WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Maxwell Billek, Esq. (055101993)
200 Campus Drive
Florham Park, New Jersey 07932
Tel: (973) 624-0800
Attorneys for Defendants The Law Firm Of Anthony Pope, P.C., & Anthony J. Pope, Jr., Esq.
Our File: 12311.374

BARBARA BOK, Plaintiff(s), vs. THE LAW FIRM OF ANTHONY POPE, P.C., & ANTHONY J. POPE, JR., ESQ., JOHN & MARY DOES, I-X, fictitious names for heretofore unknown persons, ABC INC., I-X, fictitious names for heretofore unknown corporate defendants, XYZ PARTNERHIP, I-X, fictitious names for heretofore unknown partnership entities, Defendant(s).	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO: ESX-L-008234-20 Civil Action **NOTICE OF MOTION TO DISMISS COMPLAINT PURSUANT TO R. 4:6-4(b) and R. 4:6-2(e)**

TO: Joseph E. Collini, Esq.
EMOLO & COLLINI, ESQS.
375 Broadway
Paterson, New Jersey 07501
Attorneys for Plaintiff

PLEASE TAKE NOTICE that on April 30, 2021 at 9:00 o'clock, a.m., in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorneys for the Defendants The Law Firm Of Anthony Pope, P.C., & Anthony J. Pope, Jr., Esq. will move before the Superior Court of New Jersey, Law Division, Essex County at the Courthouse in Newark, New Jersey for

an order dismissing Plaintiff's Complaint with prejudice for failing to state a claim upon which relief can be granted, pursuant to R. 4:6-2(e) and R. 4:6-4(b).

PLEASE TAKE FURTHER NOTICE that, in support of the within application, Defendant shall rely on the attached Certification, Exhibits, and Brief. A proposed form of Order is also submitted herein.

PLEASE TAKE FURTHER NOTICE that**,** pursuant to R. 1:6-2(d), the undersigned,

___ Waives oral argument and consents to disposition on the papers.

_X_ Requests oral argument only if opposed.

___ Requests oral argument.

PLEASE TAKE FURTHER NOTICE that at the time and place aforesaid, Defendants will request that the proposed form of Order submitted herewith be entered by the Court.

Discovery End Date – None Scheduled.

Case Management Conference —None Scheduled.

Pretrial Date—None Scheduled.

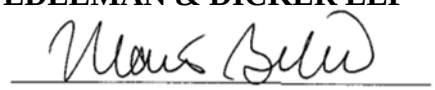
Arbitration Hearing – None Scheduled

Trial Date—None Scheduled.

Dated: March 31, 2021

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

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Attorneys for Defendants The Law Firm of Anthony Pope, P.C. and Anthony J. Pope, Jr. Esq.

PROOF OF MAILING

In compliance with Rule 1:6-4, the original of the within Motion has been E-filed with the Motion's Clerk of Essex County and copies have been served upon the following via the E-filing system, regular mail, or facsimile, if counsel or party does not participate in E-filing:

Joseph E. Collini, Esq.
EMOLO & COLLINI, ESQS.
375 Broadway
Paterson, New Jersey 07501
Attorneys for Plaintiff

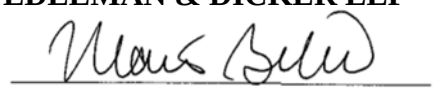
On March 31, 2021 I directed a courtesy copy of the within Motion be sent via Lawyers Service to:

The Honorable Lisa M. Adubato, Esq.
Historic Courthouse
470 Martin Luther King, Jr. Blvd., 2nd Floor
Newark, NJ 07102

Dated: March 31, 2021

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

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BARBARA BOK, Plaintiff, vs. THE LAW FIRM OF ANTHONY POPE, P.C., & ANTHONY J. POPE, JR., ESQ., JOHN & MARY DOES, I-X, fictitious names for heretofore unknown persons, ABC INC., I-X, fictitious names for heretofore unknown corporate defendants, XYZ PARTNERHIP, I-X, fictitious names for heretofore unknown partnership entities, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO: ESX-L-008234-20 Civil Action **CERTIFICATION OF COUNSEL IN SUPPORT OF MOTION TO DISMISS COMPLAINT**

I, MAXWELL BILLEK, ESQ. hereby certify:

1. I am a partner with the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys for Defendants Anthony J. Pope Jr., Esq. and The Law Firm of Anthony Pope, P.C. As such, I am fully familiar with the facts herein. I submit this Certification in support of Defendant's motion for an order dismissing Plaintiff's Complaint with prejudice for failing to state a claim upon which relief can be granted, pursuant to R. 4:6-4(b) and 4:6-2(e).

2. Attached as **Exhibit A** is a true and accurate copy of Plaintiff's Complaint.

3. Attached as **Exhibit B** is a true and accurate copy of the March 16, 2020 Transcript of Settlement for Docket no. HUD-L-4561-17.

4. Attached hereto as **Exhibit C** is a true and accurate copy of the Pre-Trial Memorandum for Docket no. HUD-L-4561-17.

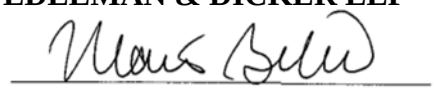
5. Attached as **Exhibit D** is a true and accurate copy of the unpublished opinion in Feld v. City of Orange Twp., No. A-3698-08T3, 2020 N.J. Super. Unpub. LEXIS 1627 (App. Div. 2010).

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

Dated: March 31, 2021

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

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BARBARA BOK, Plaintiff, vs. THE LAW FIRM OF ANTHONY POPE, P.C., & ANTHONY J. POPE, JR., ESQ., JOHN & MARY DOES, I-X, fictitious names for heretofore unknown persons, ABC INC., I-X, fictitious names for heretofore unknown corporate defendants, XYZ PARTNERHIP, I-X, fictitious names for heretofore unknown partnership entities, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO: ESX-L-008234-20 Civil Action **VIA ECOURT FILING**

STATEMENT OF FACTS AND MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Maxwell L. Billek, Esq.
Of Counsel

Katherine M. Coyne, Esq.
On the Brief

PRELIMINARY STATEMENT

Several claims raised in this matter must be dismissed where Plaintiff's Complaint against Anthony J. Pope, Jr., Esq. and The Law Firm of Anthony Pope, P.C. states immaterial and improper factual allegations as well as those which cannot be sustained at trial as a matter of law. Defendants represented her in a medical malpractice action brought in the Superior Court of Hudson County, Civil Division (HUD-L-4561-17). In that matter, Anthony J. Pope, Jr., Esq. filed a Complaint on behalf of Plaintiff against Defendants Shari Reitzen, M.D. and Rutgers University Medical Center, thereafter amending that Complaint to include Michael Zaki, M.D. Following pre-trial discovery, on March 2, 2020, trial commenced in Hudson County Superior Court before The Honorable Mary K. Costello, J.S.C. This matter was poised to proceed through weeks of trial, however, due to the inception of the public health crisis relating to the novel coronavirus pandemic, the Supreme Court of New Jersey issued an Omnibus Order on March 12, 2020 suspending new trials but allowing ongoing trials to continue. By this time, two of Plaintiff's expert witnesses had yet to testify, and the defense attorneys indicated they would require an additional two weeks to put on their case before even proceeding to summation, jury charge, and deliberation.

Plaintiff herself was reluctant to appear the following Monday, March 16, 2020. On that morning, the Court reported to the parties that the jurors were impaneled wearing masks and gloves, and were already quite apprehensive upon learning a juror had called in sick. The Court then informed the parties' counsel that no testimony would be heard that day and the jurors were released for the day. Thereafter, a half day settlement conference with Judge Costello was conducted. Plaintiff was placed in a unique situation where she was forced to decide how to handle the remainder of her case in light of the uncertainty created by the public health crisis.

This matter reached settlement between all parties at mid-day on March 16, 2020. Judge Costello conducted *voir dire* of the Plaintiff and recorded the settlement terms on the record, during

which time plaintiff acknowledged acceptance with the terms of the settlement, and equally relevant, she acknowledged, without reservation, her satisfaction with her legal representation.

Earlier this year, Defendants moved to dismiss plaintiff's entire Complaint for failure to state a cause of action, pursuant to R. 4:6-2(e). The motion was denied, without prejudice, where the court determined that the facts, if taken in a light most favorable to the non-moving party, could support a finding for the plaintiff. Specifically, the court found that discovery must be undertaken to determine the basis for Plaintiff's allegations that Defendants were negligent and breached their fiduciary duty to the Plaintiff when they allegedly exerted coercion and undue influence in conjunction with settlement discussions. In particular, the court expressed concern that Plaintiff alleged that Pope indicated that she would have to repay his expenses or find another attorney to try to the case.

However, in her Complaint, Plaintiff also attempts to create various issues of fact to support a claim that she would not have settled her medical malpractice matter but for the negligence of Defendants. Significantly, she attempts to argue that because Defendants did not appropriately question her expert witness to develop the elements of *res ipsa loquitur* and in turn, that this lack of questioning "guaranteed that the jury would not have been so charged at the conclusion of the evidence in plaintiff's case." However, Defendants had not yet finished presenting Plaintiff's case at the point when trial was interrupted by the ongoing COVID-19 pandemic. As such, this claim, which is repeated throughout Plaintiff's Complaint, is purely speculative and improper, and cannot ever be sustained at trial. These allegations do not rise to a cause of action where Plaintiff will not ever be able to say with any degree of certainty whether Defendants would have been able to establish the elements of *res ipsa loquitur* through cross-examination of the underlying defense witnesses or otherwise (such as through the use of deposition testimony). In fact, the Pre-Trial

Memorandum filed with the Court specifically set forth that at the conclusion of Plaintiff's case, the relevant portions of the deposition testimony of both Drs. Reitzen and Zaki was to be read into the record and would establish the necessary elements of *res ipsa loquitur* such that a jury could be appropriately charged. Thus, this allegation must fail and should be stricken.

Further, the allegations relating to: Defendants' alleged failure to include an "informed consent" count in the underlying Complaint; Defendant's alleged failure to move for a mistrial; and Defendants' alleged coercion of Plaintiff to accept the terms of the underlying "High/Low" agreement are speculative and irrelevant, and do not rise to a cause of action where relief could ever be granted.

As this court is aware, Plaintiff was placed in a unique situation created by the COV1D-19 pandemic and chose to settle her case, rather than face an almost certain mistrial and extensive delay getting before a jury again. Plaintiff accepted a settlement and cannot now say Defendants would not have been able to establish the requisite elements of a cause of action under "*res ipsa loquitur*" since to state that is pure speculation.

FACTUAL BACKGROUND

1. According to Plaintiff's Complaint, on or about March 7, 2017, Plaintiff presented to Hackensack University Medical Center to undergo a bilateral tonsillectomy with Dr. Shari Reitzen, M.D. and Dr. Michael Zaki, M.D. (Exhibit A).
2. As a result of this procedure, according to Plaintiff's Complaint, she suffered a hemorrhage at the right tonsillar operative site which necessitated emergency vascular surgery to cut down and ligate the external carotid artery to stop the bleeding in order to save her life. (Ex. A).
3. According to the Complaint, due to the complications that arose from this surgery, Plaintiff alleges that she is permanently disabled and unable to work. (Ex. A).
4. Thereafter on April 11, 2017, Plaintiff sought the services of Anthony Pope Law Firm, P.C. and signed a retainer agreement for Anthony J. Pope, Jr., Esq. to represent her in her lawsuit. (Ex. A).
5. On November 6, 2017, Mr. Pope filed a Complaint against Dr. Reitzen, Riverside Medical Group, and Hackensack University Medical Center, alleging counts of negligence, medical malpractice, *res ipsa loquitur*, and *respondeat superior* (HUD-L-004561-17). (Ex. A).
6. Mr. Pope later amended the Complaint on February 15, 2019 to include Dr. Zaki as a Defendant. (Ex. A).
7. Any allegation that Defendant was negligent for failing to prosecute a claim of failure to obtain informed consent is irreverent, speculative, immaterial, and improper, as Defendant's strategy and decision to include and exclude certain counts of the underlying Complaint, and the ultimate decision to exclude an informed consent count

has no bearing on whether Plaintiff later felt coerced by Defendants in deciding to settle.

8. Trial in the underlying matter commenced on March 2, 2020. Jury selection continued until March 6, 2020, and the substantive portion of trial began on March 9, 2020, with opening statements by the parties. (Ex. A).
9. Plaintiff's Complaint contains bald and speculative allegations that Defendants coerced her into accepting the terms of a revised "High/Low" agreement while trial was ongoing. (Ex. A, ¶12, 13, 14).
10. These allegations are irrelevant, immaterial and improper as the "High/Low" agreement in the underlying matter would only be relevant to the instant matter if the underlying matter reached a jury verdict, which it did not.
11. Trial proceeded to March 12, 2020. (Ex. A).
12. According to the Complaint, Defendants' direct questioning of plaintiff's liability expert, Dr. Miller, was insufficient to prove the elements of *res ipsa loquitur* and/or negligent supervision by the defendant Dr. Reitzen, over the co-defendant, resident, Dr. Zaki, or to prove the elements of res ipsa loquitur against any of the defendants. (Ex. A, ¶16).
13. In fact, according to Plaintiff's Complaint, "During the first week of trial, the plaintiff, her children, Dr. Sekin, George Canavale, Dr. Napolitano, and plaintiff's liability expert, Dr. Miller testified. The trial continued to March 12, 2020 and then adjourned until March 16, 2020." (Ex. A, ¶15).

14. Counts One, Two, and Four of Plaintiff's Complaint are all based on the allegation that Defendants failed to properly question Plaintiff's liability expert as to the elements of *res ipsa loquitur*. (Ex. A).
15. In fact, the Pre-Trial memorandum filed with the Court specifically set forth that at the conclusion of Plaintiff's case, the relevant portions of deposition testimony of both Drs. Reitzen and Zaki was to be read into the record and would establish the requisite elements of *res ipsa loquitur* such that a jury could be appropriately charged. (Ex. C).
16. On March 12, 2020, in light of the novel coronavirus pandemic, Chief Justice Stuart Rabner issued an Omnibus order suspending all new jury trials in the Superior Court of New Jersey. Ongoing jury trials were permitted to continue per this Order. (Ex. A).
17. As Plaintiff's trial was well underway at this point, all parties reported to the Hudson County Superior Court on March 16, 2020, at which point they were informed that one juror had called in sick and, as indicated in Plaintiff's Complaint, she was also reluctant to appear in Court that day. (Ex. A).
18. The ongoing public health crisis placed Plaintiff in a unique circumstance where she had to choose between settlement or the likelihood of Judge Costello declaring a mistrial due to the jurors' reluctance to appear and one juror having called in sick.
19. All counts of Plaintiff's Complaint, in part, rely on the allegation that Defendants failed to move for a mistrial in light of the COVID-19 pandemic. (Ex. A).
20. This allegation is speculative and improper, as there is basis for the claim that a mistrial would have been granted when Chief Justice Rabner's Omnibus Order specifically stated that jury trials that were already impaneled, such as the underlying trial, could continue.

21. According to Plaintiff's Complaint, after a morning of settlement negotiations, the parties agreed to settle this matter on March 16, 2020. (Ex. A).
22. Plaintiff cannot say for certain what the outcome of her case would have been because she accepted settlement prior to the conclusion of her trial. At the time she accepted settlement, there were two witnesses remaining and the entirety of the defense's case had yet to be presented.
23. Therefore certain specified claims in Plaintiff's Complaint fail to establish a cause of action because Plaintiff voluntarily settled this matter. Specifically, claims regarding the questioning of her liability expert completely fail as they are speculative and improper. But for the chain of events occasioned by the COVID-19 pandemic, this matter would have been tried to conclusion. Plaintiff cannot now assert causes of action based on trial questioning that never concluded due to her decision to settle the matter. Therefore the Complaint must be dismissed with prejudice for impropriety of the pleading.

LEGAL ARGUMENT

POINT I

ON A MOTION TO DISMISS UNDER RULES 4:6-2(E) AND 4:6-4(b), THE COMPLAINT MAY BE DISMISSED WITH PREJUDICE IF ANY PART OF A PLEADING IS IMMATERIAL.

It is well-settled that motions to dismiss focus upon the allegations in the Complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989)). In Printing Mart, the New Jersey Supreme Court instructed courts to search complaints:

> in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation [a] [c]ourt [should not be] concerned with the ability of plaintiffs to prove the allegation contained in the complaint. . . . [P]laintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the afore stated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

Id. at 7.

That said, a New Jersey court may likewise consider documents outside the complaint itself on a motion to dismiss, particularly those that are part of a judicial record such as pleadings filed in Court. E. Dickerson & Son et al. v. Ernst & Young LLP, 361 N.J. Super. 362 (App. Div. 2003), *aff'd* 179 N.J. 500 (2004) (Appellate Division considered engagement letters referenced in the complaint when granting defendants' Rule 4:6-2(e) motion to dismiss an accounting malpractice complaint and did not find it necessary to convert the motion into one for summary judgment). *See also* In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997).

To that end, in such circumstances where documentation additional to the complaint can easily shed light as to the propriety of the claims, our judiciary has permitted their consideration under *Rule* 4:6-2(e). *See* Banco Popular No. America v. Gandi, 184 N.J. 161, 183 (2005); E.

Dickerson & Son, et al. v. Ernst & Young LLP, 361 N.J. Super. 362, 365 n.1. (App. Div. 2003), *aff'd* 179 N.J. 500 (2004).

Dickerson was a professional malpractice case. There, the Court permitted the trial court's consideration of engagement letters referenced in the complaint when it granted defendants' Rule 4:6-2(e) motion to dismiss the complaint. Id.

Dickerson relied upon the Third Circuit's analysis in In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. N.J. 1997). *See* id. at 365 n.1. In Burlington, the Third Circuit reasoned that generally a District Court on a motion to dismiss may not consider matters extraneous to the pleadings. The Burlington Court recognized, however, that "an exception to the general rule is that a 'document integral to or explicitly relied upon in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.'" Id. at 1426 (internal citations omitted).

The Burlington Court's analysis continued to state that the:

> rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint -- lack of notice to the plaintiff -- is dissipated "where plaintiff has actual notice . . . and has relied upon these documents in framing the complaint." What the rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent.

In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (internal citations omitted).

Accordingly, while the New Jersey Supreme Court held in Printing Mart-Morristown that the appropriate test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts and further that the court's inquiry is limited to examining the legal

sufficiency of the facts alleged on the face of the complaint, the subsequent holdings in *Dickerson* and Banco Popular have created exceptions to this rule.

In fact, in Banco Popular North America v. Gandi, 184 N.J. 161 (2005), the New Jersey Supreme Court cited the Third Circuit standard for considering motions to dismiss and reasoned that in evaluating motions to dismiss, "courts [may] consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" *Id.* at 183 (citing Lum v. Bank of America, 361 F.3d 217 (3rd Cir.), *cert. denied*, 125 S. Ct. 271 (2004)).

In this instance, Plaintiff's Complaint contains bald, conclusory allegations regarding the establishment of the elements of *res ipsa loquitur* that are speculative, conclusory, and improper. Those allegations are directly refuted by the pre-trial memorandum filed by Defendants, and are also directly refuted by the March 16, 2020 settlement transcript. The transcript of the *voir dire* conducted by Judge Costello and counsel, as well as the pre-trial memorandum, are irrefutable and reliable. Consequently, Defendants assert that when considering the allegations in the Complaint, together with the settlement transcript and pre-trial memorandum which form the basis of the allegations, this Court must find that Plaintiff's Complaint must be dismissed with prejudice for failure to state a claim.

POINT II

PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW AND MUST BE DISMISSED

The essential elements of a cause of action for legal malpractice are: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of such duty; (3) proximate causation between the breach and injury to the plaintiff; and (4) actual damages

to the plaintiff. Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996); Zendell v. Newport Oil Corporation, 226 N.J. Super. 431, 438 (App. Div. 1988); Albright v. Burns, 206 N.J. Super 625, 632 (App. Div. 1986). If any of the basic elements of the cause of action are lacking, the claim is not actionable. Lovett v. Estate of Lovett, 250 N.J. Super. 79, 93 (Ch. Div. 1991). Here, as a matter of law, facts sufficient to sustain the elements of either a breach of duty of care or proximate cause of damages are not properly set forth in the Complaint, thus demanding the dismissal of specific allegations and components of the Complaint.

The Pre-Trial Memorandum filed with the Court specifically set forth that at the conclusion of Plaintiff's case, relevant portions of deposition testimony of both Drs. Reitzen and Zaki was to be read into the record relating to the elements of *res ipsa loquitur*, such that a jury could be appropriately charged at the conclusion of trial. Thus, the Plaintiff's allegation that the questioning of an expert witness at trial was not sufficient to establish a cause of action for *res ipsa loquitor* must fail as a matter of law as purely speculative and not capable of being proven at trial.

Moreover, there is certainly no issue of material fact as to whether Defendants properly excluded an informed consent count in the underlying Complaint. The decision to exclude a count in the underlying complaint as to informed consent was sound litigation strategy that was discussed with Plaintiff and completely irrelevant on the issue of whether Plaintiff was coerced into accepting a settlement. Further, whether Defendants coerced Plaintiff into agreeing to the revised "High/Low" agreement is equally irrelevant, as the terms of that agreement only have an effect after a jury has reached a verdict, which never came to fruition in the underlying matter. Finally whether Defendants should have moved for a mistrial in the underlying matter is a moot point, because there is no way to predict whether a judge would have granted a mistrial as Chief Justice Rabner's Omnibus Order allowed for impaneled jury trials to continue to conclusion. Indeed, all

of these allegations are speculative and improper where Plaintiff patently admitted to her satisfaction with services rendered by Defendant, as well as her complete understanding of the fees owed to Defendants, and the other terms of settlement.

A. THE COMPLAINT MUST BE DISMISSED WHERE THE FACTUAL ALLEGATIONS IN PLAINTIFF'S COMPLAINT ARE IMPROPER AND SPECULATIVE.

New Jersey Rule of Court 4:6-4(b) provides that on the motion of a party "the court may either (1) dismiss any pleading that is, overall, scandalous, impertinent, or, considering the nature of the cause of action, abusive of the court or another person; or (2) strike any such part of a pleading or any part thereof that is immaterial or redundant. That order of dismissal shall comply with R. 4:37-2(a) and may expressly require, as a condition of the refiling of a pleading asserting a claimor defense based on the same transaction, the payment by the pleading party of attorney's fees and costs incurred by the party who moved for dismissal."

In considering a Motion to Dismiss based on Rule 4:6-4(b) for scandalous or impertinent content of the Complaint,

> [t]he judge had options from which to select an appropriate remedy. Rule 4:6-4(b)(1)-(2) permits a judge to dismiss an offending complaint in its entirety or to strike portions that are immaterial or redundant. A judge's election between those remedial measures is a judicial determination that must be explained. R. 1:7-4(a).
>
> From the perspective of a trial judge, there is a practical reason for providing the required statements of facts and reasons for an order dismissing pursuant to Rule 4:6-4(b) without prejudice. An order of dismissal on that ground that is issued without a decision identifying the problems is not likely to be productive. Repetition of the improprieties is the more likely outcome when the problems have not been identified. In contrast, if there is a clear articulation of what must be eliminated in order to proceed, then it is more likely that the next pleading will be one that has been pruned of extraneous materials that are obfuscating the issues and unfairly burdening the court and the party's adversary.

Feld v. City of Orange Twp., No. A-3698-08T3, 2010 N.J. Super. Unpub. LEXIS 1627, at *16-17 (App. Div. July 19, 2010) (Pursuant to the New Jersey Rules of Court, a copy of the unpublished opinion is attached hereto as Exhibit "C").

Allegations of the Complaint will not be scandalous unless they are irrelevant. See, e.g., DeGroot v. Muccio, 115 N.J. Super. 15, 19 (Law Div. 1971). Here, Defendants respectfully request that the Court dismiss the Complaint as it contains irrelevant, impertinent factual allegations, and is procedurally improper.

Pursuant to the New Jersey Rules of Court, "each allegation of a pleading shall be simple, concise and direct." R. 4:5-7. The pleading may not contain scandalous and impertinent allegations ant are repetitive and irrelevant. R. 4:6-4(b). When the pleading does contain scandalous or impertinent information, the Court may, on Motion of a party, strike all or part of the plaintiff's Complaint. R. 4:6-4(b).

In the case at bar, the entirety of the First Count of Plaintiff's Complaint should be dismissed where it is based entirely on speculative factual allegations. Further, the plaintiff's Complaint includes the following speculative, improper, and impertinent allegations that should be dismissed:

> 12. On March 6, 2020, after much discussion with the defendant POPE, the plaintiff agreed to enter into a `High/Low' agreement with the defendants, Reitzen & Riverside Medical Center for the sum $500,000 as being the low and $1,500,000, as being the high. The agreement was memorialized in writing with the plaintiff's consent to same in an e-mail with the defendant POPE, on said date.

13. On March 9, 2020, POPE approached the plaintiff in court and explained to her that the amounts of the `High/Low' agreement of $500k/$1.5M, had been changed. He explained to her that the defendants Reiten and Riverside were now only agreeable to a High/Low of $280,000/$1,650,000. The plaintiff refused to consent to the change. However, POPE advised BOK that she should consent, because "if the jury comes back with more than the $1.65M, she could always recover the excess from the resident, co-defendant, Zaki." POPE also advised the plaintiff that the jury would probably come back with a finding of 50/50 liability between the defendant doctors and if the verdict was in excess of 1.65M that she could recover the difference from the resident, co-defendant, Dr. Zaki and Rutgers Medical School. Believing that she would be able to recover anything above the 1.65M verdict from the defendant, resident, Dr. Zaki and Rutgers Medical School, the plaintiff agreed to the 'High/Low' proposal of the defendants, Dr. Reitzen and Riverside Medical Center. The defendant did not inform the plaintiff that the chances of recovering 50% from a second-year resident who was working under the direct supervision of the defendant, Dr. Reitzen, was highly unlikely and improbable.

14. Based upon the advice of her counsel, which fostered a belief that she was going to be able to recover substantially more than the $1.65M from the co-defendants, resident physician, Dr. Zaki, and Rutgers Medical School, BOK agreed on the record in open court to accept the `High/Low' proposal of the defendants, Reitzen & Riverside Medical Center, based

upon a mis-guided belief that she would be able to recover anything above the `High' of $1.65M from the co-defendants, Dr. Zaki and Rutgers Medical School.

16. The defendant, POPE'S, direct questioning of plaintiff's liability expert, Dr. Miller, was insufficient to prove the elements of *res ipsa loquitor* and/or negligent supervision by the defendant Dr. Reitzen, over the co-defendant, resident, Dr. Zaki, or to prove the elements of res ipsa loquitor against any of the defendants.

17. The plaintiff alleges herein that POPE failed to ask the questions necessary of her key medical expert witness, Dr. Miller, to properly set forth the required elements of the tort of res ipsa loquitor, when neither defendant could testify as to who was operating on the plaintiff's right tonsil when the bleeding occurred, as both physicians testified that they were using the coblator during the surgery.

18. By not posing the required questions of plaintiffs expert witness by POPE to develop the elements of the doctrine of res ipsa loquitor at trial, guaranteed that the jury would not have been so charged at the conclusion of the evidence in plaintiff's case. POPE's omission to properly develop the elements of a res ipsa loquitor jury charge, created a fatal defect in BOK's case, as it caused the plaintiff to now have to prove individualized negligence against each of the defendants to the jury, when the res ipsa loquitor doctrine, would have alleviated same because the defendants could not testify as to who was operating on the right tonsil at the time of surgery,

but they had testified that they were both using the coblator device during BOK's surgery.

19. The defendant, POPE, failed to pose the necessary questions in his direct examination of plaintiff's medical expert, Dr. Miller, to establish the required elements of the tort of "negligent supervision" with respect Dr. Reitzen, the lead surgeon, over her resident assistant, Dr. Zaki, when neither could testify as to who was operating on the right tonsil at the time of the bleeding, and when it was admitted that the defendant, Zaki, was operating on one of the tonsils using the coblator, when he was under the direct supervision of Dr. Reitzen, during the surgery. The aforesaid omission by POPE constituted a critical error in his representation of BOK because if the jury found that Dr. Zaki was negligent and not Dr. Reitzen, they still could have found her liable of negligently supervising the resident, Zaki, during the operation, as neither defendant doctor could testify as to who was operating on the right tonsil when it bled, and it was admitted that both defendants were using the coblator during the surgery. There was also evidence that the defendant, Rietzen, may not have even been in the operating room when the bleeding in the right tonsil started.

COUNT II

40. In their capacity as counsel for the plaintiff, the defendants owed a fiduciary duty to protect her interests by, among other things, ensuring that the plaintiff's underlying case was properly prosecuted and pleaded … that all evidence was properly adduced from plaintiff's liability

expert at trial to prove the allegations set forth in the complaint … ensuring that all actions and representations undertaken for the benefit of the plaintiff complied with the New Jersey's Rules of Professional Conduct.

41. The defendants breached their fiduciary duty to the plaintiff by failing properly … question its liability expert to prove the elements of the causes of action pleaded in the amended complaint.

COUNT III

46. The defendant misrepresented various facts to the plaintiff concerning … the `High/Low' agreement as aforesaid.

COUNT IV

52. The defendant breached said terms of the retainer agreement by failing to properly … question the plaintiff's liability expert as to the elements of the causes of actions set forth in the complaint.

(See Exhibit A).

The factual allegations in the Complaint at the above-referenced paragraphs are improper pursuant to R. 4:5-7 requiring every paragraph of a pleading to be "simple, concise, and direct." Moreover, the content of the above referenced paragraph are irrelevant to plaintiff's claims of legal malpractice, as these claims cannot be proven in the course of ongoing discovery and are merely speculative in nature.

First, as to the allegation that Defendants failed to include a count in the underlying Complaint regarding “informed consent” is irrelevant to the issue of coercing a settlement. Defendant Pope was employing litigation strategy and brought the case after discussing that strategy with Plaintiff and reviewing the strengths and weaknesses of her claim. The matter was

being tried. There was a Hi/Lo agreement in effect. The matter settled and Plaintiff now alleges she was coerced into accepting a settlement when she wanted to continue with the trial. This allegation has no relevance or bearing on that decision or issue and will only serve to raise irrelevant and redundant testimony. Second, the allegation that Defendants allegedly coerced Plaintiff into accepting revised terms of a Hi/Lo agreement during trial are irrelevant as the terms of such an agreement only come into effect after a jury verdict is reached, which did not occur in this matter, and thus any speculation as to the effect of such an agreement is improper and should not be considered by this Court. Plaintiff is not alleging that the "Hi" component to the proposed agreement was not acceptable to her and thus this allegation has no relevance or bearing on her decision to settle and will only serve to raise irrelevant and redundant testimony also. Additionally, the allegation that Defendants failed to move for a mistrial is immaterial where Defendants would not have been required to move for a mistrial based on Chief Justice Rabner's Omnibus Order allowing impaneled jury trials to continue to conclusion despite the onset of the coronavirus pandemic nor is there any basis to suggest (other than pure speculation) that a mistrial would have been granted.

Equally irrelevant and speculative, Plaintiff attempts to set forth that Defendants improperly questioned her liability expert, Dr. Miller, which directly impacted her ability to establish the elements of *res ipsa loquitur*, and in turn, impacting her ability to charge the jury as to those elements. Plaintiff bases the first, second, and fourth counts of her Complaint on this allegation. This allegation is directly refuted by the pre-trial memorandum filed by Defendants which outlined relevant deposition testimony to be read into the record that would establish the elements of *res ipsa loquitur* such that a jury could be appropriately charged. Because Plaintiff's

case was unfortunately interrupted by the onset of the COVID-19 pandemic on March 16, 2020, that portion of the trial did not occur.

Viewing the facts alleged in her Complaint in a light most favorable to Plaintiff, but for the COVID-19 pandemic, trial would have proceeded. The elements of *res ipsa loquitur*, as pled in the underlying Complaint, would likely have been established by Defendants as outlined in the pre-trial memorandum. Certainly there can never be evidence to suggest something would or would not have occurred in a trial when that component of the trial did not yet happen. Thus, Plaintiff's bald allegations merely invite speculation and could never support a finding that Defendants breached their duty to Plaintiff. Thus, Plaintiff's claim for legal malpractice based on these factual allegations must fail as a matter of law.

Moreover, Plaintiff testified on the record on March 16, 2020, consenting to settlement and noting specifically that she was satisfied with the the services rendered by Defendants, in direct contravention to her allegations that Defendants improperly questioned her expert witness or failed to properly try the case. Plaintiff's claims outlined in the Complaint are improper where Plaintiff voluntarily admitted that she was satisfied with her legal representation at trial. Ms. Bok knew of Defendants' trial strategies and confirmed her satisfaction with her counsel to Judge Costello. To allow Ms. Bok to somehow revise her statements in court to advance this malpractice case based on allegations, for example, that Defendants failed to properly present her case at trial "would contravene principles of fairness and our policy in favor of encouraging conclusive settlements in ... cases to allow [the former client] to now pursue her attorney for greater monetary gain." Puder v. Buechel, 183 N.J. 428 (2005).

Thus, as Plaintiff's claims as outlined in her Complaint are improper and fail to establish a claim upon which relief may be granted, Plaintiff's Complaint must be dismissed with prejudice pursuant to R. 4:6-4(b).

CONCLUSION

For the foregoing reasons and authorities cited, this Court must dismiss the Complaint with prejudice for failing as a matter of law under R. 4:6-2(e) and R.4:6-4(b).

Dated: March 31, 2021

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

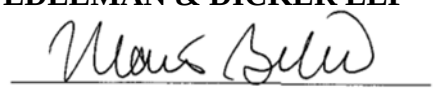
By: 

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EXHIBIT A

EXHIBIT A

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Joseph E. Collini, Esq.
375 Broadway
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(973)-742-6463
Attorney I.D. no. 023451986
Attorney for Plaintiff

BARBARA BOK,

Plaintiff,

vs.

THE LAW FIRM OF ANTHONY POPE, P.C., & ANTHONY J. POPE, JR., ESQ., JOHN & MARY DOES, I-X, fictitious names for heretofore unknown persons, **ABC INC., I-X**, fictitious names for heretofore unknown corporate defendants, **XYZ PARTNERHIP, I-X**, fictitious names for heretofore unknown partnership entities,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

Docket No.:

CIVIL ACTION

LEGAL MALPRACTICE COMPLAINT

The plaintiff, **BARBARA BOK**, residing at 519 Gregory Avenue, Apt. C215, in the City of Weehawken, County of Hudson, & State of New Jersey, by way of complaint against defendants named herein.

BACKGROUND INFORMATION

1. At all times mentioned herein the defendant, **THE LAW FIRM OF ANTHOINY J. POPE**, P.C. is a professional corporation organized under the Laws of the State of New Jersey.
2. At all times mentioned herein the defendant, **ANTHONY J. POPE, ESQ.,** is an attorney duly licensed to practice law in the State of New Jersey with its principal place of business located at 60 Park Place, Suite 703, in the City of Newark, County of Essex & State of

New Jersey.

3. At all times mentioned herein, the defendant, **ANTHONY J. POPE, ESQ.**, held himself out the general public as a Certified Civil Trial Attorney skilled in the handling of all types of civil litigation including complex medical malpractice cases.

4. At all times mentioned herein the plaintiff, **BARBARA BOK**, suffered severe personal injuries on or about March 7, 2017 when she presented to Hackensack University Medical Center to undergo a bilateral tonsillectomy performed by Dr. Shari Reitzen, M.D., and assisted by a resident by the name of Dr. Michael Zaki, M.D.

5. As a result of the surgery the plaintiff, **BARBARA BOK**, suffered a hemorrhage at the right tonsillar operative site which necessitated emergency vascular surgery to cut down and ligate the external carotid artery to stop the bleeding in order to save her life. As a result of the complications that arose from the surgery the plaintiff, then (47) years old, has been permanently disabled and incapable of working since the aforesaid surgery.

6. On April 11, 2017, the plaintiff signed a retainer agreement with "**THE ANTHONY POPE LAW FIRM, P.C.,**" which was signed by its sole partner, **ANTHONY J. POPE, ESQ**. The retainer states, among other things, that "The Law firm will protect your legal rights and do all necessary legal work to properly represent you in this matter."

7. The defendants, **THE ANTHONY POPE LAW FIRM, P.C**., & **ANTHONY J. POPE, ESQ**., [hereinafter cumulatively referred to as "**POPE**"], represented to the plaintiff, **BARBARA BOK**, that his law firm had extensive experience in handling complex medical malpractice actions such as hers and that his law firm would handle her case to its completion inclusive of the trial of the case if need be. In light of the fact that the defendant, **POPE,** represented to the defendant that "he had extensive experience in handling complex medical malpractice actions such as hers," the plaintiff relied upon said representations and entered into a retainer agreement with the defendants.

8. On November 6, 2017, **POPE** filed a complaint on behalf of the plaintiff against the known

defendants at the time, Dr. Reitzen, Riverside Medical Group, and Hackensack University Medical Center. The complaint alleged counts of negligence/ medical malpractice, *res ipsa loquitor* and *respondeat superior*., however, *it failed to set forth a count alleging the failure of the defendants, Shari Reitzen, M.D. and Riverside Medical Group, to obtain proper informed consent from the plaintiff for the surgical procedure that Reitzen was going to perform.*

9. On February 15, 2019, **POPE,** filed an amended complaint naming Michael Zaki, M.D., and Rutgers University Medical Center, as defendants. The amended complaint alleged counts of negligence/medical malpractice, *res ipsa loquitor*, *respondeat superior* and negligence supervision against the defendant, Shari Reitzen, M.D. *The amended complaint again failed to include a count alleging the failure of the defendants, Reitzen and/or Zaki, to obtain proper informed consent from the plaintiff for the surgical procedure that she was about to undergo.* Said omission, was critical, as the plaintiff had never seen the defendants, Reitzen, or Zaki, until she was about to be taken into the operating room.
10. On January 7, 2020, the defendants, **POPE,** filed an "Offer of Judgment" to the defendants in the underlying matter to settle the case for the sum of **$5,000,000** on behalf of the plaintiff. The offer was not accepted by any of the defendants and the matter proceeded to trial.
11. On or about March 2, 2020, a trial was commenced in Hudson County Superior Court before the Honorable Mary K. Costello, J.S.C. in the underlying medical malpractice case and jury selection proceeded until March 6th, when a jury was impaneled. The evidence portion of the case was to commence in earnest on March 9, 2020.
12. On March 6, 2020, after much discussion with the defendant **POPE**, the plaintiff agreed to enter into a 'High/Low' agreement with the defendants, Reitzen & Riverside Medical Center for the sum $500,000 as being the low and $1,500,000, as being the high. The agreement was memorialized in writing with the plaintiff's consent to same in an e-mail

with the defendant **POPE**, on said date.

13. On March 9, 2020, **POPE** approached the plaintiff in court and explained to her that the amounts of the 'High/Low' agreement of $500k/$1.5M, had been changed. He explained to her that the defendants Reiten and Riverside were now only agreeable to a High/Low of $280,000/$1,650,000. The plaintiff refused to consent to the change. However, **POPE** advised **BOK** that she should consent, because "if the jury comes back with more than the $1.65M, she could always recover the excess from the resident, co-defendant, Zaki." **POPE** also advised the plaintiff that the jury would probably come back with a finding of 50/50 liability between the defendant doctors and if the verdict was in excess of 1.65M that she could recover the difference from the resident, co-defendant, Dr. Zaki and Rutgers Medical School. Believing that she would be able to recover anything above the 1.65M verdict from the defendant, resident, Dr. Zaki and Rutgers Medical School, the plaintiff agreed to the 'High/Low' proposal of the defendants, Dr. Reitzen and Riverside Medical Center. *The defendant did not inform the plaintiff that the chances of recovering 50% from a second-year resident who was working under the direct supervision of the defendant, Dr. Reitzen, was highly unlikely and improbable.*

14. Based upon the advice of her counsel, which fostered a belief that she was going to be able to recover substantially more than the $1.65M from the co-defendants, resident physician, Dr. Zaki, and Rutgers Medical School, **BOK** agreed on the record in open court to accept the 'High/Low' proposal of the defendants, Reitzen & Riverside Medical Center, based upon a mis-guided belief that she would be able to recover anything above the 'High' of $1.65M from the co-defendants, Dr. Zaki and Rutgers Medical School.

15. On March 9, 2020, after the 'High/Low' agreement was placed on the court's record, trial commenced with opening statements of counsel and then the presentation of the plaintiff's case by **POPE**. During the first week of trial, the plaintiff, her children, Dr. Sekin, George Carnevale, CPA, Dr. Napolitano and plaintiff's liability expert, Dr. Miller testified. The

trial continued to March 12, 2020 and then adjourned until March 16, 2020.

16. The defendant, **POPE'S**, direct questioning of plaintiff's liability expert, Dr. Miller, was insufficient to prove the elements of *res ipsa loquitor and/or negligent supervision* by the defendant Dr. Reitzen, over the co-defendant, resident, Dr. Zaki, or to prove the elements of *res ipsa loquitor* against any of the defendants.

17. The plaintiff alleges herein that **POPE** failed to ask the questions necessary of her key medical expert witness, Dr. Miller, to properly set forth the required elements of the tort of *res ipsa loquitor,* when neither defendant could testify as to who was operating on the plaintiff's right tonsil when the bleeding occurred, as both physicians testified that they were using the coblator during the surgery.

18. By not posing the required questions of plaintiff's expert witness by **POPE** to develop the elements of the doctrine of *res ipsa loquitor* at trial, guaranteed that the jury would not have been so charged at the conclusion of the evidence in plaintiff's case. **POPE's** omission to properly develop the elements of a *res ipsa loquitor* jury charge, created a fatal defect in **BOK's** case, as it caused the plaintiff to now have to prove individualized negligence against each of the defendants to the jury, when the *res ipsa loquitor* doctrine, would have alleviated same because the defendants could not testify as to who was operating on the right tonsil at the time of surgery, but they had testified that they were both using the coblator device during **BOK's** surgery.

19. The defendant, **POPE**, failed to pose the necessary questions in his direct examination of plaintiff's medical expert, Dr. Miller, to establish the required elements of the tort of "negligent supervision" with respect Dr. Reitzen, the lead surgeon, over her resident assistant, Dr. Zaki, when neither could testify as to who was operating on the right tonsil at the time of the bleeding, and when it was admitted that the defendant, Zaki, was operating on one of the tonsils using the coblator, when he was under the direct supervision of Dr. Reitzen, during the surgery. The aforesaid omission by **POPE** constituted a critical

error in his representation of **BOK** because if the jury found that Dr. Zaki was negligent and not Dr. Reitzen, they still could have found her liable of negligently supervising the resident, Zaki, during the operation, as neither defendant doctor could testify as to who was operating on the right tonsil when it bled, and it was admitted that both defendants were using the coblator during the surgery. There was also evidence that the defendant, Rietzen, may not have even been in the operating room when the bleeding in the right tonsil started.

20. On March 12, 2016, the Supreme Court of New Jersey suspended all new jury trials in response to the Coronavirus. Chief Justice Stuart Rabner announced that New Jersey Courts "will suspend all new jury trials until further notice to help minimize community exposure to the COVID-19 coronavirus." The March 12, 2016 directive stated in pertinent part as follows:

    1. All in-person court proceedings scheduled for Monday, March 16 and Tuesday, March 17, 2020, at the trial level of the Superior Court and the Tax Court are postponed in all counties, except for proceedings listed in paragraph 3 below:

    a. Attorneys and litigants scheduled to appear for in-person matters should not come to court and should await notice of a new hearing date;

    b. Previously scheduled video and phone conferences will proceed at the judge's discretion; and

    c. Ongoing jury trials also will continue as announced in the March 12, 2020 notice, unless otherwise advised.

21. On March 12, 2020, **BOK** arrived at the courthouse and noticed that it appeared closed, as the gates were down at the entrance. In light of the public health emergency, she was reluctant to appear at court that day, however, she was allowed into the courthouse, when she advised the sheriff's officer that she was a litigant in a pending jury trial.

22. When **BOK** arrived at the courtroom at approximately 9 a.m., her attorney and the defense counsel were in chambers with the Judge. A few minutes later, **POPE** emerged from

chambers and approached her with the news that the defendant Reitzen & Riverside Medical Group, had made an offer to settle her case for the sum of $560,000 and the co-defendant, Zaki, was offering her defense costs of $40,000 to resolve her entire case against him and Rutgers Medical School. The plaintiff was also informed by **POPE** that a juror had called in sick, presumably suffering from Covid-19 and **BOK** assumed at the time, that her case would have to be cancelled because the other jurors had been in contact with the sick juror the prior week in the close quarters of the jury room.

23. Upon being notified of the settlement offer from **POPE,** the plaintiff **BOK,** immediately refused same as the 'High/Low' was $280k/$1.65M and the last demand of settlement that was made on her behalf by **POPE**, was $3M. **BOK** advised **POPE** that under no circumstances would she accept the offer and that she wanted to pursue the trial if whether postponed to a later date or a new trial, at a later date, due to the development of the health emergency in the midst of her trial.

24. Notwithstanding plaintiff's wishes, **POPE** advised **BOK** that she had to take the settlement in light of the fact that he had expended over $132,000 on the costs of her case up to that point in time and that if the case was postponed, under either scenario, (i.e. because of Covid-19 or because she did not accept the offer), that he was going to withdraw as her attorney and that she would have to pay over $50,000 in expert fees, if the case had to be re-tried.

25. In response, **BOK** advised **POPE** that she was totally disabled and she would have to expend money for her care and medications for the rest of her life and that the settlement amount was not fair or reasonable in light of same and implored **POPE** to continue with the trial and obtain a verdict. However, **POPE** remained steadfast that because of Covid-19, her case was probably going to result in a mis-trial, with no new trial for at least another year, and that she had to either take the settlement or find another attorney and pay him $50,000 for the expert costs that he had expended to try the case up to that point.

26. The plaintiff being destitute, without financial resources to pay $50,000 for duplicate expert fees for a re-trial and faced with the fact that her attorney was now threatening to abandon her if she opted to have a new trial, she believed under the pressure being imposed upon her, that she had no alternative but to acquiesce to the settlement proposal that was unfair on the court's record.

27. Several days after she left the courthouse, with the matter being marked "settled", **BOK** contacted **POPE** to advise him that she would not sign the releases and that she felt that was coerced and lied to by him to settle the case and to agree to the 'High/Low' agreement. **POPE** advised her that she had no choice but to sign the releases, her case was settled and that if she did not sign, she would not get any money and she had to repay him over $132,000 in expenses out of her own pocket, in light of said threat, she signed the releases.

28. Thereafter, **BOK** was given a Settlement Statement to sign by **POPE**, which caused her to realize why he had pressured her as he did to settle her case, as in it, **POPE** itemized $132,133.13 in expenses that he was deducting from her settlement funds, and that his reimbursement would have been delayed more than a year if there was a retrial due to Covid-19, plus duplicated expert fees if he was going to have to try the case again in light of a mistrial. It was then apparent to **BOK**, that **POPE** so fervently pressured her to accept the settlement due to his financial circumstances and desire to immediately recoup his costs and avoid a mistrial. In the self-serving process, he disregarded his client's expressed feelings as to the handling of her case going forward by coercing her to settle her case against her wishes and best interests.

29. After all the defendant's legal fees, costs, expenses and her Medicaid lien were deducted from the settlement funds of $600,000, **BOK** was left with $319,978.28, even after the defendant reduced his costs by $40,000, or otherwise she would have only received $279,978.28.

30. The plaintiff is currently still experiencing the chronic pain and disabilities that were

caused by the medical negligence of the defendants in the underlying case as she is permanently disabled and unable to work. She is also experiencing the costs in connection with her continued need for medications on a daily basis and will so for the rest of her life.

COUNT I
(Negligence and Professional Malpractice)

31. The plaintiff repeats and reiterates paragraphs 1-30 is if set forth herein in its entirety.
32. **THE LAW FIRM OF ANTHONY POPE, P.C. & ANTHONY J. POPE ESQ.**, are licensed attorneys in the State of New Jersey that operate for the purpose of providing legal counsel and related services to members of the public.
33. Defendants provided legal services to plaintiff in connection with the underlying medical negligence case entitled *Bok v. Reitzen, et al.,* bearing docket number *HUD-L-4561-17.*
34. The defendants owed a duty to plaintiff to safeguard and protect her interests in all aspects of the underlying litigation and to comply with New Jersey's Rules of Professional Conduct.
35. The defendants in their representation of the plaintiff failed to properly draft the initial complaint and all amended complaints by not including a cause of action against the defendants for failing to obtain proper informed consent from the plaintiff prior to the surgery, failed to properly present expert medical evidence at trial to prove the legal doctrine of *res ipsa loquitor* and Negligent Supervision counts of the complaint during trial, used coercive and unethical conduct to force the plaintiff to accept a palpably unreasonable settlement in light of her personal injuries and future life care needs, used coercive and misleading advice to convince the plaintiff to enter into a 'High/Low' agreement against the main defendants, Reitzen and Riverside Medical Group for an amount less than she had initially agreed to, failed to move for a mis-trial when it became patently obvious that in light of the Covid-19 public health emergency that the trial would

have never been concluded and after a juror had already called in sick presumably with Covid-19, and was otherwise negligent in the representation of the plaintiff.

36. Defendants had a duty to exercise the knowledge, skill and ability ordinarily possessed and employed by members of the legal profession and by other certified civil trial attorneys similarly situated in the discharge of their responsibilities, and to utilize reasonable care and prudence in connection with those responsibilities.

37. Defendants breached their duty to plaintiffs by failing to exercise the knowledge, skill and ability ordinarily possessed and employed by members of the legal profession and other certified civil trial attorneys similarly situated in connection with those responsibilities.

38. As a direct and proximate result of defendants' failure to exercise the knowledge, skill, ability, ordinarily possessed by members of the legal profession and other certified civil trial attorneys similarly situated in connection with the discharge of their responsibilities, plaintiffs have and will continue to suffer, substantial monetary losses,

WHEREFORE, the plaintiff demands judgment against defendants, jointly, severally, as follows:

a. Awarding compensatory and punitive damages in an amount to be determined at trial, together with interest thereon;

b. Disgorging all sums paid to or received by defendants during the course of their representation.

c. Awarding the plaintiffs their attorneys' fees, costs and disbursements; and

d. Granting such further relief as the Court deems just and proper.

SECOND COUNT
(Breach of Fiduciary Duty)

39. The plaintiff repeats and reiterates paragraphs 1-38 as if set forth herein in its entirety.

40. In their capacity as counsel for the plaintiff, the defendants owed a fiduciary duty to protect her interests by, among other things, ensuring that the plaintiff's underlying case was

properly prosecuted and pleaded, that proper and ethical advice was given concerning all settlement offers and 'High/low' agreements, that all evidence was properly adduced from plaintiff's liability expert at trial to prove the allegations set forth in the complaint, to properly advise the plaintiff as to the chances of her case proceeding to verdict on March 16, 2020 amid the Covid-19 health crises and a juror calling in sick presumably with coronavirus, and ensuring that all actions and representations undertaken for the benefit of the plaintiff complied with the New Jersey's Rules of Professional Conduct.

41. The defendants breached their fiduciary duty to the plaintiff by failing properly draft the pleadings and amended pleadings filed in the case, by failing to properly question its liability expert to prove the elements of the causes of action pleaded in the amended complaint, buy failing to properly advise the plaintiff as to the reasonableness of the settlement and 'High/Low' offers made in the case, by coercing and forcing the plaintiff to accept the settlement offer made by the defendants, by failing to move for a mis-trial when it became obvious that the underlying case was not and could not proceed to trial in light of the Covid-19 public health emergency and a juror becoming sick.

42. By their actions as aforesaid, Defendants breached their fiduciary duty to Plaintiffs.

43. Defendants' acts and omissions were wantonly and/or recklessly malicious.

44. As a direct and proximate result of the Defendants' breaches plaintiff have and will continue to suffer, substantial monetary losses.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally as follows:

a. Awarding compensatory and punitive damages in an amount to be determined at trial, together with interest thereon;

b. Disgorging all sums paid to or received by Defendants during the course of their representation;

c. Awarding Plaintiff its attorney's fees, costs and disbursements; and

d. Granting such other and further relief as the Court deems just and proper.

COUNT III
(Equitable Fraud)

45. Plaintiff repeats and reiterates paragraphs 1-44 as if set forth herein in its entirety.

46. The defendant misrepresented various facts to the plaintiff concerning the settlement offer of the defendant and the 'High/Low' agreement as aforesaid and threatened that he would abandon her as her attorney during the trial if she did not accept the terms of the defendants offer of settlement, and threatened that if she did not accept the settlement and the case had to be re-tried that she would have to pay 50k out of pocket for the experts to testify at a subsequent trial.

47. As a result of the actions, representations and counsel of defendant, plaintiff agreed to settle her case for a palpably unreasonable amount.

48. Plaintiff relied upon the actions, representations and counsel of defendants to her detriment.

49. Defendants fraudulent conduct as aforesaid was wanton, reckless, willful and outrageous, and will if not remedied by the court, cause Plaintiff substantial damages.

WHEREFORE, Plaintiff demands judgment against Defendant, jointly and severally as follows:

a. Awarding compensatory and punitive damages in an amount to be determined at trial, together with interest thereon;

b. Disgorging all sums paid to or received by Defendants during the course of their representation;

c. Awarding plaintiff's attorneys' fees, costs and disbursements; and

d. Granting such other and further relief as the Court deems just and proper.

COUNT FOUR
(Breach of Contract)

50. The plaintiff repeats and reiterates paragraphs 1-49 as if set forth herein in its entirety.

51. The plaintiff entered into a retainer agreement with the defendant on April 11, 2017. The

retainer states, among other things, that "The Law Firm will protect your legal rights and do all necessary legal work to properly represent you in this matter."

52. The defendant breached said terms of the retainer agreement by failing to properly draft the complaints as aforesaid, by failing to properly question the plaintiff's liability expert as to the elements of the causes of actions set forth in the complaint, by failing to adequately explain the terms and conditions of the 'High/Low' agreement, by recommending that the plaintiff accept a palpably unreasonable settlement offer, by coercing the plaintiff to accept the settlement offer by the use of unethical and coercive tactics and threats of abandonment, and by failing to move for a mis-trial of the case when it was obvious that the case would not reach a verdict in light of the Covid-19 public health emergency and the fact that a juror had called in sick with presumably coronavirus.

53. As a direct and proximate result of the Defendants' breaches, plaintiff has and will continue to suffer, substantial monetary losses.

WHEREFORE, plaintiffs demand judgment against Defendants, jointly and severally as follows:

a. Awarding compensatory and punitive damages in an amount to be determined at trial, together with interest thereon;

b. Disgorging all sums paid to or received by Defendants during the course of their representation;

c. Awarding Plaintiff their attorney's fees, costs and disbursements; and

d. Granting such further relief as the Court deems just and proper.

COUNT FIVE
(Punitive Damages)

54. The plaintiff repeats and reiterates paragraphs 1-53 as if set forth herein at length.

55. As a result of the defendants' wanton, and willful and reckless conduct as aforesaid the plaintiff has suffered damages.

WHEREFORE, the plaintiff demands judgment against the defendant, jointly, and severally as follows:

a. Awarding punitive damages in an amount to be determined at trial, together with interest thereon;

b. Disgorging all sums paid to or received by Defendants during the course of their representation.

c. Awarding plaintiff their attorney's fees, costs and disbursements; and

d. Granting such other and further relief as the Court deems just and proper.

Emolo & Collini, Esqs.

By:_____
Joseph E. Collini, Esq.

Dated: November 25, 2020

JURY DEMAND

The plaintiffs demand a jury on all issues raised herein.

DESIGNATION OF TRIAL COUNSEL

Pursuant to *R.* 4:25-4, Joseph E. Collini, Esq., is hereby designated trial counsel.

CERTIFICATION PURSUANT TO R. 4:5-1

I hereby certify that the foregoing pleading has been filed within the time prescribed by the applicable rules of court and extensions thereof to *R.* 4:5-1. I hereby certify that we have no knowledge of any other pending action or proceeding concerning the parties who are involved in the above captioned litigation.

Emolo & Collini, Esqs.

By:_____
Joseph E. Collini, Esq.

Dated: November 25, 2020

EMOLO & COLLINI, ESQS.
Joseph E. Collini, Esq.
375 Broadway
Paterson, NJ 07501
(973)-742-6463
Attorney I.D. no. 023451986
Attorney for Plaintiff

BARBARA BOK,

Plaintiff,

vs.

THE LAW FIRM OF ANTHONY POPE, P.C., & ANTHONY J. POPE, JR., ESQ., JOHN & MARY DOES, I-X, fictitious names for heretofore unknown persons, **ABC INC., I-X**, fictitious names for heretofore unknown corporate defendants, **XYZ PARTNERHIP, I-X**, fictitious names for heretofore unknown partnership entities,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

Docket No.: ESX-L-

CIVIL ACTION

AFFIDAVIT OF MERIT

STATE OF NEW JERSEY

COUNTY OF MORRIS : ss

I, CAESAR D. BRAZZA., ESQ., of full age, duly sworn according to law, upon my oath depose and say:

1. I am an attorney licensed to practice Law in the State of New Jersey and I have been practicing law in said State for more than (5) years. I have reviewed the legal file in the above captioned matter.

2. I have reviewed the documents and the complaint that pertain to the issues joined in the above captioned complaint and I believe that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in legal care of the plaintiff by the defendants, **THE LAW FIRM OF ANTHONY POPE, P.C. & ANTHONY J. POPE JR., ESQ. JOHN & MARY DOES, I-X. ABC INC., I-X, XYZ PARTNERSHIP, I-X,** who are named in the above captioned complaint fell outside the acceptable professional standards of law as it pertains to the representation of the plaintiff.

3. I have no financial interest in the outcome of this case, however, I am being compensated for my time and expertise.

CAESAR D. BRAZZA, ESQ.

Sworn to me this 2 day of December, 2020

Ana L Lamourt
NOTARY PUBLIC
State of New Jersey
ID # 50104367
My Commission Expires 5/8/2024

NOTARY PUBLIC

Civil Case Information Statement

Case Details: ESSEX | Civil Part Docket# L-008234-20

Case Caption: BOK BARBARA VS POPE, JR., ESQ. ANTHONY
Case Initiation Date: 12/02/2020
Attorney Name: JOSEPH E COLLINI
Firm Name: EMOLO & COLLINI ESQS
Address: 375 BROADWAY
PATERSON NJ 07501
Phone: 9737426463
Name of Party: PLAINTIFF : BOK, BARBARA
Name of Defendant's Primary Insurance Company (if known): Unknown

Case Type: PROFESSIONAL MALPRACTICE
Document Type: Complaint with Jury Demand
Jury Demand: YES - 6 JURORS
Is this a professional malpractice case? YES
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

Are sexual abuse claims alleged by: BARBARA BOK? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Other(explain) Attorney/Client

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

Please check off each applicable category: Putative Class Action? NO **Title 59?** NO **Consumer Fraud?** NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

12/02/2020
Dated

/s/ JOSEPH E COLLINI
Signed

EXHIBIT B

EXHIBIT B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
HUDSON COUNTY
DOCKET NO.: HUD-L-4561-17
A.D.# _____

BARBARA BOK,

Plaintiff,

vs.

SHARI REITZEN, RIVERSIDE MEDICAL GROUP, ET AL.,

Defendants.

TRANSCRIPT
OF
SETTLEMENT

Place: Hudson County Courthouse
595 Newark Avenue
Jersey City, N.J. 07306

Date: March 16, 2020

BEFORE:

HONORABLE MARY K. COSTELLO, J.S.C.

TRANSCRIPT ORDERED BY:

ANTHONY POPE, ESQ.
(The Anthony Pope Law Firm)

APPEARANCES:

ANTHONY POPE, ESQ.
(The Anthony Pope Law Firm)
Attorney for the Plaintiff

THOMAS J. PYLE, ESQ.
(MacNeill O'Neill & Riveles, LLC)
Attorney for Defendant, Riverside Medical Group and Shari Reitzen

Transcriber, Lauren A. Vollmin
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Pompton Plains, New Jersey 07444
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transcripts@gltranscriptsnj.com
Sound Recorded
Recording Operator, Akeem Walker

APPEARANCES (CONTINUED):

ROBERT T. EVERS, ESQ.
(Marshall Dennehey Warner Coleman & Goggin)
Attorney for the Defendant, Rutgers Medical School
and Michael Zaki

Transcriber, Lauren A. Vollmin
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Sound Recorded
Recording Operator, Akeem Walker

I N D E X

PROCEEDING	PAGE
Settlement Placed on the Record	4
By Mr. Pope	4

I N D E X T O W I T N E S S E S

NAME	DIRECT	CROSS	REDIRECT	RECROSS
Barbara Bok				
By Mr. Pope	5			

I N D E X T O E X H I B I T S

NUMBER	DESCRIPTION	I.D.	EVID.
J-1	Settlement Agreement	4	4

THE COURT: Be seated. All right. All right. Welcome back, everyone. We've had some fruitful discussions this morning in chambers and I understand we have a resolution in the case?

MR. POPE: Yes, Your Honor.

THE COURT: All right. Who would like to give me the broad strokes and then we'll take some testimony if necessary.

MR. POPE: Well, Your Honor, we have settled with Dr. Reitzen and with Rutgers University --

THE COURT: Okay.

MR. POPE: -- Medical School. There will be a dismissal as it relates to Dr. Zaki. I have -- in light of the fact that it's confidential, I have written down the settlement amount and the expense amount which I'll show to my client under oath so she can confirm same if that's okay with you --

THE COURT: Yes.

MR. POPE: -- as well as the other circumstances. Are you ready for that?

THE COURT: All right. I -- of course you shared the amount with me in chambers and I just would ask both Mr. Pyle and Mr. Evers that you have the authority of your clients and principals to offer the monies we discussed?

MR. PYLE: I do, Your Honor.

THE COURT: Okay.

MR. EVERS: Yes, Your Honor.

THE COURT: Okay. All right. No question about that. Why don't you call your client to the witness stand.

MR. POPE: Sure. No, not up there. Do you want her on the stand, Judge? I'm sorry. Go ahead.

THE COURT: Yeah. Come on up.

B A R B A R A B O K, PLAINTIFF, SWORN

THE OFFICER: Your name?

THE WITNESS: Barbara Bok.

THE OFFICER: You can have a seat.

THE COURT: Okay. No jury is present but we still need to hear you, Mrs. Bok, okay?

THE WITNESS: Okay.

DIRECT EXAMINATION BY MR. POPE:

Q Yeah. Especially, Barbara, the fact that you have the mask on so I just conveyed to you a settlement offer on behalf of the defendant. Do you understand that?

A Yes.

Q Okay. I want to show you a piece of paper and I'll mark it Plaintiff's Exhibit --

THE COURT: How about J-1?

MR. POPE: J-1 as a court exhibit. Okay. J-1.

BY MR. POPE:

Q And I'll show you the total settlement amount that I put down. Do you understand that?

A Yes.

Q Okay. Do you understand that there's expenses for the firm that comes to this amount?

A Yes.

Q Okay. Are you understanding and accepting that?

A Yes.

Q Okay. You realize that the settlement is the full and final settlement of your dispute against all of the defendants that were named in this complaint?

A Yes.

Q Are you accepting this settlement voluntarily?

A Yes.

Q Is it of your own freewill?

A Yes.

Q Are you under any medication or any influence that would not allow you to make an informed and conscious decision about the settlement today?

A No.

Q Okay Are you satisfied with the services that have been rendered by me and on behalf of my firm and Mr. Le Boeuf?

A Yes.

Q Okay. Have we answered all of your questions in regards to this?

A Yes.

Q Do you know you can never bring another lawsuit against these entities? This is final. There is no exception to it. You understand that.

A Yes.

Q And with that being said, you are willing to accept the settlement amount, the total settlement amount that's been listed on J-1 the document I showed you --

A Yes.

Q -- as well as recognizing the expenses from the law firm which come off the top, correct?

A Yes.

Q And then the balance is then distributed pursuant to court rule as to how much we get. You understand that?

A Yes.

Q Okay. Do you have any questions of me or

Mr. Le Boeuf before we conclude this matter today?

A No.

Q Okay.

MR. POPE: Thank you, Your Honor.

THE COURT: Any questions from counsel?

MR. PYLE: No, Your Honor.

MR. EVERS: No question, Judge.

THE COURT: All right. So Ms. Bok, I just want to congratulate you on bringing your case to a resolution. It's not always easy to do but you had good counsel and unless you have questions of the Court --

THE WITNESS: No.

THE COURT: No? All right. I wish you the best of continued good health and the best of luck going forward. There will be some papers that you're going to have to sign that counsel will prepare and so you need to sign those things.

There may be a check that comes made out to -- more than one check that comes made out to you and the law firm. They'll have to be endorsed. So there's a few more things that have to be done and we're relying on your testimony today that you will do those things; all the things necessary to consummate the settlement.

THE WITNESS: Yes.

THE COURT: You're prepared to do that?

THE WITNESS: Yes.

THE COURT: All right. Best of luck to you. You can step down.

THE WITNESS: Thank you.

THE COURT: All right. So, I'd ask the court clerk to prepare an order of disposition. It's a slightly archaic custom that we have in Hudson County.

It's really a bookkeeping matter. Please indicate on the order that the case is dismissed with prejudice against Dr. Zaki and settled as to all other parties and counsel you have to sign it.

And then of course you're free to exchange whatever closing papers your clients require moving forward.

Anything we need to add?

MR. EVERS: No, I just -- I wanted to refresh -- remind counsel of the conversation we had last week, that's all.

THE COURT: Okay. All right.

MR. EVERS: So that there's no issue.

THE COURT: Well, you have the thanks of the Court and before anyone leaves I would like to bring

out the jurors and dismiss them formally as the case is resolved. Right out here is good. Just line up in front of the bench. Right now. Yes, bring them right out.

(Jury enters courtroom.)

THE COURT: So, you can actually save yourselves some steps. We're just going to line everybody up right in front of the clerk's desk, just form a line.

Right here. Just move down for your fellow jurors, okay, so everybody can fit. One, two, three, four, five, six, seven.

All right. So, folks, we're on the record and I wanted to bring you back into the courtroom to give you the good news that the attorneys have found a way to settle the case and resolve their issues between their clients.

So, your services as jurors is no longer required. What I would like to do is thank you publicly on the record on behalf of the parties and attorneys for your attention and then ask you to just go right back into the jury room because I have a call out to jury management to find out given the public health concerns whether or not they want you traipsing over there just to turn in your badge and get your

paperwork.

If there's a way for us to transmit that to you by email or snail mail even it might be preferable than you running the gamut of trying to get into that public building which is shut down but for jurors and as I mentioned to you earlier, you're the only jurors in either building working today.

So, I just don't want you to scatter if they do need you to come back, okay? So, if you would go back in the jury room, I'll be in in no time flat to let you know what you have to do next.

Thank you again.

JUROR: Thank you.

(Jurors exit courtroom.)

THE COURT: Anything else I can take care?

MR. POPE: No, Your Honor. Thank you.

MR. PYLE: No, Your Honor.

MR. EVERS: No, Your Honor. Thank you.

THE COURT: If you would just stick around long enough to sign the order of disposition?

MR. POPE: Sure.

THE COURT: Best of luck to you, Ms. Bok and to both doctors going forward and we are adjourned.

MR. POPE: Thank you, Your Honor.

MR. EVERS: Thank you, Judge.

THE COURT: Do you want us to throw any of this out or you want it back or --

MR. POPE: That's all ours?

THE COURT: Most of it. I mean, we'll shred it.

MR. POPE: Yeah, it's just documents.

THE COURT: Just get rid of them?

MR. POPE: Yeah.

THE CLERK: Off the record?

THE COURT: Yes. I'm sorry. Thank you.

MR. POPE: Your Honor, we have to break down all of the equipment.

* * * * *

CERTIFICATION

I, LAUREN A. VOLLMIN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings recorded on March 16, 2020, Index Number 10:25:54 to 10:34:12 is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Lauren A. Vollmin

LAUREN A. VOLLMIN AD/T #469
G&L TRANSCRIPTION OF NJ Date: July 2, 2020

EXHIBIT C

EXHIBIT C

Anthony Pope, Esq. (#01620-1986)
THE ANTHONY POPE LAW FIRM, P.C.
60 Park Place, Suite 703
Newark, New Jersey 07102
973-344-4406

Attorneys for Plaintiff, Barbara Bok

BARBARA BOK,

Plaintiff,

vs.

SHARI REITZEN, RIVERSIDE MEDICAL GROUP, HACKENSACK UNIVERISTY MEDICAL CENTER, MICHAEL ZAKI, RUTGERS UNIVERSITY MEDICAL SCHOOL, JOHN DOE 1-10, JANE DOE 1-10 (heretofore unidentified individuals), ABC CORPORATION 1-10 (heretofore unidentified Corporations, Partnerships, and or other business Entities),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NUMBER: HUD-L-004561-17

Civil Action

Plaintiff's Pretrial Exchange Memorandum/Motions in Limine

Neutral Statement of the Case:

The Plaintiff, Barbara Bok, came under the care of Defendant, Dr. Shari Reitzen and Defendants Riverside Medical Group on January 12, 2017. Ms. Bok was scheduled for a tonsillectomy to occur at Defendant, Hackensack University Medical Center. On March 2, 2017, Dr. Reitzen, with the assistance of Defendant, Dr. Michael Zaki, a resident of Defendant Rutgers University Medical School, performed the tonsillectomy. During the procedure, Ms. Bok's profuse bleeding necessitated a subsequent emergent ligation of her external carotid artery to stop the bleeding.

The Plaintiff alleges that the Defendants committed malpractice, which resulted in Ms. Bok's pain and suffering and permanent injury. The Defendants deny they committed any malpractice.

1. POTENTIAL WITNESSES
    a. Barbara Bok
        i. 518 Gregory Avenue
        Apartment C215
        Weehawken, New Jersey 07086

b. Victoria Bok
    i. 518 Gregory Avenue
    Apartment C215
    Weehawken, New Jersey 07086
c. Christian Bok
    i. 518 Gregory Avenue
    Apartment C215
    Weehawken, New Jersey 07086
d. Gabrielle Bok
    i. 518 Gregory Avenue
    Apartment C215
    Weehawken, New Jersey 07086
e. Dr. Alexander Merkler
    i. New York Presbyterian
    525 E 68th St
    New York, NY 10065
f. Dr. Michael Morris
    i. 14955 Shady Grove Rd
    Suite #240
    Rockville, MD 20850
g. Dr. George Carnavale
    i. 1050 Clifton Ave
    Clifton, NJ 07013
h. Dr. Neil Sinha
    i. 1117 US-46 #301
    Clifton, NJ 07013
i. Kristin Kuczma
    i. 293 Eisenhower Parkway
    2nd Floor
    Livingston, NJ 07039
j. Edmond Provder
    i. 300-3 Route 17 South
    2nd Floor, Suite 4-A
    Lodi, Bergen County, NJ 07644
k. Dr. Shari Reitzen--Defendant
    i. 714 10th St
    Secaucus, NJ 07094

l. Dr. Michael Zaki—Defendant
    i. 90 Bergen Street
    Suite 8100
    Newark, New Jersey 07103
m. Dr. Massimo Napolitano
    i. 20 Prospect Ave #707

Hackensack, NJ 07601

n. Dr. Brian Benson
    i. 20 Prospect Avenue
    Suite 613
    Hackensack, NJ 07601
o. Phillip Lacson, R.N.
    i. 30 Prospect Ave
    Hackensack, NJ 07601
p. Narine Azoyan
    i. 255 State Route 3 East, Suite 101
    Secaucus, NJ 07094
q. Dr. Ali Seckin
    i. 20 Prospect Ave #602
    Hackensack, NJ 07601
r. Dr. Khorshed A. Miah
    i. 25 E Salem Street
    Hackensack, NJ 07601
s. Dr. Jerry Jurado
    i. 701 NJ-440 Ste 33
    Jersey City, NJ 07304
t. Dr. Philippe G. Douyon
    i. 20 Prospect Ave
    Hackensack, NJ 07601
u. Dr. Arun Nangia
    i. 344 Prospect Avenue
    Hackensack, NJ 07601
v. Dr. Tamkeen Lally
    i. Debra Simon Center 97, Route 17 North
    Maywood, NJ 07607
w. Dr. Takehiro Kasahara
    i. 2515 County Rd 516
    Old Bridge, NJ 08857
x. Dr. Jeffrey Raskin
    i. St. 55, 8901 John F. Kennedy Blvd 5th floor
    North Bergen, NJ 07047
y. Custodians of Records for all medical facilities—to be determined.

2. EXHIBIT LIST
    a. Medical Records of Barbara Bok—Riverside Medical Group
    b. Medical Records of Barbara Bok—HUMC
    c. Medical Records of Barbara Bok- Post Surgery
        i. Dr. Ali Seckin
            ■ 20 Prospect Ave #602
            Hackensack, NJ 07601
        ii. Dr. Jerry Jurado
            ■ 701 NJ-440 Ste 33

Jersey City, NJ 07304

iii. Dr. Massimo Napolitano
- 20 Prospect Ave #707
  Hackensack, NJ 07601

iv. Dr. Phillippe Douyon
- 20 Prospect Ave
  Hackensack, NJ 07601

v. Dr. Khorshed A. Miah
- 25 E Salem Street
  Hackensack, NJ 07601

vi. Dr. Takehiro Kasahara
- 2515 County Rd 516
  Old Bridge, NJ 08857

vii. Dr. Arun Nangia
- 344 Prospect Avenue
  Hackensack, NJ 07601

viii. Dr. Tamkeen Lally
- Debra Simon Center 97, Route 17 North
  Maywood, NJ 07607

ix. Dr. Jeffrey Raskin
- St. 55, 8901 John F. Kennedy Blvd 5th floor
  North Bergen, NJ 07047

d. Documentation related to Barbara Bok's disability award
e. REPORTS/CVs:
   i. Dr. Alexander Merkler
   ii. Dr. Michael Morris
   iii. Dr. George Carnevale
   iv. Dr. Neil Sinha
   v. Kristin Kuczma
   vi. Edmond Provder
f. All depositions.
g. All admissions with responses.
h. All interrogatories with responses.
i. Enlargements of any exhibits.
j. Photos of anatomy of the mouth/throat

3. <u>PROPOSED DEPOSITION READINGS</u>
   a. Dr. Brian Benson
      i. 38:21-24
      ii. 42:14-16
   b. Dr. Massimo Napolitano
      i. 24:4-6
      ii. 26:25
      iii. 27:1-12
      iv. 28:24-25

v. 29:1-2
vi. 31:4-22
vii. 37:2-10
viii. 39:6-9
ix. 40:7-19
x. 50:5-25
xi. 51:1-7
xii. 54:15-25
xiii. 55:1-11
xiv. 57:11-25
xv. 58:1-22
xvi. 59:1-9
xvii. 60:6-25
xviii. 61:1-25
xix. 62:1-3
xx. 65:7-25
xxi. 66:1-3
xxii. 76:8-25
xxiii. 77:1-25
xxiv. 78:1-6

c. Dr. Keane
   i. 82:15-21
   ii. 92:19-93:16.
   iii. 96:4-98:10
   iv. 99:10-18
   v. 119:19-120:23
   vi. 129:3-14

d. Dr. Sananmen
   i. 55:18-56:11
   ii. 81:21-82:15

e. Dr. Ronnie Seltzer
   i. 144:15-145:19
   ii. 179:16-180:8
   iii. 227:20-228:25

f. Dr. Michael Zaki
   i. 12:18-13:6
   ii. 16:15-16
   iii. 18:2-20
   iv. 19:12-20:11
   v. 20:20-24
   vi. 21:6-8
   vii. 23:9-19
   viii. 26:12-22
   ix. 36:5-8

g. Dr. Shari Reitzen

i. 11:10-18
ii. 18:2-4; 12-14
iii. 19:1-22
iv. 20: 14-16
v. 21:1-5
vi. 35:6-36:16
vii. 38:1-22
viii. 39:20- 40:22
ix. 41:15-42:11
x. 44:6-8; 17-19
xi. 51:1-17
xii. 51:24-52:5
xiii. 52:16-19
xiv. 52:22-53:6.
xv. 53:4-22
xvi. 63:5-11
xvii. 63: 20-22
xviii. 69: 6-11
xix. 72: 3-7
xx. 74:21-23
xxi. 76:6-8
xxii. 80:6-12

h. Dr. Kaufman
i. 15:20-16:7
ii. 28:23-29:4
iii. 31:16-25
iv. 33:24-34:9
v. 34:22-36: 2
vi. 40:15-42:12
vii. 42:13-44:11
viii. 45:7-47:2
ix. 47:3-17
x. 47:18-22
xi. 48:12-16
xii. 50:21-53:3
xiii. 53:4-56:5
xiv. 57:19-58:8
xv. 61:7-22
xvi. 63:1-6
xvii. 64:9-21
xviii. 65:12-66:1
xix. 70:6-11
xx. 80:8-81:3
xxi. 82:5-7
xxii. 84:18-85-14.
xxiii. 87:4-88:6

xxiv. Page 96: 11-18
xxv. 97:4-18
xxvi. 99:14-24
xxvii. 104:17-21

i. Dr. Steifel
   i. 26:20-24.
   ii. 27:1-4.
   iii. 37:15-22.
   iv. 38:17-23.
   v. 40:18-23.
   vi. 52:22-25.
   vii. 55:9-16.
   viii. 66:15-25.
   ix. 72:3-10.
   x. 76:13-25.
   xi. 77:1-5.
   xii. 77:6-19.
   xiii. 88:24-25.
   xiv. 89:1-3.
   xv. 102:9-24.
   xvi. 113:18-25.
   xvii. 114:1-5.
   xviii. 139:24-25.
   xix. 140:1-25.
   xx. 141:1-23.
   xxi. 142:6-25.
   xxii. 143:1-3.
   xxiii. 146:11-22.

j. Plaintiff reserves the right to read the responses to any interrogatories served upon any of the defendants.

4. IN LIMINE OBJECTIONS—SEE ATTACHED LETTER MEMORANDUM IN SUPPORT.
   a. Prohibit fact witnesses from rendering opinions.
   b. Prohibit reference to implied consent issues.
   c. Prohibit the late-amended adoption of the expert report of Dr. Keane by Defendant Reitzen. (No brief submitted.)

5. ANTICIPATED EVIDENTIAL PROBLEMS
   a. See #4

6. PROPOSED STIPULATIONS
   a. Authenticity of Medical Records—pending approval from defendants.

VOIR DIRE/JURY CHARGES

VOIR DIRE:

1. In addition to the Standard Jury Voir Dire, as promulgated by Directive #4-07, including those pertaining specifically to Medical Malpractice, the Plaintiff respectfully submits that Open-Ended Questions 2-3-4 be posed to the jury pool, as follows:

2. Do you have any feelings about whether or not our society is too litigious, that is, that people sue over things too often that they should not sue over; or do you think, on the other hand, there are too many restrictions on the right of people to sue for legitimate reasons; or do you think our system has struck the right balance in this regard? Have you heard of the concept of "tort reform" (laws that restrict the right to sue or limit the amount that may be recovered)? How do you feel about such laws?

3. There may be expert witnesses in this case. If there are, I will instruct you in more detail, but let me say for now that you do not have to accept their opinions, but you should consider their opinions with an open mind. The expected field of expertise of these witnesses is _____. How do you feel about experts in that field? Will you be able to evaluate their opinions fairly and with an open mind? Why do you feel the way you do about this?

4. Do you have any particular feelings about whether people should be allowed to sue doctors, hospitals, and other health care providers if they are dissatisfied with the results of medical treatment? Tell me how you feel about this and about what kind of circumstances you think should have to be proven before a dissatisfied patient should be allowed to recover damages?

JURY CHARGES

In addition to the general instructions outlined in Chapter One of the Model Civil Jury Charges (as revised 10/2007), the Plaintiff may respectfully request that the Court deliver any combination of the following model jury charges to the jury with possible evidentiary and legal modifications (to be discussed in detail at a charge conference):

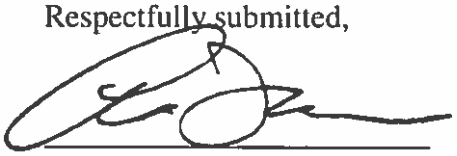
- 5.10D—Res Ipsa Loquitor
- 5.10I—Agency
- 5.50—Apparent Authority
- 5.50A—Duty and Negligence
- 5.50B—Common Knowledge Standard of Care
- 6.10—Proximate Cause-General
- 6.11—Proximate Cause-Routine Tort
- 8.10—Damages
- 8.11A—Medical Expenses (Non-auto)
- 8.11C—Loss of Earnings
- 8.11E—Disability, Impairment and the Loss of Enjoyment of Life, Pain and Suffering
- 8.11G—Life Expectancy
- 8.11H--Capitalization

- 8.11I—Future Medical Expenses

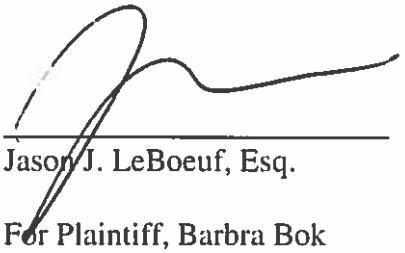
PROPOSED JURY VERDICT FORM

See attached.

Respectfully submitted,



Anthony Pope, Esq.



Jason J. LeBoeuf, Esq.

For Plaintiff, Barbra Bok

DATED: February 29, 2020

EXHIBIT D

EXHIBIT D

Feld v. City of Orange Twp.

Superior Court of New Jersey, Appellate Division

March 2, 2010, Argued; July 19, 2010, Decided

DOCKET NO. A-3698-08T3

Reporter
2010 N.J. Super. Unpub. LEXIS 1627 *; 2010 WL 4028088

JUDITH S. FELD, ROBERT M. FELD and THE FOUR FELDS, INC., d/b/a L. EPSTEIN HARDWARE CO., Plaintiffs-Appellants, v. THE CITY OF ORANGE TOWNSHIP, Defendant-Respondent, and HASSAN ABDUL-RASHEED, individually and in his capacity as a City Council member, DWIGHT MITCHELL, in his capacity as Municipal Clerk, HARVARD DEVELOPMENT URBAN RENEWAL ASSOCIATES, LLC, as the successor in interest to HARVARD DEVELOPMENT ASSOCIATES, LLC, HOUSING AND NEIGHBORHOOD SERVICES, INC., NORTHERN HILLS REDEVELOPMENT, LLC, GOLD HAVEN PROPERTIES, INC., and VILLITA ARTES, LLC, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Related proceeding at, Decision reached on appeal by *Feld v. City of Orange Township, 2012 N.J. Super. Unpub. LEXIS 502 (App.Div., Mar. 8, 2012)*

Related proceeding at, Decision reached on appeal by, Remanded by, in part *Feld v. City of Orange Twp., 2015 N.J. Super. Unpub. LEXIS 664 (App.Div., Mar. 26, 2015)*

Related proceeding at *Feld v. City of Orange Twp., 2016 N.J. Super. Unpub. LEXIS 1371 (App.Div., June 15, 2016)*

Related proceeding at, Decision reached on appeal by *Four Felds, Inc. v. City of Orange Twp., 2016 N.J. Super. Unpub. LEXIS 1444 (App.Div., June 23, 2016)*

Related proceeding at *RPM Dev., LLC v. Feld, 2018 N.J. Super. Unpub. LEXIS 678 (App.Div., Mar. 26, 2018)*

Related proceeding at *Feld v. Local Fin. Bd., 2018 N.J. Super. Unpub. LEXIS 710 (App.Div., Mar. 29, 2018)*

Related proceeding at *Four Felds v. City of Orange Twp., 2018 N.J. Super. Unpub. LEXIS 812 (App.Div., Apr. 6, 2018)*

Related proceeding at *Four Felds, Inc. v. City of Orange Twp., 2018 N.J. Super. Unpub. LEXIS 1200 (App.Div., May 23, 2018)*

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2401-08.

Core Terms

ordinance, redeveloper, allegations, counts, plaintiffs', motion to dismiss, private sale, defendants', fees and costs, impertinent, scandalous, approve, notice, costs

Counsel: Jeffrey S. Feld argued the cause for appellants.

Aldo J. Russo argued the cause for respondent (Russo & Della Badia, LLC, attorneys; Mr. Russo, on the brief).

Judges: Before Judges Wefing, Grall and Messano.

Opinion

PER CURIAM

Plaintiffs Judith S. Feld, Robert M. Feld and the Four Felds, Inc., doing business as L. Epstein Hardware Co., appeal from an order dismissing their third-amended complaint in this action in lieu of prerogative writs. The complaint was dismissed, without prejudice, on motion filed by defendant City of Orange Township (City) and joined by defendants Housing and Neighborhood Services, Inc. (HANDS) and Harvard Development (Harvard) [1] (collectively the HANDS defendants). Although defendants moved to dismiss for failure to state a claim pursuant to *Rule 4:6-2(e)* and fees pursuant to *Rule 4:6-4(b)*, the judge dismissed pursuant to *Rule 4:6-4(b)*. He also awarded fees and costs in the amount of $ 1483.50 to the City's attorney and $ 1810.50 to the attorney for the HANDS defendants.

Because **[*2]** the judge did not issue an oral or written decision setting forth findings of fact and legal conclusions explaining why a sua sponte dismissal pursuant to *Rule 4:6-4(b)* was appropriate and because we cannot conclude that it was, we reverse with direction to vacate the order and continue the proceeding. [2] We reject the City's argument urging us to affirm on a different basis, which is that the complaint should have been dismissed pursuant to *Rule 4:6-2* for violation of *Rule 4:5-2*. The HANDS defendants did not participate in this appeal.

Plaintiffs filed their first complaint on March 17, 2008. This was defendants' third motion to dismiss.

In May 2008, the HANDS defendants filed a notice of motion to dismiss pursuant to *Rules 4:6-2* and *4:6-4* and for fees and costs pursuant to *Rule 4:6-4(b)*. In a supporting certification, counsel indicated that the HANDS defendants would also rely on *Rules 4:5-8* **[*3]** and *1:4-1*. On July 10, 2008, the judge found that plaintiffs' complaint: did not include numbered paragraphs and segregate claims founded upon separate transactions into separate counts to facilitate a clear presentation of the matter, as required by *Rule 1:4-2*; did not state the particulars of the wrongs supporting plaintiffs' claims of fraud and conspiracy as required by *Rule 4:5-8*; and was insufficient to permit the judge or defendants to discern the facts upon which plaintiffs were relying or the relief they sought. Accordingly, by order of July 15, 2008, the judge reserved decision on defendants' motion "until further application by [d]efendants" and granted plaintiffs leave to file an amended complaint by July 25, 2008.

Plaintiffs filed an amended complaint on July 23, 2008, which included twenty-six counts against the City, the HANDS defendants and individual defendants. Arguments on defendants' second motion to dismiss was heard on August 29, 2008. At that motion hearing, plaintiffs were represented by an attorney who agreed to reformulate the complaint to limit the action to counts one through nine - challenges to ordinances and resolutions issued by the City Council. Counts **[*4]** one through nine were identified as the only claims properly considered in a prerogative writ action and were dismissed without prejudice in order to give plaintiffs until September 18, 2008 to file another amended complaint. The remaining counts, ten through twenty-six, were dismissed without prejudice. In addition, the request for fees was denied without prejudice. The order memorializing those determinations was entered on September 16, 2008; it does not refer to the judge's dismissal of the request for fees and costs pursuant to *Rule 4:6-4(b)* without prejudice.

Plaintiffs filed a third-amended complaint dated September 16, 2008. It included eight counts challenging four ordinances issued by the City Council between February 19 and August 6, 2008. Plaintiffs, however, filed a notice withdrawing count five on October 13, 2008.

In the seven counts that remain, plaintiffs seek invalidation of the ordinances, equitable relief and, in some instances, referral to "the Attorney General and Local Finance Board for further investigation."

Ordinance No. 54-2007 is challenged in counts one through four. That ordinance authorizes the sale of

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[1] Harvard Development Urban Renewal Associates, LLC is the successor in interest to Harvard Development Associates, LLC.

[2] "A dismissal without prejudice, however, absent a specific vacation provision is generally appealable." Pressler, *Current N.J. Rules of Evidence*, comment 2.2.4 on ***R. 2:2-3*** (2010) (citing *Morris County v. 8 Court St. Ltd., 223 N.J. Super. 35, 39, 537 A.2d 1325 (App. Div.)*, *certif. denied*, ***111 N.J. 572, 546 A.2d 500 (1988)***.

property known as 540 Mitchell Street to Harvard, pursuant **[*5]** to *N.J.S.A. 40A:12A-39*, for $ 300,000 and "[s]uch other terms and conditions as may be established by Contract of Sale." It also requires the buyer to pay the taxes on the property and improvements and to submit a site plan application to the planning board. The ordinance identifies Harvard as the "designated redeveloper" of specified lots, including 540 Mitchell Street, which is within the Central Valley Redevelopment Area, and $ 300,000 as the appraised value of the property.

In count one, plaintiffs allege that Ordinance 54-2007 is void as "ultra vires, arbitrary, unreasonable, capricious, unconstitutional and [an] unlawful act." The focus of count one is that the ordinance was not adopted in conformity with the controlling statutes and exceeds the authority delegated to the City by the Legislature. The following claims can be gleaned. Harvard is a redeveloper not a redeveloping entity within the meaning of the "Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 to -49*," and, for that reason, the private sale of property to this redeveloper is governed by *N.J.S.A. 40A:12-13(c)*, which plaintiffs assert requires compliance with the "Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 to -49* **[*6]** ." They further assert that *N.J.S.A. 40A:12A-8(g)* permits conveyance of land without bidding under terms that are "reasonable." Plaintiffs assert that the City Council did not apply the correct legal standard and approved the sale without considering the reasonableness of the price and terms of the sale. They point to the fact that the property had an assessed value of $ 704,000, which was much higher than the appraised value at which the sale was approved. Finally, they assert that the ordinance misstated the appraised value, which was $ 330,000 not $ 300,000.

Count one includes other factual allegations that have no relevance to the adoption of Ordinance 54-2007, at least none that is apparent to us. To illustrate, we note assertions about: charges pending against the mayor; violations of the Open Public Meetings Act in connection with the election of an acting mayor; error in an ordinance adopted prior to Ordinance 54-2007 that was recognized and addressed in an ordinance issued after Ordinance 54-2007; and a challenge to the legality of an ordinance approving a contract for professional services unrelated to the sale of 540 Mitchell Street.

In count two, plaintiffs seek the **[*7]** same relief as in count one plus injunctive relief in the form of an order compelling the City to append "a written instrument to any and all future sale of real property ordinances." From the allegations stated in count two, one can readily glean that the claim is based upon alleged violations of designated statutes and sections of the City's administrative code allocating the functions of the legislative and executive branches of City government. The specific violation claimed is that the ordinance unlawfully delegates the Council's authority to approve contracts to the executive branch.

In count three, plaintiffs seek a declaration that the sale approved in Ordinance 54-2007 violates "the express clear terms of the [Harvard] Redevelopment Agreement" and an order compelling compliance. They allege that the Redevelopment Agreement requires submission of a dispute about the price of the property to binding arbitration and that a debate among the councilpersons about the reasonableness of the price required submission to arbitration. They further allege that, as property owners and taxpayers who are third-party beneficiaries of the redevelopment agreement, their reasonable expectations **[*8]** were frustrated by the City's failure to arbitrate the dispute between the councilpersons.

This count, like count one, also includes allegations that have no apparent relevance to the claim asserted. For example, there is an objection based upon delay by the redeveloper in changing its name and a suggestion that there were lots excluded from the redevelopment zone for improper reasons amounting to unreasonable governmental action.

In count four, plaintiffs seek a declaration that Ordinance 54-2007 was invalid because it was not passed by a super majority, and they request injunctive relief in the form of an order compelling the vote of a super majority on all future private sales of real property. In support of that claim, they assert the following: the local ordinance requires the vote of a super majority on matters relevant to the City's finances and budget; *N.J.S.A. 40A:2-17(b)* requires a super majority for passage of a bond ordinance; and *N.J.S.A. 40A:2-27(b)(3)* requires the same for a "private sale of bonds." Paragraphs 153 and 154, which are part of count four, state the legal reasoning upon which they rely: "The private sale of City owned real estate to a private redeveloper is an **[*9]** extraordinary course event, affecting and impacting the financial well being" of those who pay property taxes; "There is no rational reason to distinguish procedurally a private sale of real property to a redeveloper from a private sale of bonds to a State agency . . . ."

As noted above, count five of the third-amended complaint was withdrawn.

In count six, plaintiffs challenge Ordinance No. 11-2008 as an "arbitrary, capricious, unreasonable, premature and ultra vires act." Through that ordinance the Council approved an application by "Harvard Development Urban Renewal Associates, LLC for the development of the Project" set forth in its application and, relying upon "*N.J.S.A. 40A:20-1 et seq.*"; granted an "exemption from taxation on improvements" made through the Project for a period of twenty years; and authorized the mayor to execute a financial agreement in lieu of taxes substantially in the form set forth as an exhibit to the ordinance.

Plaintiffs' allegations in support of their challenge to Ordinance No. 11-2008 are that the financial agreement did not comply with *N.J.S.A. 40A:20-8* and *N.J.S.A. 40A:20-9*. They contend that the financial agreement was deficient and arbitrary because **[*10]** it: contained material with typographical errors and inconsistencies; was issued before the developer held title; was issued on the same day that DEP imposed a moratorium on building in the City; lacked an "effective date deadline"; was issued on an application that did not meet the requirements of *N.J.S.A. 40A:20-8*; and is illusory.

Count six also contains assertions and allegations with no apparent relevance. There is, for example, a suggestion that the errors are a result of a rush to approve before the membership of the City Council changed.

Count seven, is a challenge to Ordinance No. 8-2008, which approves a $ 9,000,000 bond for improvements to the City's "Mountain Wells [and] the Chestnut Street Treatment Facility and High Pump Station." Plaintiffs contend that the existing infrastructure was inadequate to support further development. They seek to void the ordinance as an "unlawful, capricious, unreasonable and ultra vires act" and obtain an order compelling the City to take specified corrective actions. Among the allegations are claims that the ordinance was not passed by a two-thirds vote of the full membership, which plaintiffs assert is required by *N.J.S.A. 40A:2-27(b)(3)*; was **[*11]** mischaracterized as debt to be sold at a public sale when a private sale was intended; was impermissibly amended by resolution; failed to identify expenses and items as required by *N.J.S.A. 40A:2-20*; pledged water revenues to fund the debt without complying with *N.J.S.A. 40A:2-15*; and ignored a distinction between obligations that are "self-liquidating" and those secured by "ad valorem taxes" on real property that they claim is pertinent for purposes of *N.J.S.A. 40A:2-47(a)*.

Count seven, like counts discussed above, includes allegations that have no apparent relevance. One example is a description of plaintiffs' efforts to obtain information about a matter reported in the newspaper and their dissatisfaction with the City's response; another is the generalized criticism of practices generally employed by the City that plaintiffs allege leads to less than full public disclosure.

In count eight, the final count, plaintiffs seek an order voiding Ordinance No. 9-2008, as an "arbitrary, capricious, unreasonable, ultra vires and unconstitutional act." That ordinance provides for a five-year tax abatement for improvements to specified structures in areas in need of rehabilitation, in need of redevelopment, **[*12]** or in the City's urban enterprise zone. Again, plaintiffs present claims that are based on their perception of deviations from governing statutes - specifically *N.J.S.A. 40A:21-8*; *N.J.S.A. 40A:21-9*; *N.J.S.A. 40A:21-10*. Similarly, there are allegations concerning events after the ordinance was adopted, which was on June 4, 2008. In contrast, there are pejorative characterizations of this tax abatement program as a "below the radar," "stealth subsidy program" that may or may not have relevance to plaintiffs' allegations about the unreasonableness and arbitrariness of the City Counsel's action in passing the measure.

In November 2008, the City moved to dismiss the complaint. The notice of motion stated that dismissal was sought for failure to state a claim upon which relief can be granted, *R. 4:6-2(e)*, failure to plead with particularity, *R. 4:5-8(a)*, and for fees and costs pursuant to *Rule 4:6-4(b)*. At the motion hearing held on January 23, 2009, counsel for the HANDS defendants indicated that he had filed no opposition beyond a letter joining "in the City's position under the rules to dismiss the complaint." Thus, counsel did not renew the HANDS defendants' request for dismissal pursuant **[*13]** to *Rule 4:6-4(b)* raised on the prior motion.

At the time of the hearing on the motion, the trial judge stated: "I find the complaint does not afford the defendants a fair opportunity to apprise them of the allegations and/or causes of action and [that they] clearly would be prejudiced if they were forced to answer this complaint." He did not indicate that he had any intention of dismissing the complaint or striking

portions thereof pursuant to *Rule 4:6-4(b)(1)-(2)*. Following the hearing and without further explanation, however, the judge entered an order of dismissal pursuant to *Rule 4:6-4(b)(1)* and fees and costs. The order was entered on February 6, 2009.

Plaintiffs raise the following issues on appeal:

> I. *Rule 4:6-4(b)(1)* Must Be Interpreted Restrictively So As Not To Chill Creative Advocacy or To Bar Access To the Courts.
> Procedural Due Process Violated.
> Need For Plenary Evidentiary Hearing.
> II. He Who Seeks Equity Must Do Equity.
> III. The Trial Court Erroneously and Prematurely Limited The Felds' Ability to Rebut the Four Contested Ordinances' Presumption of Validity with Any Post Adoption Facts and Legislation.

The judge did not provide adequate notice of his intention to dismiss pursuant **[*14]** to *Rule 4:6-4*, which was not a basis for dismissal urged by defendants on this motion. Nor did the judge provide an adequate explanation for his decision to dismiss and award counsel fees and costs pursuant to *Rule 4:6-4(b)*.

Rule 4:6-4(b) provides:

> On the court's or a party's motion, the court may either (1) dismiss any pleading that is, overall, scandalous, impertinent, or, considering the nature of the cause of action, abusive of the court or another person; or (2) strike any such part of a pleading or any part thereof that is immaterial or redundant. The order of dismissal shall comply with *R. 4:37-2(a)* and may expressly require, as a condition of the refiling of a pleading asserting a claim or defense based on the same transaction, the payment by the pleading party of attorney's fees and costs incurred by the party who moved for dismissal.

The judge's findings simply do not address the considerations that warrant dismissal under *Rule 4:6-4(b)*. To be deemed "scandalous" the allegations in a complaint must be prejudicial *and* irrelevant to the claim asserted. *Calliari v. Sugar, 180 N.J. Super. 423, 430, 435 A.2d 139 (Ch. Div. 1980)*; *De Groot v. Muccio, 115 N.J. Super. 15, 19, 277 A.2d 899 (Law Div. 1971)*. Impertinent **[*15]** material "'consists of statements that do not pertain, and are not necessary, to the issues in question.' Superfluous historical allegations are a proper subject of a motion to strike." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* (construing *Fed. R. Civ. Proc. 12(f)*), *rev'd on other grounds*, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)* (citations omitted).

Based upon our review of the complaint, it is apparent that it includes some impertinent and scandalous material. In our preceding discussion of each count of this complaint, we provided illustrations of material that has no apparent relevance to the claim asserted therein. Our discussion was not intended to be exhaustive.

Nonetheless, we cannot conclude that it was appropriate for the judge to enter a sua sponte dismissal on this ground without, at a minimum, giving prior notice during the argument on defendants' motion that would have permitted plaintiffs to respond. *See Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582, 585, 371 A.2d 789 (App. Div. 1977)* (concluding that it was error to dismiss a complaint for violation of court order or rules without providing an adequate opportunity to be heard).

Nor can we **[*16]** agree that the entire complaint is either scandalous or impertinent. In our preceding discussion of the separate counts in this complaint, we detailed plaintiffs' specific challenges to the various ordinances that are based on specified deviations from statutes governing the City's actions and the subjects addressed. Without suggesting any view on whether those claims would survive an adequate motion for dismissal pursuant to *Rule 4:6-2(e)* supported by a brief demonstrating why plaintiffs could not prevail as a matter of law, it is clear to us that the entire complaint is not impertinent or scandalous.

We decline to speculate about whether the judge may have elected to dismiss the claim on the alternative ground provided in *Rule 4:6-4(b)* - that "considering the nature of the cause of action, [the complaint is] abusive of the court or another person." A judge has an obligation to explain the reasons for a determination so that this court may review it without speculating. *R. 1:7-4(a)*; *see Curtis v. Finneran, 83 N.J. 563, 569-70, 417 A.2d 15 (1980)*.

An explanation is especially important in a case such as this. The judge had options from which to select an appropriate remedy. *Rule 4:6-4(b)(1)-(2)* permits **[*17]** a judge to dismiss an offending complaint in its entirety or to strike portions that are immaterial or redundant. A judge's election between those remedial measures is a judicial determination that must be explained. *R. 1:7-4(a)*.

From the perspective of a trial judge, there is a practical

reason for providing the required statements of facts and reasons for an order dismissing pursuant to *Rule 4:6-4(b)* without prejudice. An order of dismissal on that ground that is issued without a decision identifying the problems is not likely to be productive. Repetition of the improprieties is the more likely outcome when the problems have not been identified. In contrast, if there is a clear articulation of what must be eliminated in order to proceed, then it is more likely that the next pleading will be one that has been pruned of extraneous materials that are obfuscating the issues and unfairly burdening the court and the party's adversary.

The trial judge also erred in fashioning the award of fees and costs. In addition to providing an inadequate explanation for the award, the sanction was not assessed in accordance with the *Rule 4:6-4(b)*. An award of fees and costs authorized by *Rule 4:6-4(b)(2)* **[*18]** may be imposed only "as a condition of the refiling of a pleading asserting a claim or defense based on the same transaction." The fees and costs in this case were not awarded on that basis. Accordingly, they must be vacated.

The City urges us to affirm on a different ground. They contend that the complaint was properly dismissed pursuant to *Rule 4:6-2* for violation of *Rule 4:5-2*. *Rule 4:5-2* requires plaintiffs to "set[] forth a claim for relief . . . [that] contain[s] a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement." Based on our summary of the seven counts remaining in this complaint set forth above, we reject this argument. While the City may not agree that the asserted violations and deviations from the statutes upon which plaintiffs rely are meritorious, there is no question that a cause of action is suggested by those facts. *Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192, 536 A.2d 237 (1988)*. Accordingly, we cannot affirm on the basis suggested by the City. [3]

Plaintiffs should not understand this opinion as one approving of the manner in which their several complaints were prepared or as one suggesting that there is merit to the claims. If consideration was given to our pleading rules when these complaints were filed, it is not apparent in the resulting pleadings.

Plaintiffs' lack of attention to rules formulated to facilitate the expeditious and just resolution of claims, *see R. 1:1-2*, is also evident in the papers submitted on this appeal. Plaintiffs' brief does not conform with the relevant rule. We invite plaintiffs' attorney to compare the procedural history and statement of facts set forth in its brief for compliance with *Rule 2:6-2(a)(3)-(5)*. Compliance with those provisions is more than a technicality designed to benefit the members of the appellate panel and the adversary. It facilitates a persuasive presentation of the facts pertinent to the issues.

The order under review is vacated, and the matter is remanded for further proceedings on defendants' motions to dismiss for failure to state a claim, which the trial judge did not address. The judge of course has discretion to **[*20]** establish a briefing schedule with direction for defendants to explain why they are entitled to a dismissal of the claims asserted in the various counts.

Reversed and remanded for further proceedings.

End of Document

[3] The City does not rely on ***Rule 4:6-5***, **[*19]** which permits a judge to strike an insufficient pleading.