UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1868

MARC A. STEPHENS, TYRONE STEPHENS as individuals,
Appellants

v.

CITY OF ENGLEWOOD, ENGLEWOOD POLICE DEPARTMENT,
DET. MARC MCDONALD, DET. DESMOND SINGH, DET. CLAUDIA CUBILLOS,
DET. SANTIAGO INCLE JR., AND DET. NATHANIEL KINLAW,
Individually and in official capacity, NINA C. REMSON ATTORNEY AT LAW, LLC, AND
COMET LAW OFFICES, LLC
Appellees

On Appeal from the United States District Court
for the District of New Jersey
(D.N.J. No. 2:14-cv-05362-WJM-MF)
District Judge: Honorable William J. Martini

Appellants Reply Brief
NINA C. REMSON ATTORNEY AT LAW, LLC

Marc A. Stephens and Tyrone Stephens
Plaintiffs-Appellants
Pro se

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LEGAL ARGUMENT AND REPLY

I. REMSON BREACHED THE WRITTEN AGREEMENT NOT TO TAKE PLEA DEALS AND PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL (LEGAL MALPRACTICE)

A. Marc Stephens is the guardian of Tyrone Stephens and Retained Remson

Viola testified Marc Stephens was Guardian of Tyrone during the cellphone, shoplifting, and assault charges, **ECF Doc. 66-18, pg. 29**. Tyrone testified Viola has been his guardian up until he was 12 and Marc took over as guardian, **ECF Doc. 66-7, pg. 23**. Tyrone testified Marc was his guardian during the representation by Nina, **ECF Doc. 66-7, pg. 30**. Plaintiff Marc Stephens, for 6 months, appeared in all court hearings, and is addressed in practically all documents and correspondences in the court records, "Parent/Guardian: Brother", **ECF Doc. 40-9, pg. 3, 4, 22, 23, 25, 26**.

REPLY RELEVENT FACTS

1. Remson brief, pg. 9, **"Marc, Tyrone's older brother retained and paid Remson to represent Tyrone.."**

Remson admits Marc, not Viola, paid for the representation of Tyrone Stephens regarding the multiple charges filed by the Englewood Police Department. No other fees were paid as Remson states to Marc, "I know you don't want to pay any more attorney fees, but I am going to help Tyrone nonetheless", **ECF Doc. 40-9, pg. 15**.

2. Remson brief, pg. 9**, "On June 17, 2012, Remson was retained to represent Tyrone on that charge as well, and his mother, Viola Stephens, paid an additional fee to Remson**".

Viola never paid a fee on, June 17, 2012, to have Remson represent Tyrone. Viola testified she paid Remson $500 to bail Tyrone out of jail, **ECF Doc. 66-18, pg. 12**. Viola testified after giving $500 in July 2012 she never spoke to Remson again, until she met her for the first time in the courthouse on September 17, 2012. Q: Other than paying Nina that $500 and receiving this letter that she sent to you, what other interaction did you have with Miss Remson in relation to Tyrone? **A: That was it**. After that check was sent, I hadn't any more relation with her. Q: Did you ever meet with Nina to talk about Tyrone's case at any time? A: Yes. Q Okay. A: In the courthouse, when I first met her, **ECF Doc. 66-18, pg. 13**. Viola testified Nina lied to her, and that Nina told her if she paid the $500 Tyrone cases would be dropped..and he would come home, **ECF Doc. 66-18, pg. 19**.

3. Remson brief, pg. 10, **"Tyrones older brother, Marc, and their mother, Viola Stephens, consulted with Remson regarding Tyrone's cases and overall decision making process concerning his defense"**

This statement is false. Viola testified she was not involved at all with the case. Q: Now, when Marc first retained Nina, were you involved at all with her involvement with the case? Did you interact with her at all for Tyrone? A: No, **ECF Doc. 66-18, pg. 15**. Viola testified Tyrone's cases were handled by Marc, **ECF Doc. 66-18, pg. 12**, she never discuss Tyrone's defense with Nina. Q: Did you ever tell Miss Remson what you wanted to have done for Tyrone's defense? A: No, **ECF Doc. 66-18, pg. 16**. Viola testified she never discuss Tyrone's defense with Marc. Q: Did you ever speak with Marc Stephens about how Tyrone's case should be handled? A: No, **ECF Doc. 66-18, pg. 16**. Viola testified she was not involved with any conversation with Nina and Marc regarding Tyrone Q: Now, were you ever involved in any conversations with Nina and Marc Stephens about any disagreement as to how Tyrone's case should be handled? A: No. , **ECF Doc. 66-18, pg. 17**. Viola testified Marc Stephens handles her personal, business, and medical situations, **ECF Doc. 66-18, pg. 29, #116**, which is proven as true in Marc's fee waiver in his firearm case#: 2:14-cv-06688-WJM-MF, a letter dated September 3, 2014, "Marc Attorney-in-fact for Viola Stephens", **ECF Doc. 28-5, pg. 1**.

4. Remson brief, pg. 10, **"In or around August 2012…Marc and Remson held contradictory reviews regarding crucial aspects of Tyrone's defense".**

This statement is false, On August 10, 2012, because Marc Stephens refused to take a plea deal, Remson mentioned the following in an email, "As we have discussed several times, if you want to have trials in all of these cases, you may certainly do so. However, as I also advised, additional retainers are required if you wish to pursue two or possibly three trials"… "Bottom line is if you do not want the plea bargain, that is fine....**I don't blame you or Tyrone**. He is fully entitled to a trial. But, I need to be compensated for my time", **ECF Doc. 40-9, pg. 9**.

Remson states to Marc, "You have some excellent ideas that I think I can expand on".. "I will make an application for release from detention then as well based upon the weaknesses in these cases and your being available for supervision (the Judge will want to know how you intend to keep an eye on him now so he doesn't have any more incidents..you should be prepared to address that"…it would be helpful if you continue working on the shoplifting/robbery part of it, particularly if you could isolate the video/photo clips that you sent me and detail what each represents, that would be great. This will help the court follow our intent argument", **ECF Doc. 40-9, pg. 15.**

On August 13, 2012, Defendant stated to plaintiff Marc Stephens, "Marc, I need to know how you intend to proceed and if you still want me to represent Tyrone", **ECF Doc. 40-9, pg. 13**. On August 14, 2012, Remson stated "Do you still want me to represent Tyrone?, **ECF Doc. 40-9, pg. 14.** Defendant stated to Marc, "I know you don't want to pay any more attorney fees, but I am going to help Tyrone nonetheless", **ECF Doc. 40-9, pg. 15.** Remson did not provide viola with any documents. On September 6, 2012, Nina states she served a copy of her motion to be relieved as counsel on Tyrone, Marc Stephens, and the prosecutor, **ECF Doc. 66-11, pg. 5**.

5. Remson brief, pg. 11, **"Tyrone and viola agreed to accept the plea offer"**

Tyrone and viola did not agree they were lied to and coerced by Remson to take the plea deal. Tyrone testified that Remson coerced him to take a plea deal, **ECF Doc. 77-6, pg. 20, #65-209**. Tyrone testified he told Nina that he did not want to take the plea deal, and Nina told Tyrone he would get four years in Jail and would lose if he tried the cases, EXHIBIT 12 TO PAKRUL DECL., pg. 106 para 18-25; pg. 107 para 1. Remson stated she understood not to take plea deals regarding Tyrone Stephens "agreed in writing", see Complaint, **ECF Doc. 6, paragraph 16**. "I understand your position that you will not consider a plea deal under any circumstances", **ECF Doc. 40-9, pg. 2**. Remson wants the Judge to reconsider her motion to be relieved as counsel because **Marc will not allow a plea deal** and wants new counsel, **ECF Doc. 66-11, pg. 10-12**.

B. Remson admit she Never spoke to witnesses

The duty to investigate is part of a defendant's right to reasonably competent counsel. 'The principle is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." Harris v. Blodgett, 853 F.Supp. 1239, 1255 (1994) (quoting United States v. Tucker, 716 F.2d 576, 583 n.16 (9th Cir. 1983); Jermyn v. Horn, 266 F.3d 257, 312 (3d Cir. 2001); **Berryman v. Morton, 100 F.3d 1089, 1101 (3d Cir. 1996)**. **Rule 5:22-2**, permit a juvenile to present evidence and cross-examination of any witnesses at the probable cause hearing. **State of New Jersey v. J.M. 182 N.J. 402, 866 A.2d 178.**

Tyrone testified he was not dealing with or communicating with Remson anymore and Remson called on September 17, 2012 and told Viola if Tyrone doesn't take a plea deal he is going to jail. The September letter from Remson clearly makes a threat to either take the plea or go to jail. On September 17, 2012, 6 months later, Nina Remson was still trying to coerce Tyrone to take a plea deal for the cellphone. Remson states if Tyrone does not take a plea deal regarding the Cellphone theft, "the State has advised that it intends to subpoena the co-defendant to testify against you at trial". Remson then states, "I would strongly urge you to accept this offer", **ECF Doc. 40-9, pg. 11-12**. Marc clearly address in his email to Remson that she **did not and would not** contact the witnesses to all three charges filed against Tyrone, **ECF Doc. 40-9, pg. 7-8**. Malik Buchannan admitted to stealing the cellphone and testified he was not/did not implicate Tyrone, **see ECF Doc. 77-6, pg. 2**. Defendant Remson admits that she never spoke to the witnesses, **ECF Doc. 40-8, pg. 2, #48.** Tyrone testified that he did not steal the cellphone, **ECF Doc. 77-6, pg. 18-19**, see questions 9-28. Tyrone testified he showed up to the September 17, 2012 hearing because he didn't want to go to jail and he was scared, **ECF Doc. 66-17, pg. 31, #116.** Marc testified that it was impossible for Viola to receive the Sept 17, 2012 letter because it is dated the same day of the plea hearing, which means Nina called and threatened Viola and Tyrone to get to the court or Tyrone will go to jail, **ECF Doc. 66-16, pg. 18-19, #63-65.**

On September 17, 2012, 11 days later, Remson forced Tyrone to take a plea deal without guardian Marc Stephens knowing, and before the October 25, 2012 trial date, **ECF Doc. 40-8, pg. 6**.

C. Common Knowledge Applies to breach of contract and Expert Testimony is not required

Remson was hired and inserted a Not Guilty plea on behalf of Tyrone, **ECF doc. 40-9, pg. 32**. For 6 months Marc was adamant that he was not taking any plea deals, see Plaintiffs Brief, section F, **ECF no. 77, pg 5**, and Remson agreed not to. In addition, Remson never spoke to any of Tyrone witnesses, even when Marc provided her with names and contact information. Remson disregarded Marc's instructions and forced Tyrone, a minor, to take a plea deal to multiple charges.

When a client alleges that he entered into a settlement based on negligent advice from his lawyers, he need not first seek to vacate the settlement, but may proceed directly against those lawyers the plaintiff asserts provided the negligent advice that culminated in the settlement. Ziegelheim v. Apollo, 128 N.J. 250 (1992). **Guido v. Duane Morris LLP, 995 A. 2d 844 - NJ: Supreme Court 2010.**

The standards for determining whether a client can maintain a legal malpractice action against a lawyer who counseled a settlement are set forth clearly in Ziegelheim v. Apollo, 128 N.J. 250 (1992). The court in Ziegelheim concluded that "[t]he fact that a party received a settlement that was `fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent." Id. at 265. Guido v. Duane Morris LLP, 995 A. 2d 844 - NJ: Supreme Court 2010. The duties of attorney to client have been equated with those of physician to patient; thus, the charges on legal malpractice are similar in several respects to those on medical malpractice. See Stewart v. Sbarro, supra, quoting from the language of **McCullough v. Sullivan, supra, 102 N.J.L. 381 at 385**, to the effect that the duties and liabilities between an attorney and client are the same as those between a physician and patient. Marc's breach of contract and negligence claims against Remson are equivalent to a doctor intentionally pulling out the wrong tooth, **Steinke v. Bell, 32 N.J.Super. 67, 70, 107 A.2d 825 (App.Div.1954)** (holding that expert evidence not required in malpractice case where dentist extracted wrong tooth). A client may recover the actual damages sustained by an attorney's malpractice, Olfe v. Gordon, 93 Wis.2d 173, 286 N.W.2d 573, 578 (1980) (failure to abide by client's specific instructions); cf. Hill v. OKay Construction Co., 312 Minn. 324, 252 N.W.2d 107, 116-17 (Minn.1977) (no expert testimony required when conflict of interest "obvious") Wagenmann v. Adams, 829 F. 2d 196 - Court of Appeals, 1st Circuit 1987. If the failure of attorney performance is so clear that professional negligence may be found without the aid of expert testimony, this instruction is unnecessary. Wright v. Williams, 47 Cal. App.3d, 802, 121 Cal. Rptr. 194. "lay competence" and thus a jury is not foreclosed from considering whether

there was coercion even if there is "unequivocal, uncontradicted and unimpeached testimony of an expert" addressing the issue. Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 76-77 (1st Cir. 2002). **Halsey v. Pfeiffer, Court of Appeals, 3rd Circuit 2014**.

II. APPELLANTS PROVIDED NOTICE OF AFFIDAVIT OF MERIT IN COMPLIANCE WITH N.J.S.A. 2A:53A-27 AND N.J.S.A. 2A:53A-28

REPLY AFFIDAVIT OF MERIT

6. Remson brief, pg. 12, **"Prior to filing suit in district court, Marc Stephens had sent several emails to Remson…Those communications did not advise Remson that Plaintiffs were requesting documents in connection with an Affidavit of Merit"**

This statement is false. On November 11, 2013, 9 months before filing the civil complaint, the Plaintiff requested for discovery *"This information is needed to present to the judge*", **ECF Doc. 40-8, pg. 10.** On February 28, 2014, 6 months before filing the civil complaint, plaintiff forwarded a Notice of Intent to Sue which addressed the Affidavit of Merit, **ECF Doc. 40-8, pg. 20.** It reads as follow:

> ***"Legal malpractice***
>
> *The Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, provides, in pertinent part:*
>
> *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".*

"Attorneys should begin discovery promptly when facts are needed to comply with the Affidavit of Merit statute. We urge counsel to time their discovery - with court intervention, if necessary - so that facts necessary to comply with N.J.S.A. 2A:53A-27 are available by the statutory deadlines." **Fink v. Thompson, 167 N.J 551, 564-65 (2001)**. The plaintiffs started **9 months before filing**.

A. The doctrine of substantial compliance Applies

The doctrine of substantial compliance is used by courts to "avoid technical defeats of valid claims," Zamel v. Port of New York Auth., 56 N.J. 1, 6, 264 A.2d 201 (1970) and requires:

"(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim, and (5) a reasonable explanation why there was not a strict compliance with the statute." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353, 771 A.2d 1141 (2001) at 1149. **Palanque v. Lambert-Woolley, 774 A. 2d 501 at 506**. Palanque v. Lambert-Woolley, 774 A.2d 501, 506 (N.J. 2001); see also Alan J. Cornblatt, P.A. v. Barow, 708 A.2d 401, 411 (N.J. 1998) (doctrine of substantial compliance invoked so that technical defects will not defeat a valid malpractice claim). Good faith requirements set forth in Ryan v. Renny, 207 N.J. 37, 55 (2010).

In Galik, supra, the Court found that there had been substantial compliance with the statute where plaintiff served unsworn expert reports on the defendants **eight months prior** to litigation. Id. at 355, 771 A.2d 1141. **Palanque v. Lambert-Woolley, 774 A. 2d 501 - NJ: Supreme Court 2001 at 506**. In both Galik, supra, and Fink, supra, the plaintiffs took a series of steps that notified the defendants about the merits of the malpractice claims filed against them.

On August 26, 2014, Marc and Tyrone Stephens filed a complaint against defendant for legal malpractice, breach of contract, ineffective assistance of counsel, and negligence, **see Complaint, ECF Doc. 6**.

On October 22, 2014, the plaintiffs forwarded interrogatories, request for admissions, and production of documents to defendant, **ECF Doc. 30-6, pg. 2**. Discovery was due within 30 days, on November 22, 2014. Pursuant to FRCP Rule 33(b)(2), it states, "The responding party **must serve** its answers and any objections within **30 days** after being served with the interrogatories. Pursuant to FRCP Rule 36(a)(3), "A matter is **admitted** unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. Pursuant to FRCP Rule 33(b)(4), "The grounds for objecting to an interrogatory must be stated with specificity".

Despite the 60 days rule in the State statue, N.J.S.A. 2A.:53A-27, the defendant was **obligated** to provide the plaintiff with discovery request for production of documents within 30 days pursuant to federal rules. "The law of the State, though enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation". **Gibbons v. Ogden, 9 Wheat. 1, 22 U. S. 211; Sperry v. State of Fla. ex. rel Florida Bar, at Pg. 373 U. S. 384.** The defendant who was fully aware that plaintiff filed a legal malpractice complaint should have known to provide plaintiff with the requested documents. The Supreme Court has held "that parties are presumed to know the law and are obliged to follow it." **Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 424 (2010)** (citing Emanuel v. McNell, 87 N.J.L. 499, 504 (E. & A.1915)).

B. Defendant's motion for summary judgment is barred by the doctrine of laches.

On November 21, 2014, Plaintiff sends another request for a few documents and emails which defendant tells plaintiff to **stop requesting** for the documents, "*We still urge you to please refrain from engaging in such discovery until we have heard from the court with respect to the parameters of permissible discovery for this litigation*", **ECF Doc. 40-8, pg. 25.**

Doctrine of laches is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. In re Kietur, 332 N.J.Super. 18, 28, 752 A.2d 799, 805 (App.Div.2000) (citing County of Morris v. Fauver, 153 N.J. 80, 105, 707 A.2d 958, 970 (1998)). Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned. Dorchester Manor v. Borough of New Milford, 287 N.J.Super. 163, 172, 670 A.2d 600, 604 (Law Div.1994), aff'd, 287 N.J.Super. 114, 670 A.2d 576 (App.Div.1996). **Knorr v. Smeal, 836 A. 2d 794 - 2003 - NJ: Supreme Court.**

C. Defendant waived her rights and Motion for Summary Judgment is late

On December 8, 2014, the Remson document request was due, and pursuant to affidavit of merit statute, 2a:53a-28(3), affidavit is not required if "at least **45 days** have elapsed since the defendant received the request". "Waiver is the voluntary and intentional relinquishment of a known right". **W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152, 141 A.2d 782, 786 (1958)**. "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights". Id. at 153, 141 A.2d at 787. "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference". See **Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J.Super. 235, 254, 172 A.2d 206, 216 (App.Div.1961), aff'd, 37 N.J. 114, 179 A.2d 505 (1962).**

On February 16, 2015, plaintiff forwarded a sworn statement "Waiver for Affidavit of Merit" to Judge Mark Falk., raising the argument that defendant is intentionally withholding discovery and that the Common Knowledge Exception applies by providing exhibits showing Remson agreed in writing not to plead guilty and then later forced Tyrone to plead guilty, **see ECF Doc. 25 pg. 45-46, and ECF 33, 33-1, 34, 34-3.**

On March 6, 2015, **133 days later**, Defendant sends full discovery to Plaintiffs labeled (**NCR 1-195)**. "To ensure that discovery related issues, such as compliance with the Affidavit of Merit statute, do not become sideshows to the primary purpose of the civil justice system-to shepherd legitimate claims expeditiously to trial-we propose that an accelerated case management conference be held within ninety days of the service of an answer in all malpractice actions". **Ferreira, supra, 178 N.J. at 154**.

D. Defendant is estopped from seeking relief

On March 11, 2015, the defendant moved for a summary judgment claiming the plaintiffs did not obtain an Affidavit of Merit, and is now asking the court to dismiss the Complaint with prejudice. "Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." **Casamasino v. City of Jersey City, 158 N.J. 333, 354, 730 A.2d 287, 298 (1999)**. The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. **Mattia v. Northern Ins. Co. of New York, 35 N.J.Super. 503, 510, 114 A.2d 582, 585 (App.Div.1955).** The doctrine is invoked in "the interests of justice, morality and common fairness." Palatine I v. Planning Bd.,

133 N.J. 546, 560, 628 A.2d 321, 328 (1993) (quoting Gruber v. Mayor of Raritan Township, 39 N.J. 1, 13, 186 A.2d 489, 495 (1962)). Its purpose is to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose. **Anske v. Borough of Palisades Park, 139 N.J.Super. 342, 347, 354 A.2d 87 (App.Div.1976).** It is a doctrine based on justice and fairness, designed to avoid technical rejection of legitimate claims. Zamel, supra, 56 N.J. at 6, 264 A.2d 201. Estoppel, unlike waiver, requires the reliance of one party on another. Country Chevrolet, supra, 190 N.J.Super. at 380, 463 A.2d at 962. In short, to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally, or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. Miller v. Miller, 97 N.J. 154, 163, 478 A.2d 351, 355 (1984). **Knorr v. Smeal, 836 A. 2d 794 - 2003 - NJ: Supreme Court.**

In Knorr v. Smeal, 836 A. 2d 794 - 2003 - NJ: Supreme Court, the court concluded that the defendants were equitably estopped because of the untimely filing of their motion. Ibid; see also Konopka v. Foster, 356 N.J.Super. 223, 812 A.2d 363 (App.Div.2002) (holding that plaintiff can raise equitable estoppel to bar dismissal for failure to provide physician's certification where defendant continued with discovery to completion and did not challenge timeliness of service until after statute of limitations had run); cf. Zaccardi v. Becker, 88 N.J. 245, 440 A.2d 1329 (1982) (refusing to apply statute of limitations to bar subsequent malpractice suit where defendant participated in discovery for seventeen months after plaintiff's initial suit had been dismissed for failure to answer interrogatories).

E. Common Knowledge Applies to the Affidavit of Merit and Expert Testimony is not required

In a common knowledge case, whether a plaintiff's claim meets the threshold of merit can be determined on the face of the complaint. Because defendant's careless acts are quite obvious, a plaintiff need not present expert testimony at trial to establish the standard of care. Chin, supra, 160 N.J. at 469-70, 734 A.2d 778. The defendant knew that the plaintiffs had a valid common knowledge claim. So defendant willfully engaged in withholding the discovery from the plaintiffs until the 120 day limit expired to submit an affidavit of merit, or to prove common knowledge. Tousignant v. St. Louis County, 615 N.W.2d 53, 60 (Minn. 2000) (stating that plaintiff was not required to file expert affidavit in common knowledge case even though "expert testimony may ... at some point be necessary to refute evidence presented by respondents at trial"). An expert will not be permitted to testify in plaintiff's case-in-chief, **Palanque v. Lambert-Woolley, 774 A. 2d 501 - NJ: Supreme Court 2001 at 507**.

In Hubbard, supra, a plaintiff is not required to file an affidavit of merit in a common knowledge malpractice case, a case in which " 'jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts.' " 168 N.J. at 394, 774 A.2d 495 (quoting Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469, 734 A.2d 778 (1999). **Palanque v. Lambert-Woolley, 774 A. 2d 501 at 506-507**.

REPLY POINT I

7. Remson brief, pg. 17, **"Opening brief deficient, fails to sets forth the issues raised on appeal and presented an argument in support of the issues"**

Plaintiff set forth the issues raised on appeal and presented an argument in support of the issues which reads, "*The court erroneously granted the defendant Nina C. Remson's motion for summary judgment based on the following: "Remson is entitled to summary judgment because Plaintiffs failed to comply with New Jersey's affidavit of merit statute, N.J.S.A. 2A:53A-27" see Order ECF no. 82, pg. 5. The plaintiffs provided Remson with 8 notices and Remson, and her attorney, ignored the request from plaintiffs, ECF no. 84, pg. 1-6"*.

"[N]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson." **Halbert v. Michigan, 545 U.S. 605, 621 (2005)**. Accordingly, this Court can and should excuse inadvertent failures to comply with the Court's rules when they result from the difficulties inherent in proceeding pro se. **Cf. Schacht v. United States, 398 U.S. 58, 64 (1970)** ("The procedural rules adopted by the Court for the orderly transaction of its business … can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.") "Where the plaintiff is proceeding pro se, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." **Erickson v. Pardus, 551 U.S. 89, 93–94 (2007)**. Plaintiffs substantially complied and did not prejudice the defendant. "Prejudice involves impairment of defendant's ability to defend on the merits, rather than foregoing such a procedural or technical advantage." **Boley v. Kaymark, 123 F.3d 756, 759 (3d Cir.1997).**

8. Remson brief, pg. 20, **"Plaintiffs received a copy of Remson's entire case file in August 2012".**

The plaintiffs were not in possession of the entire Remson file at the time they filed this lawsuit. The plaintiffs were specifically requesting for "email communications" between Marc Stephens and Remson which discussed Tyrone's defense strategies, Remson statements regarding not taking plea deals, and Marc stating for 6 months not to take plea deals. On February 11, 2014, Marc Stephens was ordered by Judge Jerejian during his firearm hearing to report to the Englewood Police Department to file a police report of death threats and attacks that he was receiving, of which Marc Stephens testified that his "computer was being constantly hacked", **ECF no 84, pg. 14**. This is why Marc started requesting email discovery from Remson on February 28, 2014, which is **6 months** before filing the complaint. Remson held on to the emails for 133 days which was a strategy to place plaintiffs' claims in violation of the 120 day Affidavit of Merit requirement. Remson knew the emails had a substantial bearing on obtaining an affidavit of merit and were loaded with the truth that she ignored the written agreement not to take plea deals, which is discussed herein.

REPLY POINT II

F. The district court errored by denying the first and second motions for reconsideration

A Rule 59(e) motion "is appropriate where the court has misapprehended the facts, a party's position, or the controlling law **(citing Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991)**. "Reconsideration is the appropriate means of bringing to the court's attention manifest errors of fact or law. See **Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) at 909**, **Max's Seafood Cafe V. Quinteros176 F.3d 669, 678 (3d Cir. 1999) at 678**.

First Reconsideration errors of facts, law, and overlooking evidence

Errors of facts and overlooking evidence: District court stated **"plaintiffs failed to comply with Affidavit of Merit"**. On record the evidence shows the plaintiff requested for emails and documents months before filing the complaint, and gave notice of the requirement of the affidavit of merit. In addition, the plaintiff filed two sworn statements with Judge Falk detailing why the affidavit should be waived, **ECF Doc. 25 pg 45-46**, and **ECF 33, 33-1, 34, 34-3**.

Errors of facts and law and overlooking evidence: District court stated "**common knowledge does not apply"**. The facts and law states it does apply. Remson agreed she understood not to take plea deals under any circumstances, and she later forced Tyrone to take a plea against the instructions from Marc not to take plea deals, see Plaintiffs Brief, section F, **ECF no. 77, pg 5**. This is equivalent to pulling out the wrong tooth. **Steinke v. Bell, 32 N.J.Super. 67, 70, 107 A.2d 825 (App.Div.1954)** (holding that expert evidence not required in malpractice case where dentist extracted wrong tooth). A client may recover the actual damages sustained by an attorney's malpractice, Olfe v. Gordon, 93 Wis.2d 173, 286 N.W.2d 573, 578 (1980) (failure to abide by client's specific instructions).

Errors of facts: District court stated "**brother who paid a portion of the retainer fee and claimed to be Tyrone's guardian**". The record clearly shows Marc is the only person to retain Remson and testimony show Marc is the only guardian. On August 13, 2012, Remson stated to Marc, "Marc, I need to know how you intend to proceed and if you still want me to represent Tyrone", **ECF Doc. 40-9, pg. 13**. On August 14, 2012, Remson stated "Do you still want me to represent Tyrone?, **ECF Doc. 40-9, pg. 14**. Defendant stated to plaintiff Marc Stephens, "I know you don't want to pay any more attorney fees, but I am going to help Tyrone nonetheless", **ECF Doc. 40-9, pg. 15**.

Errors of facts: District court stated **"thicket of complicated legal issues surrounding Remson's relationship with her client".** Testimony proves, herein, Marc is the only guardian, and Remson was fully aware.

Errors of facts: District court stated **"Plaintiffs also argue that the affidavit of merit statute is "facially unconstitutional" because it imposes excessive cost on litigants**

defendants". Plaintiffs raised the argument that the Affidavit of Merit requirement is facially unconstitutional because (1) it violates and creates a monetary barrier to access the court system which violates due process and equal protection rights afforded by the 5th and 14th Amendment of the U.S. Constitution, (2) it violates Article I, paragraph 1 and 9, of the NJ Constitution, and (3) it violates Article IV- Section VII, paragraph 8 and 9(8) of the NJ Constitution, see Plaintiffs Brief, section F, **ECF Doc. 40, pg. 18-22**.

Second Reconsideration errors of facts, law, and overlooking evidence

Errors of facts: District court stated **"Plaintiffs have not put forth any evidence"**. The court overlooked plaintiffs' eight notices for Remson's emails on record.

III. EXPERT OPINION NOT REQUIRED ON DUTY OF CARE, STANDARD OF CARE, CAUSATION, DAMAGES AND LEGAL MALPRACTICE UNDER DOCTRINE OF RES IPSA LOQUITUR

In New Jersey, legal malpractice claims are grounded in the substantive law of negligence. To establish liability on the part of an attorney, a plaintiff must prove each of the following elements: (1) that an attorney-client relationship existed, thereby giving rise to a duty of care on the part of the attorney; (2) that the attorney breached that duty; and (3) that the attorney's negligence was a proximate cause of the damages claimed to have been suffered by plaintiff. **See, e.g., McGrogan v. Till, 167 N.J. 414, 425 (2001); Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996).**

(1) The defendant admit that on March 28, 2012, guardian Marc Stephens retained the legal services of defendant Nina C Remson Attorney at Law LLC to handle three cases for Tyrone Stephens, a minor, thereby giving rise to a duty of care on the part of the attorney, Viola, Tyrone, and Marc Stephens all testified that Marc Stephens was the guardian for Tyrone (2) the plaintiffs provided evidence that guardian Marc Stephens and defendant **agreed in writing** not to take any plea deals, yet on September 17, 2012 the defendant coerced Tyrone to plead guilty, (3) and the defendant's negligence is the proximate cause of plaintiffs criminal record, compensatory and other damages.

The case against defendant is not a highly extraordinary case which would remove the factfinders as final decision makers. It's very simple: (1) Did the defendant breach the contract not to take a plea deal?; and (2) is Marc Stephens the guardian of Tyrone that gave instructions not to take plea deals? **The answer to both questions is simply, "Yes"**. Plaintiffs are entitled to inference of negligence under doctrine of res ipsa loquitur, without providing expert testimony. **Jerista v. Murray, 883 A. 2d 350 - NJ: Supreme Court 2005**. Res ipsa is available if it is more probable than not that the defendant has been negligent. **Buckelew, supra, 87 N.J. at 526, 435 A.2d 1150; Tierney, supra, 214 N.J.Super. at 30, 518 A.2d 242.** If res ipsa applies, the factfinder may draw "`the inference that if due care had been exercised by the person having control of the instrumentality causing the injury, the mishap would not have occurred.'" **Brown, supra, 95 N.J. at 288-89, 471 A.2d 25 (quoting Bornstein, supra, 26 N.J. at 269, 139 A.2d 404).** Because the inference is purely permissive, the factfinder "is free to accept or reject"

it. Buckelew, supra, 87 N.J. at 526, 435 A.2d 1150. Common knowledge is sufficient to entitle plaintiffs to the res ipsa inference, **Jerista v. Murray, 883 A. 2d 350 - NJ: Supreme Court 2005**. When the average juror can deduce what happened without resort to scientific or technical knowledge, expert testimony is not mandated. **Jerista v. Murray, 883 A. 2d 350 - NJ: Supreme Court 2005**. "The occurrence bespeaks negligence." **Rose v. Port of New York Authority, 293 A. 2d 371 - NJ: Supreme Court 1972**.

IV. DOCTRINE OF PRESUMED DAMAGES PERMITS APPELLANTS TO SURVIVE A MOTION FOR SUMMARY JUDGMENT

Tyrone has a criminal record which reflects robbery and aggravated assault due to the negligence of defendant Nina Remson, **ECF Document 40-8, page 6.** Tyrone testified that he had suicidal thoughts, and anxiety see EXHIBIT 18, #237-241, #251-252, **ECF Document 77-6, page 27.** Tyrone could not make reduced bail because the prosecutor used the Remson guilty plea of robbery to keep Tyrone in jail, see EXHIBIT 18, #296-305, **ECF Document 77-6, page 29.** When Tyrone was not falsely incarcerated for crimes he did not commit he received straight "A" in school, **ECF Document 77-6, page 39.** Tyrone's education was negatively impacted by the negligence of Nina Remson**.**

Marc testified he receive job offers but had to reject because of Tyrone cases with Remson, **ECF Doc. 66-16, page 5, #11-12; page 6 #14; page 7 #17.** In fact, in July 2, 2012, Marc signed a subcontractor agreement for $96,000, **ECF Document 77-6, page 41.** Marc testified he could not work and was financially and emotionally damaged because of Nina negligence in representing Tyrone, **ECF Doc. 66-16, page 21, #75; page 24 #87,88; page 25, #89**. Marc testified he could not get a firearm permit because Nina forced Tyrone to take a plea deal, **ECF Doc. 66-16, page 28, #101, page 40, #151**, and **ECF Document 77-6, page 54.** Tyrone testified that Marc lost over 75lbs due to the stress of dealing with trying to free Tyrone from jail, see EXHIBIT 18, #228-236, **ECF Document 77-6, page 26-27.**

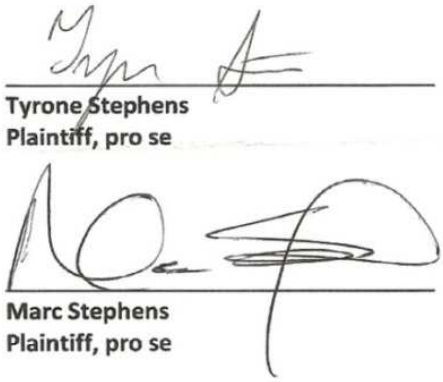
Where a plaintiff does not proffer evidence of actual damage to reputation, the doctrine of presumed damages permits him to survive a motion for summary judgment and to obtain nominal damages, thus vindicating his good name. **WJA v. DA, 43 A. 3d 1148 - NJ: Supreme Court 2012.**

CONCLUSION

The district court decision should be reversed, and the case should be sent to trial.

Respectfully Submitted,

November 4, 2016



Tyrone Stephens
Plaintiff, pro se

Marc Stephens
Plaintiff, pro se

CERTIFICATE OF SERVICE

Plaintiffs-Appellants, pro se, hereby certify that on November 4, 2016, Plaintiffs filed (1) Reply Brief to the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will then send a notification to the defendants, and their counsel:

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