UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE NO. 16-1868

MARC A. STEPHENS; and TYRONE STEPHENS,

Appellants,

-against-

CITY OF ENGLEWOOD; ENGLEWOOD POLICE DEPARTMENT; DET. MARC McDONALD; DET. DESMOND SINGH; DET. CLAUDIA CUBILLOS; DET. SANTIAGO INCLE JR.; DET. NATHANIEL KINLAW, Individually and in official capacity, NINA C. REMSON, Attorney at Law, LLC; and COMET LAW OFFICES, LLC,

Appellees,

On Appeal from an Order of the United States District
Court for the District of New Jersey
Docket No. 2:14-cv-05362
Honorable William J. Martini, U.S.D.J.

BRIEF OF DEFENDANT/APPELLEE, NINA C. REMSON ATTORNEY AT LAW, LLC, IN OPPOSITION TO PLAINTIFFS' APPEAL

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 16-1868

Marc Stephens, et al.

v.

City of Englewood, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

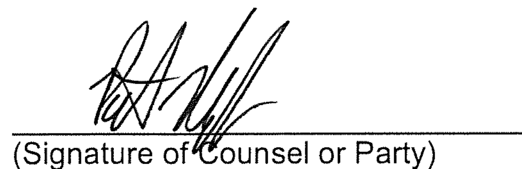
Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Nina C. Remson Attorney at Law, LLC
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:
This party does not have a parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
No publicly held corporation owns 10% or more of this party's stock.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.



(Signature of Counsel or Party)

Dated: 10/11/16

TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF JURISDICTION 1

COUNTER-STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

I. RELEVANT FACTS 2

A. ***Factual Background of the Legal Malpractice Claims*** 2

B. ***Undisputed Material Facts Relevant to the Affidavit of Merit Issue*** 4

II. RELEVANT PROCEDURAL HISTORY 6

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AND DISMISSED THE CLAIMS AGAINST REMSON WITH PREJUDICE BECAUSE PLAINTIFFS FAILED TO COMPLY WITH NEW JERSEY'S AFFIDAVIT OF MERIT STATUTE 9

A. ***Standard of Review*** 9

B. ***Plaintiffs' Opening Brief Is Deficient*** 10

C. ***Plaintiffs Did Not Provide an Affidavit of Merit Pursuant to Section 2A:53A-27*** 11

D. ***Plaintiffs Did Not Provide an Appropriate Sworn Statement in Lieu of Affidavit Pursuant to Section 2A:53A-28*** 13

E. *The Absence of a* **Ferreira** *Conference in the District Court Action Does Not Excuse Plaintiffs' Failure to Comply with the Affidavit of Merit Statute* 15

F. *The Common Knowledge Exception Does Not Apply to Plaintiffs' Claims Against Remson*...................................... 17

II. THE DISTRICT COURT PROPERLY DENIED RECONSIDERATION 19

A. *Standard of Review*.. 19

B. *Plaintiffs Failed to Meet the Requirements for Reconsideration* 19

CONCLUSION.. **21**

COMBINED CERTIFICATIONS **22**

TABLE OF CITATIONS

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10

Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 12, 783 A.2d 246 (App. Div. 2001) 17

Blystone v. Horn, 664 F.3d 397 (3d Cir. 2011)... 20

Couri v. Gardner, 173 N.J. 328, 801 A.2d 1134 (2002)...................................... 11

Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 836 A.2d 779 (2003) 15-16

Hancock Indus. v. Schaeffer, 811 F.2d 225 (3d Cir. 1987).................................. 10

Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 774 A.2d 495 (2001)......... 13, 17

Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc., 617 F.3d 207 (3d Cir. 2010).. 9

Kant v. Seton Hall Univ., 422 Fed. App'x 186 (3d Cir. 2011) 15

Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329 (3d Cir. 1985) 19

Kost v. Kozakiecwicz, 1 F.3d 176 (3d Cir. 1993).. 10

Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669 (3d Cir. 1999).. 19

McBride v. International Longshoremen's Ass'n, 778 F.3d 453 (3d Cir. 2014).. 19

Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withumsmith Brown, P.C., 692 F.3d 283 (3d Cir. 2012)... 16

Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 997 A.2d 982 (2010)... 16

Scaffidi v. Horvitz, 343 N.J. Super. 552, 779 A.2d 439 (App. Div. 2001) 14-15

Simmons v. City of Philadelphia, 947 F.2d 1042 (3d Cir. 1991) 11

Sommers v. McKinney, 287 N.J. Super. 1, 670 A.2d 99 (App. Div. 1996) 17

United States v. Irizarry, 341 F.3d 273 (3d Cir. 2003) 11

United States v. Smith, 445 F.3d 713 (3d Cir. 2006) 19

Vitale v. Carrier Clinic, Inc., 409 Fed. App'x 532 (3d Cir. 2012) 16

Statutes

28 U.S.C. § 1367 1

28 U.S.C. § 1291 1

N.J. Stat. Ann. § 2A:53A-26 .... 1, 11, 13

N.J. Stat. Ann. § 2A:53A-27 .... 11, 12

N.J. Stat. Ann. § 2A:53A-28 .... 12, 13, 14, 15

N.J. Stat Ann. § 2A:53A-29 12

Rules

Fed. R. Civ. P. 56 10

Fed. R. App. P. 28(a)(9)(A) 10, 11

Fed. R. App. P. 28(i) 21

STATEMENT OF JURISDICTION

Subject matter jurisdiction over plaintiffs/appellants' claims against this particular defendant/appellee arises from 28 U.S.C. § 1367, which grants supplemental jurisdiction "over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

Appellate jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1291.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the District Court correctly granted summary judgment and dismissed all claims against defendant/appellee Nina C. Remson Attorney at Law, LLC with prejudice, by determining that plaintiffs/appellants Marc Stephens and Tyrone Stephens (collectively, "**Plaintiffs**") failed to comply with New Jersey's Affidavit of Merit Statute, N.J. Stat. Ann. §§ 2A:53A-26, *et seq.*

2. Whether the District Court correctly denied Plaintiffs' self-styled motions for reconsideration of the Order granting summary judgment in favor of defendant/appellee Nina C. Remson Attorney at Law, LLC.

STATEMENT OF THE CASE

I. RELEVANT FACTS

A. *Factual Background of the Legal Malpractice Claims*

In March 2012, Nina C. Remson, Esq. and her law firm, defendant/appellee Nina C. Remson Attorney at Law, LLC (hereinafter referred to collectively as "**Remson**" for simplicity purposes) were retained to defend certain juvenile delinquency charges that were brought against plaintiff Tyrone Stephens ("**Tyrone**") in the Superior Court of New Jersey, Bergen County. Dkt. Entry Nos. 30-13, at ¶¶ 3-7; 66-6.

Tyrone had been arrested by the Englewood Police Department on March 19 and March 26, 2012, and charged with fourth-degree theft of movable property, second-degree robbery and violation of probation. Dkt. Entry No. 66-6. Marc Stephens ("**Marc**"), Tyrone's older brother, retained and paid Remson to represent Tyrone in connection with those charges. Dkt. Entry Nos. 30-13, at ¶ 8; 66-7.

On June 17, 2012, Tyrone was again arrested by the Englewood Police Department and charged with aggravated assault. *Id.* at ¶ 5; Dkt. Entry No. 66-6. Remson was retained to represent Tyrone on that charge as well, and his mother, Viola Stephens, paid an additional fee to Remson. Dkt. Entry Nos. 30-13, at ¶ 5; 66-7.

At all times during Remson's underlying representation, Tyrone was a minor. *Id.* at ¶¶ 3, 7. As such, Tyrone's older brother, Marc, and their mother, Viola Stephens, consulted with Remson regarding Tyrone's cases and the overall decision-making process concerning his defense. *Id.* at ¶ 8. In the course of representing Tyrone, Remson obtained discovery, reviewed it with Tyrone, made several court appearances on the case and engaged in plea negotiations with the prosecutor's office. *Id.* at ¶ 9; Dkt. Entry No. 66-10 (at ¶ 4).

In or around August 2012, Marc began severely impeding Remson's efforts to advise and communicate with Tyrone. Dkt. Entry No. 30-13, at ¶ 9. Marc and Remson held contradictory reviews regarding crucial aspects of Tyrone's defense. *Ibid.* During this time period, Remson had difficulty getting in touch with Tyrone. *Ibid.* It became apparent to Remson that Tyrone was not heeding his attorney's advice, and instead intended to rely on his older brother's guidance. *Ibid.*

The situation deteriorated to the point that Marc notified Remson that *he* was taking over the representation, and he began circumventing and supplanting Remson, including filing motions on Tyrone's behalf. *Id.* at ¶ 10. In August 2012, Marc informed Remson that he would be handling Tyrone's defense going forward, and requested that Remson withdraw as counsel for Tyrone. *Ibid.*

By mailing dated August 24, 2012, Remson provided Marc and Viola Stephens with a copy of her entire file relative to her representation of Tyrone,

along with a substitution of attorney form. *Id.* at ¶ 11. Remson thereafter filed a motion with the Superior Court to be relieved as counsel for Tyrone. *Id.* at ¶ 12. At a September 6, 2012 hearing, however, Judge Gary N. Wilcox, J.S.C., denied Remson's motion to be relieved as counsel, and confirmed that Tyrone would stand trial on October 25, 2012. *Id.* at ¶ 13.

Sometime thereafter, Remson received an updated plea offer from the Bergen County Prosecutor's Office, and conveyed same to Tyrone and his mother Viola. *Id.* at ¶ 14. Tyrone and Viola agreed to accept the plea offer. *Ibid.* On September 17, 2012, Remson, Tyrone and Viola presented to Judge Wilcox's courtroom for the purposes of accepting and entering the plea agreement. *Id.* at ¶ 15. Judge Wilcox accepted Tyrone's allocution and guilty plea in accordance with the terms of the plea offer. *Id.* at ¶¶ 16-18; Dkt. Entry No. 66-12, at pp. 8-21.

Tyrone was sentenced to eighteen months' probation under a juvenile-supervision program. Dkt. Entry No. 66-19, at ¶ 18. He was not incarcerated or otherwise detained as a result of his guilty plea. Dkt. Entry No. 66-12.

B. *Undisputed Material Facts Relevant to the Affidavit of Merit Issue*

On August 26, 2014, Plaintiffs filed a Complaint in the U.S. District Court for the District of New Jersey against Remson and a number of other individuals and governmental entities. *See* Dkt. Entry No. 1. Counts Sixteen (Negligence), Seventeen (Breach of Contract) and Eighteen (Ineffective Assistance of Counsel)

are the only counts in the Complaint pertaining to Remson. *Id.* at ¶¶ 124-38. The claims embodied in those counts arose from Remson's legal representation of Tyrone in connection with the juvenile delinquency charges filed in March and June 2012. *Ibid.*; Dkt. Entry No. 30-13, at ¶¶ 3-7.

Prior to filing suit in the District Court, Marc Stephens had sent several emails to Remson regarding the juvenile matters for which Remson had represented Tyrone, some of which generally requested documents and information from Remson. Dkt. Entry No. 40-8, at pp. 8, 10, 12-22, 24, 27-28, 30. Those communications did not advise Remson that Plaintiffs were requesting documents in connection with an affidavit of merit. *Ibid.*

On October 22, 2014, Marc emailed Plaintiffs' initial discovery requests to Remson's attorneys, which consisted of interrogatories, requests for admissions and a notice to produce. *See* Dkt. Entry Nos. 30-6, 30-7. However, neither Marc's email, nor the discovery demands themselves, indicated that Plaintiffs were requesting documents to prepare an affidavit of merit or that the production of any documents was required within the forty-five day period provided under N.J. Stat. Ann. § 2A:53A-28. *Ibid.*

On October 26, 2014, Remson filed its Answer and Separate Defenses to the Complaint. *See* Dkt. Entry No. 16. Remson's Nineteenth Separate Defense stated

that "Plaintiffs' claims should be dismissed for failure to timely secure and serve an appropriate Affidavit of Merit." *Id.* at p. 31.

Plaintiffs did not serve Remson's attorneys with an affidavit of merit within 120 days of the filing of Remson's answer. Dkt. Entry No. 30-3, at ¶¶ 12-13. In fact, Plaintiffs never provided an affidavit of merit at all. *See* Dkt. Entry No. 66-5, at ¶ 18; Dkt. Entry No. 82, at p. 2.

II. RELEVANT PROCEDURAL HISTORY

On March 11, 2015, Remson filed a motion for summary judgment seeking to dismiss all claims against Remson with prejudice due to Plaintiffs' failure to provide an Affidavit of Merit. *See* Dkt. Entry No. 30. At that time, Plaintiffs had not provided Remson's attorneys with an affidavit of merit and more than 120 days had elapsed since Remson filed its Answer to the Complaint. Dkt. Entry No. 30-3, at ¶¶ 12-13.

On April 7, 2015, Plaintiffs filed their Opposition to Remson's motion for summary judgment. Dkt. Entry No. 40. On April 13, 2015, Remson filed its Reply to Plaintiffs' Opposition papers. Dkt. Entry No. 41.

The District Court did not rule on Remson's motion for summary judgment during the pendency of discovery. *See* Dkt. Report (Annexed to Plaintiffs' Appendix). By Order filed on June 4, 2015, the District Court directed the parties, *inter alia*, to file dispositive motions by August 14, 2015. Dkt. Entry No. 29.

On August 14, 2015, Remson filed a renewed motion for summary judgment seeking dismissal of Plaintiffs' Complaint on a number of different grounds. Dkt. Entry No. 66. Remson's renewed motion expressly incorporated by reference its prior summary judgment motion based on Plaintiffs' failure to comply with the Affidavit of Merit Statute. Dkt. Entry No. 66-1, at p. 11.

On September 9, 2015, Plaintiffs filed their Opposition to Remson's renewed motion for summary judgment. Dkt. Entry No. 77. Remson filed a Reply to Plaintiffs' Opposition on September 15, 2015. Dkt. Entry No. 79.

On November 3, 2015, the District Court entered an Opinion and Order, *inter alia*, granting summary judgment in Remson's favor and dismissing the Complaint as against Remson with prejudice. Dkt. Entry Nos. 82-83. The District Court granted summary judgment in favor of Remson due to Plaintiffs' failure to comply with the Affidavit of Merit Statute. *Ibid.*

On November 17, 2015, Plaintiffs filed a letter addressed to Judge Martini asking the Court to reconsider its November 3, 2015 Order granting summary judgment to Remson and other co-defendants. Dkt. Entry No. 84. Remson filed Opposition to Plaintiffs' letter request for reconsideration on December 7, 2015. Dkt. Entry No. 88.

On January 13, 2016, the District Court entered an Opinion and Order denying reconsideration. Dkt. Entry Nos. 91-92. Plaintiffs thereafter filed

additional letters to the District Court purporting to be second and third motions for reconsideration of the summary judgment Order. Dkt. Entry Nos. 84, 94, 101.

On March 31, 2016, the District Court entered an Order on the case docket acknowledging receipt of multiple letters from Plaintiffs. Dkt. Entry No. 98. The Order stated, "To the extent those letters are intended to be additional motions for reconsideration, they are not permitted under the Local Rules and are therefore DENIED." *Ibid.*

On April 6, 2016, Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. Dkt. Entry No. 103.

SUMMARY OF THE ARGUMENT

Remson respectfully submits that the legal and factual bases of the District Court's holdings are sound. The District Court did not err in any of the decisions from which Plaintiffs appeal. Therefore, reversal is unwarranted.

With respect to the first appellate issue, the District Court properly determined that Plaintiffs were required to serve an affidavit of merit in connection with their claims against Remson, and that Plaintiffs' failure to do so subjected their claims to dismissal with prejudice. In reaching that conclusion, the District Court correctly rejected Plaintiffs' opposition arguments that they were excused from the affidavit requirement based on (1) the absence of a *Ferreira* conference, (2) the common knowledge exception and (3) Remson's purported noncompliance

with requests from Plaintiffs for documents necessary to prepare an affidavit of merit.

Second, the District Court properly denied Plaintiffs' motions seeking reconsideration of its Order granting summary judgment in favor of Remson. Plaintiffs failed to set forth any legitimate grounds for reconsideration in the first place, and, in any event, their substantive arguments were unsubstantiated and meritless.

In sum, the District Court correctly determined, in light of the undisputed facts of this case and in accordance with well-established legal precedent, that Plaintiffs' failure to serve an appropriate Affidavit of Merit was fatal to their claims against Remson. Accordingly, Remson respectfully submits that this Court should affirm all of the District Court's Orders from which Plaintiffs appeal.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AND DISMISSED THE CLAIMS AGAINST REMSON WITH PREJUDICE BECAUSE PLAINTIFFS FAILED TO COMPLY WITH NEW JERSEY'S AFFIDAVIT OF MERIT STATUTE

A. *Standard of Review*

A District Court's grant of summary judgment is subject to *de novo* review. *Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, 617 F.3d 207, 213, n.6 (3d Cir. 2010).

Summary judgment must be granted when the pleadings and discovery "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "'[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

B. *Plaintiffs' Opening Brief Is Deficient*

As a threshold matter, Remson submits that Plaintiffs' opening brief fails to satisfy the basic requirement under the Rules "to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief." *Kost v. Kozakiecwicz*, 1 F.3d 176, 182 (3d Cir. 1993); *see also* Fed. R. App. P. 28(a)(9)(A)(argument section of an appellant's brief "must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

The most egregious of several deficiencies is Plaintiffs' failure to present any meaningful legal or factual contentions within the argument section of their brief pertaining to Remson. *See* Plaintiffs' Brief, at pp. 5-6. Instead, Plaintiffs simply purport to "incorporate herein" their prior submissions in the underlying

action, which they claim "addressed the District Court's erroneous opinion in its entirety." *Id.* at p. 6. Such incorporation by reference within an appellate brief is improper. *See Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991)(observing that "a passing reference to an issue in a brief will not suffice to bring that issue before this court"), *cert. denied*, 503 U.S. 985 (1992).

Remson, not to mention this Court, should not be required to sift through Plaintiffs' District Court filings to divine the errors and arguments Plaintiffs have failed to develop on appeal. *See United States v. Irizarry*, 341 F.3d 273, 305 (3d Cir. 2003)("An appellant who fails to comply with [Fed. R. App. P. 28(a)(9)(A)] fails to preserve the arguments that could otherwise have been raised.").

C. *Plaintiffs Did Not Provide an Affidavit of Merit Pursuant to Section 2A:53A-27*

The New Jersey Affidavit of Merit Statute, N.J. Stat. Ann. § 2A:53A–26, *et seq.*, applies to any and all claims against a licensed professional that require "proof of a deviation from the professional standard of care for that specific profession." *Couri v. Gardner*, 173 N.J. 328, 801 A.2d 1134, 1141 (2002)(explaining that courts should analyze "the nature of the legal inquiry . . . . rather than focusing on whether the claim is denominated as tort or contact").

Under Section 2A:53A–27, the plaintiff in a professional malpractice action must provide the defendant, no later than 120 days after filing of the defendant's answer, with an affidavit attesting to the suit's merit:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.
>
> [*Ibid.*]

Alternatively, in lieu of an affidavit, the plaintiff may provide a sworn, written statement setting forth that, after written request, the defendant "failed to provide the plaintiff with records that have a substantial bearing on the preparation of the affidavit." N.J. Stat. Ann. § 2A:53A–28.

Unless an exception applies, the plaintiff's failure to provide either the affidavit or the sworn statement warrants dismissal "for failure to state a cause of action." N.J. Stat. Ann. § 2A:53A–29.

Here, there is no legitimate dispute that all of Plaintiffs' claims against Remson charged Remson with deviating from the standard of care required of the legal profession. *See* Dkt. Entry No. 1, at ¶¶ 124-38. It is also undisputed that Plaintiffs did not provide counsel for Remson with an affidavit of merit within the applicable 120-day period. *See* Dkt. Entry No. 30-3, at ¶¶ 12-13; Dkt. Entry No. 66-5, at ¶ 18.

Rather, in opposing summary judgment, Plaintiffs argued that they were excused from the affidavit requirement based on several exceptions. Those contentions are addressed *seriatim* in the following subsections.

D. *Plaintiffs Did Not Provide an Appropriate Sworn Statement in Lieu of Affidavit Pursuant to Section 2A:53A-28*

Plaintiffs contend that Remson purportedly refused their requests for documents necessary for the preparation of an affidavit of merit, and that they are therefore excused from the affidavit requirement pursuant to N.J. Stat. Ann. § 2A:53A-28. *See* Dkt. Entry No. 40. These arguments were properly rejected by the District Court.

The undisputed record demonstrates that Plaintiffs received a copy of Remson's entire case file in August 2012. *See* Dkt. Entry No. 30-13, at ¶ 11; Dkt. Entry No. 66-10, at ¶ 13. Plaintiffs' unsubstantiated assertions to the contrary are insufficient to create a genuine issue of material fact. *See* Dkt. Entry Nos. 40; 84.

Additionally, there is nothing in the plain language of the Affidavit of Merit Statute that requires an affiant to review particular materials or documents in order to prepare an affidavit of merit. *See* N.J. Stat. Ann. § 2A:53A-26, *et seq*. Indeed, the New Jersey Supreme Court has emphasized that the statute is only concerned with a plaintiff's ability to establish "some objective threshold merit" to the allegations contained in the complaint. *Hubbard ex rel. Hubbard v. Reed*, 168 N.J. 387, 774 A.2d 495, 499 (2001) (internal quotation marks omitted). Here, Plaintiffs

offered no legitimate explanation why they were unable to prepare an affidavit of merit without additional documentation from Remson, *see, e.g.*, Dkt. Entry Nos. 40; 84 – particularly as they were clearly able to prepare their Complaint without the aid of such documentation, and zealously argued throughout the District Court action that Remson's alleged negligence was so obvious that no expert testimony is required, *see, e.g.*, Dkt. Entry Nos. 33-1, at pp. 2-3; 40, at pp. 14-15; 84, at pp. 3-4.

Furthermore, Plaintiffs failed to avail themselves of the procedures set forth in Section 2A:53A-28 for relief from the requirement of serving a timely affidavit of merit. That statute provides:

> An affidavit shall not be required pursuant to [N.J. Stat. Ann. § 2A:53A-27] if the plaintiff provides a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request.
>
> [*Ibid.*]

Here, the record reflects that Plaintiffs never requested records or information from Remson pursuant to this section – none of the communications referred to by Plaintiffs specifically advised Remson that Plaintiffs were seeking records or information for the purpose of preparing an affidavit of merit. *See* Dkt. Entry No. 40-8, at pp. 8, 10, 12-22, 24, 27-28, 30; Dkt. Entry No. 30-7; *cf. Scaffidi*

v. Horvitz, 343 N.J. Super. 552, 779 A.2d 439, 443-44 (App. Div. 2001)(holding that plaintiff failed to comply with Section 2A:53A-28, where plaintiff's requests for medical records did not indicate they were being requested to prepare an affidavit of merit). Moreover, in their opposition to summary judgment, Plaintiffs failed to make a threshold showing under Section 2A:53A-28 that the records requested from Remson had a "substantial bearing" on their ability to prepare an affidavit. *See* Dkt. Entry Nos. 40, 71; *cf. Kant v. Seton Hall Univ.*, 422 Fed. App'x 186, 191 (3d Cir. 2011)(holding that plaintiff failed to comply with Section 2A:53A-28, where plaintiff filed an unsworn statement that neither referenced the affidavit of merit statute, nor explained how the defendant's alleged noncompliance with discovery requests had any effect on plaintiff's ability to obtain an affidavit of merit).

In sum, the Plaintiffs did nothing to comply with the provisions of Section 2A:53A-28, and the District Court appropriately rejected Plaintiffs' attempted reliance on this provision to avoid the dismissal of their Complaint as against Remson.

E. *The Absence of a* **Ferreira** *Conference in the District Court Action Does Not Excuse Plaintiffs' Failure to Comply with the Affidavit of Merit Statute*

Plaintiffs argue that a case management conference should have been held in this matter, pursuant to *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144,

836 A.2d 779, 785 (2003)(establishing that "an accelerated case management conference be held within ninety days of the service of an answer in all malpractice actions"). The fact that a case management conference was not held, however, does not excuse Plaintiffs' failure to comply with the Affidavit of Merit Statute.

Since its ruling in *Ferreira*, the New Jersey Supreme Court has held that the lack of a case management conference within the 120-day statutory period will not toll the time in which a plaintiff is required to serve an affidavit. *See Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 202 N.J. 415, 997 A.2d 982, 984 (2010).

Furthermore, this Court has previously held that *Ferreira* conferences are not mandatory in federal district court litigation, and the absence of such a conference "will not prevent an action from being dismissed based on the failure to file a timely affidavit." *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withumsmith Brown, P.C.*, 692 F.3d 283, 304-05 (3d Cir. 2012); *see also Vitale v. Carrier Clinic, Inc.*, 409 Fed. App'x 532, 534 (3d Cir. 2012)(same).

In short, Plaintiffs' position on this issue is contradicted by well-settled New Jersey and Third Circuit case law, and is therefore without merit.

F. *The Common Knowledge Exception Does Not Apply to Plaintiffs' Claims Against Remson*

Plaintiffs contend that they were not required to comply with the Affidavit of Merit Statute under the common knowledge exception, arguing that their claims against Remson were so obvious that no expert testimony was needed.

New Jersey law is clear that a plaintiff does not require expert testimony "where the causal relationship between the attorney's legal malpractice and the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge." *Sommers v. McKinney*, 287 N.J. Super. 1, 670 A.2d 99, 104 (App. Div. 1996).

The common knowledge exception is a carefully circumscribed judicial doctrine which excuses the affidavit of merit requirement in cases where expert testimony is not needed to establish a professional malpractice claim. *See, e.g., Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 N.J. Super. 1, 12, 783 A.2d 246, 253 (App. Div. 2001); *Hubbard, supra*, 774 A.2d at 501 (cautioning that the exception must be narrowly construed to avoid non-compliance with the Affidavit of Merit Statute). The common thread running through common knowledge cases is that "none of them require[] the trier of fact to evaluate an attorney's legal judgment concerning a complex legal issue." *Ezekwo, supra*, 783 A.2d at 253.

Here, Plaintiffs' claims against Remson do not fall under the common knowledge exception. The District Court properly concluded that Plaintiffs were required to present expert testimony in order to establish their legal malpractice claims against Remson. *See* Dkt. Entry No. 82, at pp. 6-7. In its cogent and well-reasoned opinion, the District Court recognized that Plaintiffs claims "implicate a thicket of complicated legal issues surrounding Remson's relationship with her client." *Id.* at p. 6. Contrary to Plaintiffs' assertions, a jury would not be able to evaluate whether Remson deviated from the standard of care required in connection with her underlying representation of Tyrone based on its common knowledge and experience.

Accordingly, as Plaintiffs needed to provide expert testimony to prove their claims against Remson, the District Court correctly concluded that Plaintiffs were not excused from providing an affidavit of merit under the common knowledge exception.

In conclusion, based on the foregoing, the District Court correctly determined that the Affidavit of Merit Statute applied to Plaintiffs' claims against Remson, and that none of the exceptions raised by Plaintiffs excused their failure to comply with the statute. The District Court properly held, in light of the undisputed facts of this case and in accordance with well-established legal precedent, that Plaintiffs' failure to serve an appropriate affidavit of merit was fatal

to their claims against Remson. Accordingly, Remson respectfully submits that the November 3, 2015 Order of the District Court should be affirmed.

POINT II

THE DISTRICT COURT PROPERLY DENIED RECONSIDERATION

A. *Standard of Review*

The denial of a motion for reconsideration is generally reviewed for an abuse of discretion. *See United States v. Smith*, 445 F.3d 713, 716 (3d Cir. 2006). If the denial of a motion to reconsider was based upon the interpretation of legal precepts, review of the District Court's decision is plenary. *See Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3d Cir. 1985). However, "[e]very other aspect of the District Court's decision to deny the motion is examined for an abuse of discretion." *McBride v. International Longshoremen's Ass'n*, 778 F.3d 453, 458 (3d Cir. 2014).

B. *Plaintiffs Failed to Meet the Requirements for Reconsideration*

In order to prevail on a motion for reconsideration, the movant must establish at least one of the following: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

Here, Plaintiffs failed to meet their heavy burden to demonstrate appropriate grounds for reconsideration. Plaintiffs' motions did not point to any intervening change in the law controlling the issues raised in Remson's motion for summary judgment. *See* Dkt. Entry Nos. 84, 94, 101. Plaintiffs also failed to identify any clear error of law or fact in the District Court's summary judgment decision. *Ibid.* Finally, Plaintiffs did not present new evidence that was unavailable to Plaintiffs at the time the District Court considered the motion for summary judgment. *Ibid.*

Instead, Plaintiffs' self-styled motions for reconsideration to the District Court simply rehashed arguments previously raised in their opposition to summary judgment, essentially arguing that the District Court "got it wrong" the first time around. *Cf. Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011)("[Motions for reconsideration] are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence."). Accordingly, the District Court did not abuse its discretion in denying Plaintiffs' motions for reconsideration, and the Orders appealed from should be affirmed.

CONCLUSION

Based upon the foregoing, as well as upon the arguments presented within the briefs submitted on behalf of the other defendants (which are adopted by reference herein pursuant to Fed. R. App. P. 28(i)), defendant/appellee Nina C. Remson Attorney at Law, LLC submits that the orders entered on November 11, 2015, January 13, 2016 and March 31, 2016, which granted summary judgment in favor of Remson and denied Plaintiffs' self-styled motions for reconsideration, should be affirmed.

Respectfully submitted,

/s/ Patrick J. Mulqueen

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October 11, 2016

COMBINED CERTIFICATIONS

Patrick J. Mulqueen, being of full age, certifies as follows:

A. **Bar Membership.** Pursuant to L.A.R. 46.1, I certify to being a member of the bar of the Third Circuit Court of Appeals.

B. **Compliance with Rule 32(a).** I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,558 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 font Times New Roman.

C. **Service on Counsel.** I certify that this brief was filed on this date through the court's electronic filing system. All parties to the appeal have consented to receiving electronic service through the court's docketing system.

D. **Identical Compliance of Briefs.** I certify that the electronic and hard copies of Remson's principal brief are identical and in compliance.

E. **Virus Check.** I certify that the electronic version of Remson's brief was scanned for viruses prior to its electronic submission to the court, and was reported by Symantec Antivirus Corporate edition ® to be virus free.

Dated: October 11, 2016

/s/ Patrick J. Mulqueen
Patrick J. Mulqueen