS AND BAPTIST.

Plaintiff's single breach of contract claim is based upon submission of the DCA Report. Plaintiff cannot show as a matter of law that Defendants Shields or Baptist had any involvement with the submission of any DCA Report. Defendant Mitros has been dismissed from the case. When asked whether he had "any facts or evidence that would suggest that Dr. Mitros played any role in providing the National Practitioner Data Bank document or the Board of Medical Examiners document," Plaintiff responded, "I wouldn't know." (Pa176). When asked whether his "I wouldn't know" response would "be the same for Dr. Baptist, Dr. Shields, and Dr. Mitros," Plaintiff responded

"Correct." (Pa176). Without any evidence of Defendants Shields' or Baptists' involvement in the drafting or submission of any DCA Report, they must be dismissed from the case.

POINT V
PLAINTIFF HAS NOT SHOWN THAT A REMAND IS WARRANTED, LET ALONE BEFORE ANOTHER JUDGE

The trial court properly granted summary judgment to Defendants because, as a matter of law, the Hospital was statutorily obligated to file the DCA Report. The trial court did not err, and did not show any bias against Plaintiff.

The record evidence clearly shows that, as a result of the patient records gathered by the MPRP in the course of its investigation of Plaintiff, the BME "retained an expert who concluded that [Plaintiff] grossly deviated from the accepted standard of care when treating C.A and L.W. and that he deviated from the standard of care when treating E.B." (Pa276). In April of 2016, the BME received an additional quality of care complaint regarding Plaintiff and the BME's expert concluded that Plaintiff deviated from the standard of care when treating another patient, R.C. (Pa276). Plaintiff admitted that after voluntarily agreeing to cease practicing, he renewed several of his patients' prescriptions, and also called in prescriptions for controlled substances for himself using his partner's name. (Pa278). On July 6, 2017, Plaintiff

surrendered his federal Drug Enforcement Administration ("DEA") registration, which surrender was deemed by the DEA to be "for cause." (Pa276). The BME ultimately found cause for disciplinary sanctions against Plaintiff pursuant to N.J.S.A. 45:1-21(c) and (e), and found that Plaintiff "deni[ed] all allegations of wrongdoing." (Pa276). However, the BME and Plaintiff resolved the matter without the need for additional administrative proceedings via Consent Order which was entered on or about May 14, 2018, which suspended Plaintiff's license to practice medicine for a period of three years. (Pa276).

To the extent that the trial court commented on Plaintiff's capacity to practice medicine, which was germane to the Hospital's ongoing investigation and reporting obligations in the instant matter, the statements in no way represent a bias on the part of the trial judge. The public policy underlying DCA reporting directly relates to patient safety. The trial court's comments were made in the context of interpreting the Act and its purpose.

Plaintiff's complaint was meritless, and even after discovery ended, Plaintiff was unable to proffer any evidence to support his claim. As such, the trial court granted summary judgment and dismissed the complaint, based on a fair, impartial application of the law. The trial court did not err, and was not motivated by any bias.

CONCLUSION

Defendants were and are entitled to summary judgement on Plaintiff's breach of contract claim because nothing in the Settlement Agreement precluded, or could have precluded, the Hospital from fulfilling its statutory obligations to file a DCA report concerning Plaintiff's voluntary relinquishment of privileges during a review of his professional misconduct.

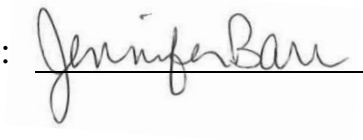
The clerical error referencing "criminal" conduct instead of "clinical" conduct within the initial DCA report did not cause any damages. The BME investigation and resulting Consent Order was based solely upon Plaintiff's clinical competency.

Additionally, the Hospital is entitled to immunity under the Act from Plaintiff's breach of contract claim with respect to the report made.

Based on the foregoing, it is respectfully submitted that the Appellate Division affirm the opinion of the trial court below granting summary judgment to Defendants.

Respectfully submitted,

COOPER LEVENSON, P.A.

By: 

Dated: June 13, 2024

Jennifer B. Barr, Esquire
Attorney for Defendants-Respondents, Inspira Health Network, Inc. a/k/a South Jersey Health System, Inc., Gladwyn D. Baptist, M.D., David S. Shields, M.D. and Steven C. Linn, M.D.

NG-C2N3CBX6 4869-1287-3403.9 File No. 62019.2

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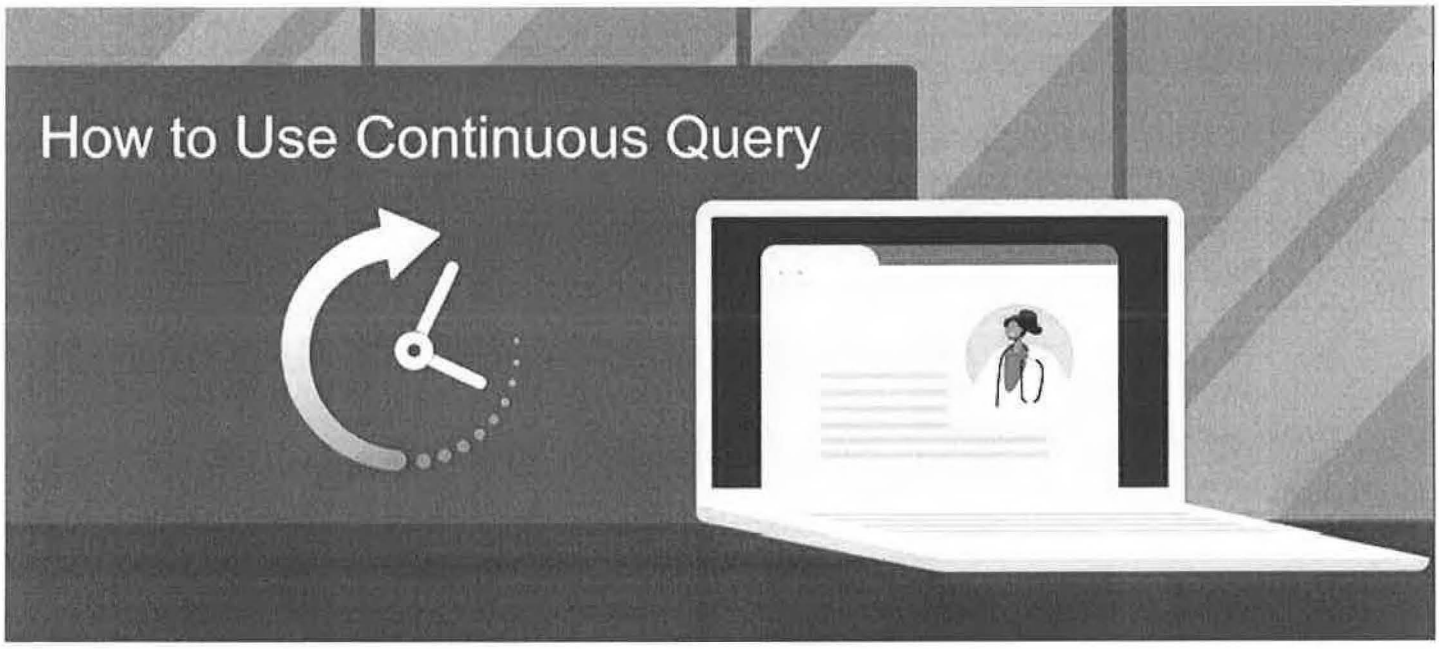

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GARY A. MATUSOW, Plaintiff-Appellant, v. INSPIRA HEALTH NETWORK, INC. a/k/a SOUTH JERSEY HEALTH SYSTEM, INC., SOUTH JERSEY HOSPITAL, INC., GLADWYN D. BAPTIST, M.D., DAVID S. SHIELDS, M.D., THOMAS F. MITROS, M.D. and STEVEN C LINN, M.D., Defendants-Appellees.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003797-21 Civil Action <u>Sat Below</u>: Hon. James R. Swift, J.S.C. Superior Court of New Jersey Law Divison: Cumberland County Docket No. CUM-L- 0216-19

REPLY BRIEF OF APPELLANT GARY A. MATUSOW

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PRELIMINARY STATEMENT

Despite their best efforts to bolster the faulty decision of the trial court, ultimately the Appellees Inspira Health Network, Inc. a/k/a South Jersey Health System, Inc., South Jersey Hospital, Inc., Gladwyn D. Baptist, M.D., David S. Shields, M.D., Thomas F. Mitros, M.D. and Steven C Linn, M.D. (collectively, the "Hospital Defendants") fail to refute the most fundamental of facts here – namely, that they violated their Settlement Agreement with Plaintiff-Appellant Gary A. Matusow ("Dr. Matusow") by making a materially false report to the New Jersey Division of Consumer Affairs ("the DCA") that failed to use the agreed-upon language that appeared in that agreement. Further, nothing presented by the Hospital Defendants can overcome the fact that the trial court both failed to give Dr. Matusow the benefit of any favorable inferences, it drew numerous negative inferences against Dr. Matusow that were unsupported by the record and irrelevant to the issues raised by the motion. For all these reasons, as well as the reasons set forth in Dr. Matusow's initial Appellant's Brief, the trial court's grant of summary judgment should be reversed and the matter remanded for hearing by a different trial judge.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE HOSPITAL DEFENDANTS WERE REQUIRED TO REPORT TO THE DCA FIVE MONTHS AFTER ALL PROCEEDINGS AGAINST DR. MATUSOW WERE CONCLUDED AND SETTLED [T28-22 to T29-12]

This Court owes no deference to the trial court's mis-reading of the Health Care Professional Responsibility and Reporting Enhancement Act (also known as "the Cullen Act"), N.J.S.A. 26:2H-12.2b, and its accompanying regulations, but instead reviews such questions *de novo*. *See*, *e.g.*, *Cadre v. Proassurance Cas. Co*., 468 N.J. Super. 246, 257 (App. Div.) ("We owe no deference to the motion judge's legal analysis or interpretation of a statute."), *cert. denied*, 249 N.J. 338 (2021). Looking at the plain language of the Cullen Act – which is the best indication of the Legislature's intent, *e.g.*, *W.S. v. Hildreth*, 252 N.J. 506, 518 (2023) – the only logical conclusion is that the Cullen Act did not require the Hospital Defendants to notify the DCA about Dr. Matusow's status some five months after the fact.

The applicable Cullen Act sections are written in the present tense. For example, a hospital must notify the DCA in writing if a health care professional:

> ***voluntarily relinquishes any partial privilege or authorization to perform a specific procedure if***: (a) the health care entity ***is reviewing*** the health care professional's patient care or reviewing whether, based upon its reasonable belief, the health care professional's conduct demonstrates an impairment or incompetence or is unprofessional, which incompetence or

> unprofessional conduct relates adversely to patient care or safety; ***or*** (b) the health care entity, through any member of the medical or administrative staff, has expressed ***an intention to do*** such a review.

N.J.S.A. 26:2H-12.2b(a)(4) (emphasis added). Similarly, the Cullen Act's implementing regulations require a health care entity to file a report with the DCA concerning a health care professional when the health care entity "***is undertaking an investigation or a review***" of a health care professional's conduct. N.J.A.C. 13:45E-3.l(a)(4) (emphasis added). In short, reporting to the DCA is mandated by the plain language of the statute and the regulations only when the review is in process or is about to happen, not five months after the fact, as happened here. [Ca003; *see also* Pa261].

All investigation(s) of Dr. Matusow by the Hospital ended with the signing of the Settlement Agreement on December 13, 2012. [T17-6 to -18, T25-27 to -25]. The trial court agreed on this point, stating "[t]here ***was*** an investigation ongoing, ***and it ceased at the time that they made this agreement. I agree with that***." [T25-19 to - 21]. Any obligation to report the ongoing investigation ceased with the investigation, as clearly stated by the Cullen Act and N.J.A.C. 13:45E-3.l(a)(4). Thus, when the Hospital Defendants took it upon themselves to make a late report, they were not acting under the authority of the statute. They were, instead, violating the Settlement Agreement with Dr. Matusow. The trial court's decision to grant summary judgment to the Hospital Defendants thus cannot stand up to *de novo* review, and should be reversed.

POINT II

EVEN IF THE HOSPITAL DEFENDANTS HAD A DUTY TO REPORT, THEY REPORTED FALSE AND INACCURATE INFORMATION CONTRARY TO THE SETTLEMENT AGREEMENT [T27-20 to T32-7]

The Hospital Defendants do not dispute that they filed a DCA Form containing language other than that agreed upon in the Settlement Agreement. They do not dispute that they checked a box on that form stating that Dr. Matusow "voluntarily relinquished" his Conscious Sedation ("CS") privileges at the Hospital.[1] Nor do they dispute that they filled out the DCA Form in a way that falsely accused Dr. Matusow of criminal conduct. Nonetheless, they insist that they somehow did not breach the Settlement Agreement by doing all of this – a patently absurd conclusion that finds no support in the record.

The Hospital Defendants seem to be arguing that they did not breach the Settlement Agreement because they could not have filed a report with the DCA containing information that complied with the Settlement Agreement. That is far from true. The DCA Form does include language that more accurately reflects the terms of the Settlement Agreement than the language the Hospital Defendants chose. Specifically, the Hospital Defendants could have and should have selected the box that reads as follows:

[1] "The Hospital" refers collectively to Defendants-Appellees South Jersey Health System, Inc., now known as Inspira Health Network, and South Jersey Hospital, Inc., now known as Inspira Medical Centers, Inc.

> ***Conditions or limitations placed on the exercise of clinical privileges or practice within the health care entity*** (including, but not limited to second opinion requirements, non-routine concurrent or retrospective review of admissions or care, non-routine supervision by one or more members of the staff, completion of remedial education or training).

[Ca003 (emphasis added)].

Checking the box indicating that Dr. Matusow "voluntarily relinquished" his CS privileges was a false statement, in breach of the Settlement Agreement. The Settlement Agreement expressly provided the language to be used when reporting about Matusow. That language contained no mention of relinquishment, voluntary or otherwise.

Instead, Dr. Matusow's use of CS privileges was made subject to the condition that he not use those privileges at the Hospital, subject to review of his use of CS procedures elsewhere and possible reinstatement. [Pa085-87; see also Pa186-187; Pa236; Pa300]. Further, the Settlement Agreement clearly states as follows:

- The Hospital "shall grant Matusow Conscious Sedation ("CS") privileges," subject to certain conditions [Pa085-87];
- Dr. Matusow "will continue to retain CS privileges at the Hospital" [Pa088]; and

This language belies the Hospital Defendants' central premise that Matusow voluntarily gave up his CS privileges. Unlike the trial court, this Court cannot simply ignore it in favor of punishing Dr. Matusow for perceived bad deeds.

Further, the notion that the Hospital Defendants' breach of the Settlement Agreement was somehow harmless to Dr. Matusow is contrary to the evidence. The New Jersey State Board of Medical Examiners ("the Board") clearly stated in its August 5, 2015 letter to Dr. Matusow that its investigation of the doctor was premised on the Hospital Defendants' report to the DCA and the representation that he had voluntarily relinquished his CS privileges. [Pa 274]. Additionally, in a subpoena dated August 27, 2013, the Board demanded all documents related to Dr. Matusow including all of the documents related to the allegations (or proposed Corrective Actions) that were the subject of the Hospital's investigations. [Pa264-265]. The May 14, 2018 Consent Order between Dr. Matusow and the Board expressly states that the Board's investigation was prompted by the DCA Form. [Pa277].

Giving Dr. Matusow the benefit of all reasonable inferences, a jury could conclude that the Board would not have investigated Dr. Matusow but for the inaccurate report made to the DCA that he had voluntarily relinquished his privileges. Further, a reasonable jury could conclude that had the Hospital Defendants used the language in the Settlement Agreement stating that no Corrective Actions were taken, the Board would not have investigated.

The trial court did not afford Dr. Matusow the benefit of these favorable inferences. Instead, Judge Swift improperly drew inferences against Dr. Matusow based on his own personal opinions regarding Dr. Matusow's competence as a

medical doctor, [*see*, *e.g.*, T31-18 to -23, T24-13, T29-18], and his unfounded speculation about whether Dr. Matusow had a narcotics habit. [T9- 20 to T10-3; T24-18 to -22]. For all of these reasons, the trial court erred in granting summary judgment in favor of the Hospital Defendants. That ruling should be reversed and the matter remanded to another trial judge.

POINT III

WHETHER THE HOSPITAL DEFENDANTS ARE IMMUNE FROM LIABILITY FOR IMPROPER REPORTING IS A QUESTION OF FACT

The Hospital Defendants argue that they acted "in good faith and without malice" when they submitted the inaccurate DCA Form, and thus are immune from liability under N.J.S.A. 26:2H-12.2b(g). Questions concerning a party's state of mind, including whether they acted in good faith or not, are uniquely unsuited for summary judgment. *See*, *e.g.*, *Gray v. Press Commc'ns, LLC*, 342 N.J. Super. 1, 12 (App. Div. 2001) ("[T]he issue of state of mind does not readily lend itself to summary disposition."); *Prudential Prop. & Cas. Ins. Co. v. Karlinski*, 251 N.J. Super. 457, 466 (App. Div. 1991) (explaining that "a motion for summary judgment should not ordinarily be granted where an action or defense requires determination of a state of mind"). Nothing here warrants an exception to this general rule for the Hospital Defendants.

The Hospital Defendants contend that Dr. Matusow has offered nothing

more than a "bare allegation of malice." That is not the case. As previously noted, in the context of a similar immunity provided to hospital review committees under N.J.S.A. 2A:84A-22.10, *Hurwitz v. AHS Hosp. Corp.*, 438 N.J. Super. 269 (App. Div. 2014), defined malice as acting "either with ill will, without just cause, or with a reckless disregard of the truth of the facts regarding the physician's quality of care." 438 N.J. Super. at 299–300.

A reasonable jury could conclude that the Hospital Defendants acted with reckless disregard for the truth of what they were stating on the DCA Form. The Settlement Agreement expressly provides what could and could not be reported by the Hospital Defendants about Dr. Matusow (assuming such a report to the DCA was required), yet the Hospital Defendants completely failed to use that language despite all the alleged care taken with their response. The Hospital Defendants inaccurately accused Dr. Matusow of being involved in criminal issues [*see* Ca003], yet no one apparently noticed that alarming error for nearly six months. [*See* Ca003-06]. When the Hospital Defendants finally corrected the inaccurate and false DCA Form, they corrected only the reference to criminal issues, not the inaccurate statement that Dr. Matusow had voluntarily relinquished his CS privileges. [Ca006; *see also* Pa059; Pa251; Pa261; Pa268].

Giving Dr. Matusow the benefit of all favorable inferences from these facts – and most especially from the false accusation of criminal involvement, which the Hospital Defendants let stand for six months without correction – a jury could

conclude that they are not entitled to immunity. The trial court, however, failed to give Dr. Matusow the necessary benefit of favorable inferences. For this reason as well, the grant of summary judgment below should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's Order granting summary judgment in the Hospital Defendants' favor should be reversed, and the matter remanded with instructions that it be assigned to a judge other than Judge Swift.

Respectfully submitted,

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(008732007)

Dated: July 27, 2024