No. 18-2193

In the United States Court of Appeals for the Third Circuit

VICTOR MONDELLI,
Plaintiff/Appellant,
v.
BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, MARINA FERRER, DIANE WILVERDING and JOHN/JANE DOES 1 THROUGH 5
Defendants/Appellees

Appeal of Victor Mondelli

Appeal from the Order of the United States District Court for the District of New Jersey by the Honorable Esther Salas, U.S.D.J.,
in Civil Action No. 16-1569 (ES)(SCM)

Brief of Defendants, Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, Diane Wilverding

Walter F. Kawalec, III, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
15000 Midlantic Drive, Suite 200
P.O. Box 5429
Mt. Laurel, New Jersey 08054
(856) 414-6000
Attorneys for Appellees, Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, Diane Wilverding

Disclosure Statement

The undersigned counsel for Defendant, Berkeley Heights Nursing & Rehabilitation Center, LLC hereby certifies that this party is not a publically-held corporation, has no parent corporation, and no publicly-traded stock.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Walter F. Kawalec, III
Walter F. Kawalec, III, Esquire
Attorneys for Defendant,
Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding

DATED: 1/29/2021

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I. Counterstatement Of The Issues Presented For Review

1) When presented with verifiable evidence of incompetence, a district court has the obligation to inquire as to the mental competence *of an unrepresented party*. In this case, Plaintiff was not an unrepresented party; at all relevant times in the district court, he was represented by counsel and did not proceed pro se. Since Plaintiff was not an unrepresented party, was it reversible error for the district court judge not to make the competency inquiry required for unrepresented parties?

Suggested Answer: No.

1a) In the alternative, if the fact that Plaintiff was not pro se is deemed not to preclude the duty of inquiry, was the duty of inquiry nevertheless not triggered because Plaintiff did not present verifiable evidence of incompetence in connection with his motion to reopen the case?

Suggested Answer: Yes.

1b) In the further alternative, since Rule 17(c) is designed to ensure Plaintiff's interests are protected, and since Plaintiff's causes of action have no merit as a matter of law and therefore Plaintiff had no valid interest to be protected, was the lack of any inquiry into Plaintiff's mental competence no worse than harmless error?

Suggested Answer: Yes.

2) Prior to dismissing a complaint because a party failed to abide by the

applicable discovery obligations, this Court requires the district court to examine and balance six factors, including the extent of the party's personal responsibility, the prejudice to the adversary, the history of the party's dilatoriness, whether the conduct was willful or in bad faith, the effectiveness of alternative sanctions, and the meritoriousness of the claim. The district court examined each of these factors and found that those which favored dismissal outweighed those few that did not. Consequently, was the district court's determination favoring dismissal proper?

Suggested Answer: Yes.

II. Statement Of The Case

Plaintiff filed his complaint on March 22, 2016 in the United States District Court for the District of New Jersey, at docket 2:16-cv-01569. (Ja24-36) The complaint was filed on Plaintiff's behalf by his attorney, Kenneth Rosellini, Esq. of Clifton, New Jersey. (Id.) During all of the events in the district court between the filing of the complaint and the denial of the motion to reopen it, Mr. Rosellini represented Plaintiff.

The complaint named three defendants, Berkeley Heights Nursing and Rehabilitation Center, Marina Ferrer and Diane Wilverding. (Id.) Defendants filed their answer on August 18, 2016. (Ja37-51) Among the defenses asserted in that complaint was that the action was barred by the "applicable Statute of Limitations." (Ja48)

The complaint asserted two causes of action: a claim under Title II of the Americans with Disabilities Act (hereinafter "ADA") and a state law claim for the intentional infliction of emotional distress. (Ja24-36) The claims stem from disputes which Plaintiff had with Defendants concerning the manner in which his mother was being cared for while she was a resident at Berkeley Heights Nursing and Rehabilitation Center from January 2012 to March 2015. (Id.) This conflict resulted in Plaintiff being restricted in the amount of time he was permitted to visit with his mother and the place in the facility where he was permitted to meet with

her. (Id.)

A Rule 16 case management conference was held via telephone with the Honorable Steve Mannion, U.S.M.J., on November 17, 2016. (Ja58-61; ECF No. 10) At this conference, all parties agreed to case management deadlines, which were codified in the Court's Pre-trial Order of November 17, 2016. (Id.)

Under that order, the parties were to provide Rule 26 initial disclosures by December 10, 2016. (Id.) Defendants provided their Rule 26 initial disclosures on December 9, 2016. Plaintiff never provided his Rule 26 disclosures. (See, e.g., Ja63)

The parties were also required to serve all interrogatories, notices to produce and requests to admit by December 30, 2016, to be responded to within thirty days of receipt. (Ja58) Defendants served their discovery requests on December 5, 2016, which included a single request to admit. (Ja65-76) Therefore, the response to the discovery requests were due on January 4, 2017. (Ja58; 65-76)

A follow-up letter requesting the Plaintiff's Rule 26 disclosures was sent on January 3, 2017. (Ja63) Neither Rule 26 disclosure nor any discovery responses were served by Plaintiff at any time during the pendency of this case.

A second telephone case management conference was held on January 20, 2017. (Ja78; ECF No. 14) During this conference, Plaintiff requested additional time to respond to all outstanding discovery, including the responses to the

discovery requests, which were, at that time, sixteen days late.

Judge Mannion granted Plaintiff the additional time and Plaintiff agreed to provide all outstanding discovery by February 3, 2017. (ECF No. 15) This agreement was confirmed via letter to Plaintiff's counsel dated January 23, 2017. (Ja78) Plaintiff once again failed to provide discovery and meet the new February 3, 2017 deadline.

A third telephone case management conference was held on March 29, 2017. (Ja82) At this time Mr. Rosellini stated that he had not been able to get in touch with his Plaintiff and requested additional time to complete the outstanding discovery. The Court granted Plaintiff fourteen days from the date of the conference to produce all outstanding discovery or to consider an administrative termination of the proceeding. (Id.) The fourteen-day deadline expired on April 12, 2017 without Plaintiff providing any of the outstanding discovery or seeking leave for an administrative termination of the proceedings.

On April 25, 2017, Defendants sought leave of court to file a motion to dismiss for failure to provide discovery and a motion for summary judgment. (ECF No. 16) In response, Judge Mannion entered an Order to Show Cause on May 3, 2017, which required Plaintiff to "show cause in writing by May 18, 2017 why sanctions should not be imposed against him pursuant to Federal Rules of Civil Procedure 16(f) and 37." (Ja83) Judge Mannion's order stated that the possible

sanctions included costs, attorneys' fees, and an order dismissing the complaint. (Id.)

On May 19, 2017, Plaintiff responded to the Order to Show Cause and requested an administrative termination of the case for 180 days. (Ja85-110) Plaintiff executed a certification which asserted that he had physical and mental problems that prevented him from being able to "prosecute this matter." (Id.) He also claimed that on April 6, 2017, a municipal court judge found him incompetent to stand trial, but did not submit any competent evidence to substantiate that allegation. (Id.)

Plaintiff supported that certification with a number of notes addressed "to whom it may concern" and which asserted in summary fashion that Plaintiff experiences mental disabilities and state that he would be unable to "attend court" or "represent himself." (Id.) None of the notes indicates that Plaintiff would be unable to assist his attorney in doing discovery in this case, however. (Id.) Indeed, Plaintiff was more than capable of assisting Mr. Rosellini in drafting and executing the certification he submitted seeking the administrative dismissal.

Neither Plaintiff nor Mr. Rosellini requested the appointment of a guardian ad litem, nor did Mr. Rosellini move to be relieved as counsel.

This Court administratively terminated this matter on May 22, 2017 and gave Plaintiff 180 days to move to reinstate the claim. (Ja111) The 180 day period

expired on Saturday, November 18, 2017.

On November 21, 2017, Plaintiff filed his motions to extend the time to reopen this case, or in the alternative to reopen the case, and a motion to recuse Judge Mannion and to request a new judge be assigned. (ECF Nos. 20 & 21, Ja113-116) Plaintiff executed a new certification for this motion, but he did not attached any documentation of his alleged mental disability. (Ja114-116; ECF 20-1) [1] Rather, he only attached discharge instructions from Morristown Medical Center relating to treatment he received in connection with a cat bite and a bee sting, which he believed demonstrated a reason for granting the additional time. (ECF 20-1)

The motions were submitted to the Honorable Esther Salas, U.S.D.J. for her consideration. She scheduled a telephonic hearing on the motions on Friday April 27, 2018. (Ja6-21) Neither Plaintiff nor Mr. Rosellini sought the appointment of a guardian ad litem, but merely sought "one more extension" in order to comply with the outstanding discovery. (Ja15). Mr. Rosellini expressed difficulty in reaching his client and expressed a desire to obtain a power of attorney because he did not believe that he could sign on Plaintiff's behalf. (Ja15-16) Judge Salas denied that request. (Id.)

[1] N.B.: In connection with these motions, the plaintiff submitted two certifications. They are almost identical in substance, but the certification at ECF 20-1 includes the attached documents from Morristown Medical Center.

Judge Salas then examined each of the six factors which this Court has set forth in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984), to determine whether it is appropriate to dismiss Plaintiff's complaint for failure to provide any discovery. (Ja18-21) Judge Salas found that the failure to follow the discovery orders was due to Plaintiff's own conduct; that Defendants have been greatly prejudiced by the delay in litigation; that Plaintiff, himself, demonstrated dilatoriness from the onset of the case; that Plaintiff, but not counsel, has acted willfully; that dismissal is the only appropriate remedy; and that Plaintiff's ADA claim lacked legal merit. (Id.)

Plaintiff appealed that order pro se, trigging this Court's review under 28 U.S.C. § 1915(e)(2) to determine if summary action under Third Circuit L.A.R. 27.4 and I.O.P. 10.6 was proper. (Ja2-4) On June 14, 2019, this Court issued its order declining to take summary action. In that order, the Court further directed Plaintiff to indicate whether he objected to the appointment of counsel. (June 14, 2019 Order) The Court further directed the parties to address two issues: 1) whether the District Court erred by dismissing the action without inquiring into Plaintiff's competency, and 2) whether the District Court properly considered and balanced the Poulis factors. (Id.)

Counsel was appointed by order dated September 17, 2019. (September 17, 2019 Order.) However, on November 4, 2019, appointed counsel filed a motion

seeking to withdraw, citing an "irretrievable breakdown in communication and trust" with Plaintiff. (November 4, 2019 Motion to Withdraw) This Court granted the motion and ordered a briefing schedule to be set. (November 21, 2019 Order) A briefing order was set, establishing the due date of Plaintiff's brief as December 31, 2019. Plaintiff did not file a brief and appendix.

After multiple extensions of the briefing order and significant motion practice, this Court, on September 9, 2020 appointed Michael L. Foreman, Esq., as an amicus curiae on behalf of the appellant. (App. ECF No. 77) On December 16, 2020, the amicus brief was filed per this Court's request. (App. ECF No. 86)

III. Summary Of The Argument

The district court judge did not abuse her discretion or err in any way in the consideration of Plaintiff's competency. The duty of inquiry under Powell v. Symons, 680 F.3d 301 (3d Cir. 2006) and Fed. R. Civ. P. 17(c) applies when a party is proceeding pro se and is not represented. In this case, Plaintiff was represented at every moment in the district court, prior to his filing of the notice of appeal. Consequently, the duty of inquiry never arose.

Further, that limitation is important, as parties who are represented by counsel have interests in the protection of the attorney-client relationship and the exercise of personal autonomy to be considered. More importantly, the attorney has specific ethical duties when the client has diminished capacities which serve

the same function as does the duty of inquiry under Rule 17(c) for pro se plaintiffs.

Furthermore and in the alternative, in this case, the duty of inquiry was not triggered because Plaintiff did not submit any verifiable evidence of incompetence to Judge Salas, when he sought to reopen the complaint which had been administratively terminated. Moreover, Defendants submit that Plaintiff's cause of action lacked any merit as a matter of law in any event and, therefore, any failure to inquire under Rule 17(c) was no worse than harmless error because Rule 17(c) is designed to protect Plaintiff's interest and he had no interest to be protected as the causes of action were without merit.

Next, the district court did not err in analyzing the Poulis factors. She correctly found that Plaintiff's own conduct led to the discovery orders not being followed; that Defendants have been and continue to be prejudiced by the litigation delay; that Plaintiff had a history of dilatoriness in this case; that Plaintiff's conduct was willful; that dismissal of the Plaintiff's complaint is the only proper remedy; and that Plaintiff's ADA claim is without any legal basis.

Based on all these arguments, this Court should affirm Judge Salas's determination.

IV. Argument

A. THE DISTRICT COURT DID NOT ABUSE HER DISCRETION OR ERR IN ANY WAY IN CONNECTION WITH THE PLAINTIFF'S COMPETENCY.

1) The Duty Of Inquiry Is Only Triggered When The Plaintiff Is Pro se; Because The Plaintiff Was Represented At Every Stage Of The Underlying Case, The Duty Of Inquiry Did Not Arise.

The amicus first argues that this Court's decision in Powell v. Symons, 680 F.3d 301 (3d Cir. 2006) and Fed. R. Civ. P. 17(c) required the District Court to inquire as to Plaintiff's competency, and that denying the motion to reopen the case without such an inquiry was an abuse of discretion. Because Plaintiff was ***not*** an unrepresented party in the District Court, the duty under Rule 17(c) was not triggered and none of the law cited by the amicus is relevant in this case.

Rule 17(c) states in its entirety:

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person ***who is unrepresented in an action.***

Fed. R. Civ. P 17(c) (emphasis added.) The second sentence of this Rule is relevant here and requires a district court to appoint a guardian ad litem, but, by its plain terms it only applied when the minor or incompetent person "is unrepresented in an action." In this case, Plaintiff was represented by counsel – specifically Attorney

Kenneth J. Rosellini of Clifton, New Jersey – throughout the entirety of the proceedings before the district court between the filing of the complaint through the denial of the motion to reopen the case after it was administratively dismissed.

Since Plaintiff was not "unrepresented in [the] action," the mandate of Rule 17(c) does not apply. Therefore it cannot be said that Judge Salas abused her discretion for not applying a rule which did not apply.

In Powell, this Court adopted the reasoning set out by the Second Circuit Court of Appeals in Ferrelli v. River Manor Health Care Center, 323 F.3d 196 (2d Cir. 2003) for determining when a court must, sua sponte, inquire about the mental competency of a plaintiff. In Powell and Ferrelli, the plaintiffs were proceeding pro se. See, Powell, 680 F.3d at 303, ("This consolidated appeal arises from two cases in which prisoners, proceeding pro se, sought damages from prison officials."); Ferrelli, 323 F.3d at 198, ("Pro se plaintiff-appellant Isabella Ferrelli sued defendant-appellee River Manor Health Care Center...")

The same is true for other cases upon which the amicus relies. For example, in asserting that there was error here, the amicus references Allen v. Calderon, 408 F.3d 1150 (9th Cir. 2005) and Hoffenberg v. Bumb, 446 Fed. Appx. 394 (3d Cir. 2011). (Amicus brief at 20-21) However, both of those cases featured plaintiffs who were proceeding pro se, and the decisions of the courts in both of those cases were premised on that status. See, Allen, 408 F.3d at 1153, ("A party proceeding

pro se in a civil lawsuit is entitled to a competency determination when substantial evidence of incompetence is presented."); Hoffenberg, 446 Fed. Appx. at 395 ("Steven Jude Hoffenberg, proceeding pro se and *in forma pauperis*,...")

The Ferrelli test is explicitly premised on the pro se status of the plaintiff. In setting out the question presented in the case, the Ferrelli Court stated:

> This case raises the question of when a court is required to inquire into the mental capacity of ***a pro se litigant*** to determine whether, pursuant to Federal Rule of Civil Procedure ("Rule") 17(c), the court should appoint a guardian ad litem or take other measures to protect the litigant's interests.

Ferrelli, 323 F.3d at 198 (emphasis added.) See, also, Krain v. Smallwood, 880 F.2d 1119, 1121 (9th Cir. 1989) ("The preferred procedure when a substantial question exists regarding the mental competence of ***a party proceeding pro se*** is for the district court to conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed." Emphasis added.)

Because Mr. Rosellini represented Plaintiff and he was, therefore, not proceeding pro se, the requirement under Rule 17(c)(2) did not arise. Consequently, Judge Salas did not err in not performing an inquiry as to whether a guardian ad litem should be appointed, as the amicus suggests.

Furthermore, this result is proper. The amicus argues that Judge Salas permitted Plaintiff's interests "to go unprotected" by not sua sponte inquiring into Plaintiff's competency. (Amicus brief at 19) However, Plaintiff's interests were

not unprotected, as they were protected at all relevant time by his counsel, Mr. Rosellini.

Moreover, that representation is not something which can blithely be waived away. A party appearing pro se is in a significantly different position than one who is represented by counsel. When a party appears pro se, justice requires that the trial court ensure that an incompetent pro se party's interests are adequately protected, because the party is potentially unable to do so for him or herself, and there is no one but the court who can ensure that those interests are protected.

The same is not true, however, when a plaintiff is represented by counsel. When a party is represented, it is counsel's role and responsibility to protect the client's interests. Further, when a party is represented, the policies which might otherwise favor the judiciary involving itself in protecting the party's interests shifts against that involvement. The inquiry under Rule 17(c)(2) which the amicus believes should have been done here would necessarily require the court inserting itself into the attorney-client relationship and, at least potentially, interfering in that relationship, with the potential to override the party's own decisions and their right to exercise their personal autonomy and self-determination in concert with their chosen representative.

Moreover, the fact that a party is represented by counsel is key, as attorneys in every jurisdiction in this circuit are bound by rules of professional conduct

which address clients with diminished capacity. See, New Jersey Rules of Professional Conduct, RPC 1.14; Pennsylvania Rules of Professional Conduct 1.14; Delaware Lawyers' Rules of Professional Conduct, Rule 1.14; V.I. Supreme Ct. Rule 211.1.14.

Each are based on the American Bar Association Model Rules of Professional Conduct, Rule 1.14, which reads:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ABA Model Rule 1.14. Thus, counsel who represents a litigant with diminished capacity has an obligation to take reasonable action including, when appropriate,

seeking the appointment of a guardian ad litem, to protect the client's interest. Defendants believe that this obligation, by an officer of the court, provides the proper protection in the case of a represented plaintiff, such that the duty of inquiry under Rule 17(c) could only apply to pro se litigants. Limiting Rule 17(c) to those case where a party proceeds pro se protects the interests of those parties while, at the same time, preventing the trial court from being improperly enmeshed in the relationship between attorneys and their clients.

Further, there is nothing improper in this, as Rule 17(c) does not necessarily require that a guardian ad litem must be appointed, even in cases of pro se party, as courts have the discretion, when appropriate, to appoint a lawyer, rather than a guardian ad litem. See, e.g., Krain, 880 F.2d at 1121 ("[T]he court may find that the incompetent person's interests would be adequately protected by the appointment of a lawyer.")

Additionally, the court system has, in many contexts, been cognizant of the potential for courts and judges to interfere in the the attorney-client relationship and the exercise of parties' autonomy and have been adamant that breaching that relationship and interfering with the exercise of a party's choice may on only occur in the clearest and rarest of circumstances. See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc., __ U.S. __, 139 S. Ct. 524, 528, 202 L. Ed. 2d 480 (2019) (courts must respect parties' decisions to delegate question of arbitrability of

disputes to arbitrator.); Strickland v. Washington, 466 U.S. 668, 681, 104 S. Ct. 2052, 2061, 80 L. Ed. 2d 674 (1984) (judges must defer to a party's counsel's informed decisions and strategic choices when reviewing ineffective assistance claim); Taylor v. United States, 287 F.3d 658, 662 (7th Cir. 2002) (counsel's initiation of the colloquy putting waiver of the right to testify on the record avoids the risk that a judge-initiated inquiry will interfere with the attorney-client relationship); Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3d Cir. 1995) (favoring the trial court's power to impose time limits on a party's presentation at trial in order to "reduce[] the incidence of the judge interfering with strategic decisions."); United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982) (District court may only rarely interfere with a party's choice of counsel); Aiellos v. Zisa, CIV.A. 2:09-3076, 2010 WL 421081, at *5, n.8 (D.N.J. Feb. 2, 2010) ("The adversarial system requires courts to respect the strategic choices made by parties' counsel.")

Here, because Plaintiff was represented by able counsel at trial who was quite capable of protecting Plaintiff's interests up to and including requesting the appointment of a guardian ad litem if one was appropriate.

Therefore, the fact that Plaintiff was a represented party in this case means that the duty of inquiry under Rule 17(c) was not triggered in this case and Judge Salas's did not err in denying the motion to reopen Plaintiff's case for failure to

provide any discovery in this case.

2) Gardner *Demonstrates That No Duty Of Inquiry Was Present Here.*

The amicus cites to this Court's decision in Gardner by Gardner v. Parson, 874 F.2d 131 (3d Cir. 1989), and argues that it was irrelevant that Plaintiff represented by counsel in this case. Gardner, however, is the exception that proves the rule.

In Gardner, a civil rights action was brought by the grandmother of a teen with severe mentally disabilities. The suit was brought by the grandmother, Alma Gardner, ("Alma"), both individually as as next friend for the teen, Patsy Gardner, ("Patsy"). Gardner, 874 F.2d at 134. Patsy had suffered severe mental disabilities from birth, and the Delaware Division of Social Services ("DDS") was awarded custody after her mother failed to adequately provide for her basic and special needs and failed to cooperate with DDS. Id., at 135. Patsy was ultimately placed with Alma, with the court retaining custody. Id.

A dispute ensued, in which DDS believed that Patsy should undergo psychiatric evaluation, and there were questions regarding Alma's care as she was medicating Patsy without a prescription and because Patsy's mother continued to live with Alma. Id. The court thereafter placed Patsy with a psychiatric center for evaluations and diagnoses. Id. In response, Alma filed suits in federal court against a DSS social worker, but the court found she failed to establish a viable

constitutional or statutory claim and that it had no jurisdiction over Patsy's custody. Id.

Next, a Dependency/Neglect Petition for Protective Supervision was filed by the Division of Child Protective Services ("DCPS"). Id. A subsequent court determination found that Patsy was not dependent or neglected, but held that DCPS had continuing legal custody of Patsy. Id., at 135-36. The court held that the placement with Alma could be terminated by DCPS without further court order, and set out conditions for that continued placement. Id.

A subsequent family court order denied Alma's petition for sole custody, awarded sole custody to DCPS, and ordered a new placement for Patsy. Id., at 136. DCPS placed Patsy with Esther Gardner, Alma's former daughter-in-law. Id. Alma appealed to the Delaware Superior Court, which initially affirmed the decision, and then to the Delaware Supreme Court, which remanded the matter to the Superior Court for further consideration. Id. The case was thereafter remanded to the family court for a hearing on a number of issues after the Superior Court found that Alma had a protectable liberty interest in continuing her familial relationship with Patsy, and that that interest had been denied in the absence of due process. Id.

In family court, after affording Alma, *inter alia*, a fair hearing on the DCPS's dependency/neglect petition and her own custody petition, the court found Patsy to be a "dependent and/or neglected child" and denied Alma's custody

petition, directing that DCPS retain temporary custody. Id. The decision was affirmed on appeal. Id.

Alma then filed suit, individually and purportedly as next friend of Patsy. The suit asserted various claims under 42 U.S.C. § 1983, as well as a number of other federal and state statutes and constitutional provisions. The suit was asserted against DCPS administrators, school officials and others involved in Patsy's care. Id. Defendants moved for summary judgment, which was granted. In doing so, the district court entered an order removing Alma as Patsy's next friend and refused to enter a replacement, dismissing Patsy's claims as asserted by Alma. Id.

On appeal, this Court affirmed the district court determinations that Patsy did not have a duly appointed representative, as Patsy's Court Appointed Special Advocate ("CASA"), Patricia Levins, had a conflict given that she was named as a defendant in the suit. Id., at 138. The Court then affirmed the district court's determination that Alma was not a proper next friend because she was unqualified based on the fact that Patsy Gardner was dependent and/or neglected, and that Alma Gardner was a clear and present danger to Patsy's wellbeing. Id., at 139.

The Court then addressed whether the district court erred in not appointing a next friend for Patsy, in light of Ms. Levins's disqualification and the determination that Alma was not a proper next friend. The district court reasoned that because the suit was, essentially, a collateral attack on the determinations

made in the Delaware state courts, it was improper to raise them in federal court. Id., at 140. Therefore, no next friend was appointed. Id.

This Court reasoned that under the circumstances, Rule 17(c) did not permit the trial court not to appoint a guardian ad litem or take some other action to protect Patsy's interests.

> The purpose of Rule 17(c) is to further the child's interest in prosecuting or defending a lawsuit, or at least to allow an evaluation of the merits of the suit relative to the child's best interests. The court should have appointed a next friend or at the least held a hearing to determine whether a next friend should be appointed. Rule 17(c) was not intended to be a vehicle for dismissing claims on a summary judgment motion. This result cannot be what the drafters of Rule 17(c) had in mind when they provided that a court which declines to appoint a representative "shall make such other order as it deems proper for the protection of the infant or incompetent person."

Id. The Gardner Court then inserted the key footnote, which addressed the fact that Patsy was, in fact, represented by counsel at the time of the district court's determination. However, the Gardner Court reasoned that because counsel had represented both Alma and Patsy, he could not be considered as having represented Patsy, given the conflicting positions between the interests of Patsy and Alma.

> [B]ecause Appellant's counsel also represented Alma, he may not be an appropriate next friend for Patsy, to the extent that Patsy's interests diverge from Alma's. While Alma seeks to litigate a section 1983 claim and recover damages, Patsy might be best served if no claim were brought, so that her life may settle into a productive

> routine and the defendants who care for her may resume their professional duties unimpeded....
>
> We also note that Plaintiffs' counsel, despite his capable performance, may have a conflict of interest in acting as an attorney for both Alma and Patsy, considering their divergent interests.... When the complaint was filed, counsel represented Alma individually and as next friend of Patsy. When the court removed Alma as next friend, counsel continued to advocate for Patsy's interests rather than simply letting those interests go unprotected. Although at this point Alma's and Patsy's interests had been deemed adverse—and correctly so—we cannot say that counsel's decision to remain Patsy's advocate was in any way unethical. Indeed, counsel's vigorous representation was laudatory. The problem would have been resolved, of course, had the court appointed another next friend, because that person likely would have secured new counsel for Patsy.

Id., at 140. In this case, by contrast, there was no conflict such as that which affected Patsy's counsel in Gardner. Here, there was a single plaintiff represented by Mr. Rosellini, so there was no conflict between two clients whose interests diverged, as in Gardner. While that conflict in Gardner was sufficient to deem Patsy to have been unrepresented, nothing similar exists here.

Consequently, because Plaintiff was not an "incompetent person who is unrepresented" in this case, the obligation under Powell and Rule 17(c) did not arise, and there was no error in Judge Salas not, sua sponte, appointing a next friend.

3) Sufficient Evidence Was Not Presented To Trigger The Duty Of Inquiry

Further, in the alternative, if this Court were to disagree with the fact that the obligation under Rule 17(c) did not arise because Plaintiff was represented, the duty of inquiry is still not present in this case. First, the Powell Court, citing favorably to Ferrelli, recognized an important limiting factor on Rule 17 and held that the duty of inquiry only arises upon presentation to the Court of "verifiable evidence of incompetence." The Court stated:

> [A] district court need not inquire *sua sponte* into a pro se plaintiff's mental competence based on a litigant's bizarre behavior alone, even if such behavior may suggest mental incapacity. That is an important limiting factor as to the application of Rule 17. The federal courts are flooded with pro se litigants with fanciful notions of their rights and deprivations. We cannot expect district judges to do any more than undertake a duty of inquiry as to whether there may be a viable basis to invoke Rule 17. That duty of inquiry involves a determination of whether there is verifiable evidence of incompetence. In the context of unrepresented litigants proceeding *in forma pauperis,* this inquiry would usually occur after the preliminary merits screening under 28 U.S.C. § 1915A or 28 U.S.C. § 1915(e)(2).

Powell, 680 F.3d at 307. Further, in determining whether there is a "verifiable evidence of incompetence" presented, the Powell Court stated that the standard for verifiable evidence of incompetence might be met if the Court is presented with "evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received

verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent." Powell, 680 F.3d at 307 (quoting Ferrelli, 323 F.3d at 201.)

In this case, Plaintiff did not present any such evidence to Judge Salas. Plaintiff supported his motion to extend time to reopen case, or in the alternative, to extend the time to reopen the case, with a certification by Plaintiff asserting that he had been found incompetent to stand trial in a municipal matter in Fanwood, New Jersey, and asserting that he was diagnosed with Schizophrenia with major depression. Plaintiff did not supply Judge Salas with any supporting documentation for those averments, such as a court record, transcript or documentation of any kind from the alleged municipal court matter, merely Plaintiff's bald averment. Thus, there was no "evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent."

Similarly, Plaintiff's counsel did not present Judge Salas with any medical documentation supporting the averments as to his mental state. Plaintiff only supported his certification with copies of medical discharge instructions he received after treatment at Morristown Medical Center, stemming from a severe reaction he suffered from a bee sting, and for rabies treatment stemming from a cat bite.

The evidence that the amicus relies upon in this case was not presented to Judge Salas in support of the order at issue in this appeal. Rather, it was presented to Magistrate Judge Mannion in response to the order to show cause issued on May 3, 2017.

Thus, the amicus's position appears to not only require a Rule 17(c) hearing even when a plaintiff is represented by counsel, but would also obligate the district court to comb through all of the materials which was previously submitted by counsel to determine if the "verifiable evidence of incompetence" exists anywhere on the record, as well. There is nothing in this Court's interpretation of Rule 17(c) or the rule itself requires any such duty.

As such, because no "verifiable evidence of incompetence" was presented in the motion to reopen, the duty to inquire under Rule 17(c) did not arise.

4) Any Violation Of The Duty Of Inquiry Was No Worse Than Harmless Error, As The Causes Of Action In The Complaint Lacked Any Merit.

Finally, in the further alternative, Defendants submit that if there was a duty of inquiry under Rule 17(c), the failure to do so in this case was nothing worse than harmless error, because Plaintiff's complaint is wholly without merit as a matter of law. Consequently, the district court had ***no*** obligation to appoint a guardian ad litem under Rule 17(c) in order to protect Plaintiff's interest, as he has no viable interest to protect. See, Harris v. Mangum, 863 F.3d 1133, 1136 (9th Cir. 2017)

("Because Harris had no interest in this case that could have been protected by appointment of a guardian ad litem or issuance of another appropriate order pursuant to Rule 17(c)(2), the district court was not required to evaluate his competence prior to dismissing the action. We affirm.")

The complaint asserted two causes of action: the first under Title II of the Americans with Disabilities Act ("ADA"), and a state-law claim for the intentional infliction of emotional distress. Neither of these claims are valid as a matter of law.

First, the ADA claim is plainly without merit, as Title II of the ADA allows for private causes of action only against public entities and their employees. 28 C.F.R. § 35.101. See, also, Anderson v. Macy's, Inc., 943 F. Supp. 2d 531, 538 (W.D.Pa. 2013) Defendants in this matter are a private corporation and its employees.

Additionally, an ADA claim under a private corporation only allows for injunctive relief. Id. A request for injunctive relief would have been unavailing here, because Plaintiff's only connection with Berkeley Heights Nursing & Rehabilitation Center was the fact that his mother was a resident there until her death in May of 2015. Since she died, Plaintiff no longer has a viable claim for injunctive relief, and therefore lacks the threat of a concrete and particularized injury required to have standing to sue for injunctive relief under the ADA. Harty v. Burlington Coat Factory of Pennsylvania, L.L.C., CIV.A. 11-01923, 2011 WL

2415169, at *2 (E.D. Pa. June 16, 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Therefore Plaintiff cannot assert a valid ADA claim as a matter of law.[2]

Plaintiff also cannot assert a viable intentional infliction of emotional distress claim, because the complaint was filed beyond the running of the statue of limitations. The complaint was filed on March 21, 2016. However, the last factual averment in Plaintiff's complaint occurred on March 20, 2014, more than two years before the date of filing. (Ja31, ¶75) Both Title II of the ADA and a New Jersey state law claim for intentional infliction of emotional distress have two-year statutes of limitations. See, Disabled in Action of Pa. v. SEPTA, 539 F.3d 199, 208 (3d Cir. 2008) (Claims under Title II of the ADA are subject to the statute of limitations for personal injury claims in the state in which they are raised; New Jersey has a two-year statute of limitations for personal injury claims. N.J. Stat. Ann. 2A:14-2); Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 85 (2006)(claim for intentional infliction of emotional distress subject to two-year statute of limitations.)

[2] The amicus asserts that monetary damages might be available under Title III of the ADA in a suit brought by the Attorney General. (The amicus Brief, at 27, fn. 8, citing 42 U.S.C. § 12188(b)(2)(B) and 28 C.F.R. § 36.504.) However, the Attorney General has not filed suit, nor is there any indication whatsoever that the Attorney General will seek to join this suit. Realistically, the possibility that the Attorney General might wish to litigate the question of whether the defendant violated the ADA back in 2014, when it limited the time and place where the plaintiff was permitted to visit with his mother, is essentially zero.

Further, Plaintiff's assertion that Defendants "thereafter violated the Plaintiff's rights" by enforcing the restrictions (Ja32, ¶76) does not save this complaint from being time barred, as the statute of limitations would run from the time when the restriction was imposed as the continuing violation doctrine does not apply to state law intentional infliction of emotional distress claims. See Roberts v. Mintz, No. A-1563-14T4, 2016 WL 3981128, at *4 (N.J. Super. Ct. App. Div. July 26, 2016) (stating that New Jersey courts "have only applied [the continuing violation doctrine] to hostile work environment claims under the Law Against Discrimination, and continuing nuisance claims.")

Therefore, because Plaintiff's ADA and Intentional Infliction of Emotional Distress claims are unsupportable as a matter of law, Plaintiff had no interest which required the appointment of a guardian ad litem to protect.[3] Consequently, the failure to appoint such a guardian ad litem could not be any worse than harmless error.

[3] To the extent that the complaint is critical of the medical treatment given to the plaintiff's mother during her time as a resident of Berkeley Heights Nursing & Rehabilitation Center, the plaintiff neither demonstrated that he has standing to assert any medical malpractice action on her behalf or behalf of her estate, nor did the plaintiff meet the Affidavit of Merit statute as required by New Jersey law, and the time for him to have done so is long expired. N.J. Stat Ann. § 2A:53A-27; Snyder v. Pascack Valley Hosp., 303 F.3d 271, 273 (3d Cir. 2002) (Affidavit of Merit Statute "is enforceable in the district courts when New Jersey law applies.")

B) THE DISTRICT COURT PROPERLY ANALYZED THE POULIS FACTORS

Next, Judge Salas properly analyzed this matter under this Court's decision in Poulis and there is no basis to find that she abused her discretion. Each of her conclusions was supported by the record.

This Court, in Poulis, established a six part test for determining when a matter can be dismissed due to a party's failure to follow discovery orders. The Court must examine: "1) the extent of the *party's* personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense." Poulis, 747 F.2d at 868 (emphasis in original.) Further, dismissal may be proper even if all six of the factors are not met. Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992).

A trial court's determination of whether the Poulis factors should lead to dismissal is entitled to "great deference." Id. Moreover, appellate review on this question is limited to whether the district court's discretion was abused, not what the appellate judges might have decided had they decided the question initially:

> Perhaps some judges, for reasons which we could not comprehend, would not have dismissed the [plaintiff's] complaint had those judges themselves sat at the trial

> level. But that potential difference in trial management approach demonstrates, rather than obviates, the need to leave such decisions within the discretion of the district court judge. The scope of *our* review is restricted to determining whether the district court abused *its* discretion. How we imagine we might have exercised our own discretion had we been in the district court judge's robe is entirely irrelevant.

Id., at 1373-74 (emphasis in original.) Further, the Supreme Court has also recognized the importance of leaving the decision to dismiss firmly within the discretion of the district court judge, so that the district court has dismissal available s a tool to punish wrongdoers but also as a warning for those who might chose to thereafter be deficient in their discovery obligations:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing...
>
> [T] he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642–43, 96 S.Ct. 2778, 2780-81, 49 L.Ed.2d 747 (1975).

In this case, Judge Salas properly considered all six of the Poulis factors in considering whether to deny Plaintiff's motion to reopen the case, and properly exercised her discretion to deny that motion. Because that decision was supported

by the evidence of record, there was no abuse of discretion, this Court is requested to affirm that exercise of discretion.

1) The Failure to Follow Discovery Orders is Due to Plaintiff's Own Conduct.

The first factor is the extent of Plaintiff's personal responsibility in providing discovery. From the inception of this case, Plaintiff failed to participate in discovery at all. At each of the case management conferences, Mr. Rosellini indicated difficulties in reaching Plaintiff to get complete responses. No evidence was ever provided to demonstrate why Plaintiff has chosen to not participate in this litigation.

However, when it came time for Plaintiff to move for the matter to be placed on administrative hold or to have the matter reopened, Mr. Rosellini seemed to have no difficulty at all procuring Plaintiff's signature of certifications which Mr. Rosellini drafted. There was no explanation offered as to why Plaintiff could be reached to sign those certifications but could not, for example, complete his Rule 26 disclosure.

Further, Judge Salas correctly reviewed this factor, stating:

> [P]laintiff is personally responsible for his failure to prosecute. Plaintiff's counsel has repeatedly advised the Court that he has been unable to answer discovery requests because he has not been able to contact his client.

> To date, plaintiff has failed to respond to defendant's discovery request despite multiple court orders requiring him to do so. And plaintiff's submissions do not adequately explain why he has failed to respond to discovery requests or otherwise prosecute the case.

(Ja19) This conclusion is well established in the record and there has been no explanation for Plaintiff's failure to complete discovery.

Therefore, Judge Salas did not abuse her discretion in finding that the first factor favored dismissal.

2) Defendants Have Been Prejudiced By Plaintiff's Delays in Litigation.

The second factor examines the prejudice to Defendants caused by Plaintiff's delays. Defendants have been and will continue to be prejudiced by Plaintiff's numerous delays in litigation. Plaintiff's mother was a resident at defendant Berkeley Heights Nursing and Rehabilitation Center from 2012 to 2015. Plaintiff's complaint avers violations and complaints regarding her treatment stemming from ***the fall of 2012***—which is more than eight years ago. Should this matter be reinstated and continue in litigation, Defendants will be at a severe disadvantage to find all necessary witnesses and documents to counter Plaintiff's various and far reaching claims.

Without even the Rule 26 disclosures and the responses to discovery, Defendants were unable to fully investigate this matter and it will be impossible at this late date to properly prepare a defense to this matter. Further, in 2016 Berkeley

Heights Nursing and Rehabilitation Center was sold, which caused additional difficulties in the ability of Defendants to gather documents and witnesses in its defense as unrestricted access to documents and witnesses are no longer assured.

Judge Salas properly considered these matters in her decision, as consideration of this matter in this Court has been delayed by Plaintiff and his refusal to assist his appointed counsel followed by a repeated insistence that new counsel be assigned.

Judge Salas noted:

> [D]efendants have been prejudiced by plaintiff's failure to prosecute. As defendants argued in opposition, plaintiff's claims stem from incidents that occurred nearly five years ago.[4] In addition, the Berkeley Heights Nursing and Rehabilitation Center was sold in 2016. With each passing day, defendants are losing the ability to gather documents and witnesses in its defense of plaintiff's claims.

(Ja19-20) This reasoning is sound and clearly based on the record in this case. Further, Judge Salas's point that the passage of time without Plaintiff completing even the most basic discovery in the case should be all the more striking, given that this determination, itself, occurred nearly three years ago. There have been many more passing days, which have further prejudiced Defendants.

The amicus suggests that this factor can be discounted because there would have been a litigation hold on documents in this case. (Amicus brief at 23)

[4] Now, as noted, closer to eight years ago.

However, that fact is insufficient to remove even a small part of the prejudice inflicted on Defendants by Plaintiff's recalcitrance. The absence of even a Rule 26 statement by Plaintiff places the defendant in the impossible position of attempting to gather specifics concerning testimony and evidence of events which occurred the better part of a decade ago.

Judge Salas did not abuse her discretion in finding that the prejudice to Defendants was present.

3) Plaintiff Has Shown a History of Dilatoriness In This Matter.

Next, Plaintiff has demonstrated extreme dilatoriness in this matter. Plaintiff's Rule 26 disclosures were due on December 10, 2016, over four year ago. He was sent discovery requests, including a request to admit, in December 2016, which were due at the end of that month. At each conference in this case, Plaintiff's counsel requested more time in order to get the discovery done, and at each step, the discovery was not completed. Even after Plaintiff's complaint was administratively dismissed for six months, at Plaintiff's request, Plaintiff still did not do anything to comply with even the most basic of the discovery obligations applicable to him.

Judge Salas properly analyzed this factor when she held that:

> Plaintiff has shown a history of dilatoriness. The parties were ordered to exchange Rule 26 disclosures on December 10, 2016, and other discovery requests on

> December 30th, 2016. To date, plaintiff has not engaged in discovery. Indeed, at every status conference before Magistrate Judge Mannion, plaintiff requested more time to respond to the request but each time failed to do so.

(Ja20) This determination was clearly correct and was not an abuse of discretion.

4) Whether The Conduct Of The Party Or The Attorney Was Willful Or In Bad Faith.

Plaintiff's counsel stated at several case management conferences that the failure to abide by the court's orders was due to Plaintiff's own affirmative conduct, refusing over a period of several months to respond to his counsel's attempts at contact in order to fulfill his obligations. The fact that Plaintiff agreed to then cooperate with counsel in order to execute certifications necessary to move to have the case administratively dismissed, to seek Judge Mannion's recusal, and for additional time to move to reopen the case, demonstrates that his failure to cooperate in discovery was willful, as he clearly participated in those other tasks.

Judge Salas determined that Mr. Rosellini did not engage in willful or bad faith conduct but made no such determination as to Plaintiff himself. (Ja20)

5) Dismissal of Plaintiff's Complaint Is The Only Appropriate Remedy.

Next, Judge Salas properly considered whether there was any alternative appropriate remedy other than dismissal of the complaint.

> Fifth, the Court is not convinced that any sanction other than dismissal is appropriate... [T]he Court does not think

> monetary sanctions, such as fines, costs or attorneys fees would spur plaintiff to resume actively litigating the case.

(Ja20)

Despite numerous extensions and opportunities, Plaintiff failed to provide any of the outstanding discovery in this matter, even a Rule 26 statement. Even when seeking to reopen the case, Plaintiff's certification was silent as to any intention of providing the outstanding items or on Plaintiff's willingness to participate in this litigation. Mr. Rosellini simply sought more time. Thus, Judge Salas's review was clearly appropriate and she did not abuse her discretion in finding there to be no alternative which might be appropriate.

6) The Claims in Plaintiff's Complaint Are Without Legal or Factual Basis.

Finally, Judge Salas considered whether Plaintiff's legal claims were meritorious. She stated, with regard to Plaintiff's claims under the ADA, "[T]he Court does not view plaintiff's ADA claim as meritorious... Title 2 of the ADA allows for injunctive relief only. Because plaintiff's mother passed away in May of 2015, no such relief is available to him." (Ja20-21)

This analysis is correct. As previously discussed, Plaintiff's cause of action is barred as a matter of law. There is no valid Title II ADA claim asserted, and the complaint was filed beyond the statute of limitations. Further, Plaintiff's complaint, even if all of the averments are assumed true, does not allege facts

sufficient to find that the defendant intended to cause emotional distress, does not allege that Defendants' conduct toward Plaintiff was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community, and does not allege that Plaintiff suffered emotional distress which is so severe that no reasonable man could be expected to endure it.

As such, while Judge Salas "declined to say at this time" that Plaintiff's intentional infliction of emotional distress claim was non-meritorious, (Ja21), however, she recognized that Plaintiff must meet an elevated threshold which can only be satisfied in extreme cases. (Id., citing Fahnfulleh v. Steneck, 218 WL 1610692, at *11 (D.N.J. 2018)). See, also, Buckley v. Trenton Sav. Fund Soc'y, 544 A.2d 857, 863 (N.J. 1988) (To assert a cause of action for intentional infliction of emotional distress, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" and "the emotional distress suffered by Plaintiff must be so severe that no reasonable man could be expected to endure it" and "the defendant must intend both to do the act and to produce emotional distress. Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow.")

Plaintiff did not allege anything close to that which is required to assert a valid cause of action. The complaint, in its essence, asserts that Berkeley Heights Nursing & Rehabilitation Center placed restrictions on the amount of time Plaintiff could spend visiting his mother and the location of that visitation – first in the cafeteria, later in the lobby – in response to Plaintiff's disorderly conduct, conflicts, and conflicting opinions as to the proper care and treatment of Plaintiff's mother while she was a resident at the defendant facility. (Ja24-36)

Even viewed in its broadest, Plaintiff simply does not allege facts demonstrating the kind of conduct which is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, does not allege facts that Defendants had an actual intent to cause emotional harm to Plaintiff, nor that Plaintiff suffered emotional distress which was severe beyond the level that a reasonable person might be expected to endure. Assuming Plaintiff's allegations are believed, no reasonable trier of fact could conclude that Plaintiff had alleged facts sufficient to establish a viable claim for the intentional infliction of emotional distress.

Judge Salas clearly considered and properly weighed this factor in her conclusion that this Poulis factor favored dismissal of the complaint.

7) Conclusion

Because Judge Salas's determination on each of the Poulis factors favored

denying the motion to reopen the case and was supported by the record in this case, she did not abuse her discretion and this Court is respectfully requested to affirm that determination.

V. Conclusion

For all the foregoing reasons, this Court is respectfully requested to affirm the decision of Judge Salas.

Respectfully Submitted,
Marshall Dennehey Warner Coleman and Goggin

/s/ Walter F. Kawalec, III
Walter F. Kawalec, III, Esq.
Attorneys for Defendant,
Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding

Dated: 1/29/2021

VI. CERTIFICATION OF BAR MEMBERSHIP

The undersigned hereby certifies that, pursuant to 3d Circuit Local Appellate Rule 46.1(e), Walter F. Kawalec, III, Esquire is a member of the bar of this Honorable Court, is in good standing in all jurisdictions in which he is admitted to practice, and that there are no disciplinary proceedings pending against him in any jurisdiction.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Walter F. Kawalec, III
Walter F. Kawalec, III, Esquire
Attorneys for Defendant,
Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding

DATED: 1/29/2021

VII. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE STYLE, AND ELECTRONIC FILING REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because:

- this brief contains 9,151 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 in 14 point Times New Roman.

3. This brief complies with the requirements of Third Circuit LAR 31(b) & (c) because:

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MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Walter F. Kawalec, III
Walter F. Kawalec, III, Esquire
Attorneys for Defendant,
Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding

DATED: 1/29/2021

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief for Appellees, was, on the date listed below, served upon the parties listed below, in the manner indicated:

By E-filing and U.S. Mail to the following:

Michael L. Foreman, Esq.
Penn State Law, Civil Rights Appellate Clinic
329 Innovation Blvd., Suite 118
University Park, PA 16802
Court-Appointed Amicus Curiae Counsel

By U.S. Mail to the following:

Victor Mondelli
P.O. Box 236
Green Village, N.J. 07935
Plaintiff/Appellant

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Walter F. Kawalec, III
Walter F. Kawalec, III, Esquire
Attorneys for Defendant,
Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding

DATED: 1/29/2021