In a victory for all New Jersey physicians, the New Jersey Appellate Court recently reversed the New Jersey Medical Board's summary license suspension of a triple board-certified Bergen County physician's medical license. The Medical Board was wrongly held to have suspended the physician's license without affording him an opportunity to conduct discovery and without giving him his constitutionally mandated right to a hearing. DeCotiis, FitzPatrick & Cole, L.L.P, defended the doctor against the New Jersey Medical Board.

In February 2010, the New Jersey Appellate Court overturned the Medical Board's 2009 summary judgment ruling against the doctor because it presumed the doctor's guilt without giving him a "full and fair chance to defend himself." Although DeCotiis' client unequivocally denied the Medical Board's numerous allegations and filed nine affirmative defenses on his behalf, neither the Attorney General nor the Medical Board accepted the doctor's denials as "good enough" to allow him a full and fair hearing, as required by the United States and New Jersey Constitutions and the New Jersey Administrative Procedure Act. The Appellate Court rejected the Attorney General's position and ordered that a full hearing be held, as requested by the DeCotiis firm on the doctor's behalf.

This recent Appellate Court ruling reinforces and reminds all New Jersey physicians and Medical Society members that the New Jersey Medical Board cannot deny physicians a full and fair hearing when they are charged with professional misconduct. For more, go to (_____).

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
[redacted]

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE OF

[redacted]

TO PRACTICE MEDICINE AND SURGERY
IN THE STATE OF NEW JERSEY.

Argued January 27, 2010 - Decided February 26, 2010

Before Judges Graves, Sabatino, and J. N. Harris.

On appeal from the State Board of Medical Examiners.

Benjamin Clarke argued the cause for appellant [redacted]. (DeCotiis, FitzPatrick, Cole & Wisler, L.L.P., attorneys; Mr. Clarke, Susan Fruchtman, and Irene Stavrellis, on the brief).

Kim D. Ringler, Deputy Attorney General, argued the cause for respondent State Board of Medical Examiners (Paula T. Dow, Acting Attorney General, attorney; Andrea Silkowitz, Assistant Attorney General, of counsel; Ms. Ringler, on the brief).

PER CURIAM

We review the imposition of sanctions against a physician by the State Board of Medical Examiners (Board). Finding the Board's

grant of a motion for summary decision inappropriate, we reverse and remand for a full contested proceeding.

[redacted], a dermatologist, stands accused of sexual misconduct by twelve patients, and falsification of two applications for renewal of hospital privileges.[1] He became the subject of at least two Bergen County indictments relating to the patients' accusations.[2] With the consent of the Bergen County Prosecutor's Office (the Prosecutor), in order to resolve the indictments, [redacted] was permitted entry into a pretrial intervention program (PTI) without making an admission of guilt as to any of the charges in the indictments.[3]

Within four months of [redacted] admission to PTI, the Attorney General filed this disciplinary action. It rests upon a twelve-count complaint, asserting professional misconduct in

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[1] We glean the number of complainants from two sources: the March 16, 2006 Final Consent Order between [redacted] and the Board (describing two patients) and the July 9, 2008 Consent Order (2008 PTI Order) between [redacted] and the State (describing ten patients).

[2] The record contains a copy of only one indictment, Bergen County Indictment No. S-616-06. However, the 2008 PTI Order refers to two other indictments, Bergen County Indictment No. S-867-03 and No. S-999-07. The number of indictments is not critical because all of the criminal charges against [redacted] were resolved in the 2008 PTI Order, which will be discussed later.

[3] We emphasize that this was entirely consistent with Guideline 4 of Rule 3:28 ("[e]nrollment in PTI programs should be conditioned upon neither informal admissions nor entry of a plea of guilt.").

violation of several statutes and Board regulations. [redacted] responded to the Attorney General's allegations with an answer that denied all aspects of the claimed misconduct and asserted affirmative defenses.

Bypassing a reference to the Office of Administrative Law (OAL), the Attorney General moved for summary decision pursuant to N.J.A.C. 1:1-12.5, less than three weeks after receiving [redacted] answer. Following an exchange of briefs and certifications—but without a realistic opportunity for any discovery—and after oral argument, the Board granted the Attorney General's motion. Briskly moving into a penalty phase that was organized ahead of time (with notice given to [redacted]), the Board immediately imposed a sanction of one year's active suspension, plus two years of "stayed suspension," together with certain conditions. The Board's decision was stayed by this court, pending our complete review.

From our vantage point, fully cognizant of our obligation to accord substantial deference to the actions of the Board, we discern that genuine issues of material fact were indeed in dispute at the time the motion for summary decision was wrongly decided. Accordingly, the Board was precluded from deciding the matter in the truncated fashion that it employed. We reverse and remand for further proceedings.

I.

A.

[redacted] has been a practicing dermatologist [redacted] since 1991, and before that in Scarsdale, New York. He holds medical licenses in New Jersey, New York, and Florida and had been certified by the American Board of Internal Medicine and the American Board of Dermatology. He specializes in Mohs Micrographic Surgery, a treatment for skin cancer for which he was certified by the American Board of Mohs Micrographic Surgery & Cutaneous Oncology.

In 2003, two of [redacted] female patients brought their grievances to the Prosecutor, alleging that [redacted] had inappropriately touched them in a sexual manner during medical examinations at his office. An indictment resulted from these accusations in 2003, to which [redacted] entered a plea of not guilty.

This 2003 indictment, along with the witnesses' statements, related investigative materials, and patient records were submitted to the Board for its consideration. After a review of these data, the Board entered an Interim Order—with [redacted] acquiescence and consent—on June 11, 2003, requiring an independent practice monitor (IPM) to be present in the examination room any time [redacted] interacted with a female

patient. The IPM, to be selected by the Board at [redacted] expense, was ordered to report all questionable conduct by [redacted] to the Board.

On August 1, 2003, [redacted] completed an application for staff reappointment at the Hackensack University Medical Center (HUMC). On that application, [redacted] indicated that his "hospital privileges, duties, staff membership, professional licensures, DEA or NJCDS numbers" had not been "suspended, withheld, denied, reduced, revoked, modified, or not renewed" by "any . . . State agency or office." Additionally, he incorrectly indicated on the same application that there had not been "any disciplinary action or investigation by any State licensing board" or "any criminal proceedings against" him since his initial or last reappointment.

Almost five months later, on December 23, 2003, while completing a separate yet similar reappointment application for the Jacobi Medical Center/North Central Bronx Hospital (Jacobi Hospital) in New York, [redacted] inaccurately stated that his medical license had never been "denied, revoked, suspended, relinquished, withdrawn, reduced, limited, placed on probation, not renewed, or currently pending/under investigation in this [New York] or any other state[.]" He did answer affirmatively on this application that he had been "investigated" by a "government

agency or . . . been charged with a violation of federal, state or local law[.]" However, the attachment that [redacted] later supplied to explain this affirmative answer described inapposite civil litigation in New Jersey involving alleged "improper performance of surgery" that was settled in the Law Division by his insurance carrier.[4]

In the autumn of 2004, while the 2003 indictment was still pending and as the Board's Interim Order remained in place, [redacted] approached the Board and asked it "to replace the Interim Order with another arrangement by which the public interest will continue to be protected while [redacted] contests the criminal allegations contained in the [i]ndictment." This resulted in the Board's adoption, again with [redacted] consent, of the Second Interim Consent Order, dated November 15, 2004, whereby [redacted] was prohibited from

> engag[ing] in the practice of medicine with regard to any female patient. For purposes of this Order, the practice of medicine shall include but not be limited to providing any medical diagnosis, treatment or any medical service, prescription, device or medication to any female patient.

[4] The attachment was initially referenced in the December 23, 2003 application, but was not attached. Instead, [redacted] sent the attachment separately under a cover letter dated January 23, 2004.

This order also expressly reserved the "right and prerogative" of the Board to revise and review this Second Interim Consent Order if it later discovered that [redacted] "enter[ed] into a Pretrial Intervention Program pursuant to N.J.S.A. 2C:43-12 et seq. as the result of any charge or accusation contained in the [i]ndictment."

On March 7, 2005, an order (2005 PTI Order) related to the 2003 indictment was entered—with the consent of an assistant prosecutor appended—approving [redacted] first admission into PTI. The order deliberately made no mention of [redacted] culpability for the alleged sexual misconduct charges. Nevertheless, the order contained the following conditions directly related to those allegations:

> 1) Apology to victim.
>
> 2) Not to engage in medical practice with any female patients ever.
>
> 3) PTI officers to conduct random office visits for compliance.

One year later, on March 16, 2006, the Board entered a Final Consent Order reprimanding [redacted] "for violating N.J.S.A. 45:1-21(e) [professional misconduct as may be determined by the Board]

and N.J.A.C. 13:35-6.3 [sexual misconduct]."[5] The order continued [redacted] prohibition on engaging in the practice of medicine with regard to any female patients.

B.

Meanwhile, back in January 2006, another of [redacted] former female patients reported to the Prosecutor that in 2001, she had been inappropriately touched during an office visit while still a patient, the same time period as the other previous complaints. After she learned from her mother—also a former patient of [redacted]—that he was apparently no longer seeing female patients, this former patient

> immediately went to the Internet. I googled [redacted] and what immediately came up, the first hit was the first - - the second inter[im] order that was put into place or looks like it was put into place by the Attorney General's Office and was stating that there was some sexual misconduct and inappropriate activity on [redacted] part. I couldn't believe it.

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[5] This order further recites, "in order to avoid further proceedings in this case, [redacted] consents and agrees to each and every term of this Final Consent Order." Also, [redacted] signature appears immediately below the following words:

> I have read the within Order. I understand the Order and I agree to be bound by its terms and conditions. I hereby consent to the entry of this Order.

The former patient then contacted the Prosecutor, was later interviewed by detectives in the Sex Crimes/Child Abuse Squad, and ultimately testified before a Bergen County grand jury.[6]

The Prosecutor proceeded to charge [redacted] with fondling this former patient, which resulted in publicity—including an account of [redacted] turning himself in to authorities and being released without bail—in the Bergen Record newspaper on February 25, 2006. Beginning on March 1, 2006—after the negative public exposure—even more female patients came forward making similar claims against [redacted] Several of these allegations were presented to a Bergen County grand jury that, on April 5, 2006, returned a seven-count indictment charging [redacted] with criminal sexual contact relating to six patients taking place between January 2001 and March 2003.[7]

[redacted] entered a plea of not guilty as to all of these charges. Subsequently, on July 9, 2008, the Law Division entered

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[6] This former patient testified before the grand jury more than one year later, on May 29, 2007. We know this because her grand jury testimony is included in the record on appeal. We believe that she may have testified before a grand jury on more than one occasion, but the record is unclear on this point and no other grand jury transcripts of this complainant were provided by the parties.

[7] This 2006 indictment is docketed as Indictment No. S-616-06. The grand jury testimony provided in the record was conducted, as previously noted, on May 29, 2007, and reflects Indictment No. S-999-07, which presumably was issued sometime in 2007.

the 2008 PTI Order, admitting [redacted] "in the pre-Trial Intervention Program (PTI), as of April 8, 2008, for a period of three (3) years."[8] The 2008 PTI Order continued to enforce the restriction on [redacted] practice limiting it to only male patients. It further ordered him to have no contact with ten women who had formerly been his patients including "those women whose charges fall outside the scope of the statute of limitations[.]"

The 2008 PTI Order further required [redacted] to read a pre-scripted apology in open court on April 8, 2008, as follows:

> In [m]edical [s]chool the first thing we learn is "do no harm." I stand before you today to apologize for harm that my actions have caused you. You each deserve my sincere apology.

It referred to the women as "the victims in this matter" and further stated that [redacted] "stipulate[d] that all statements and/or Grand Jury testimony from each of the above-listed victims may be presented to the Medical Board without objection and/or without the need for any of these women to be present and/or testify[.]" Finally, the 2008 PTI Order required [redacted] to

[8] This order states that it supersedes "the PTI Order dated April 8, 2008." We have not been provided with a copy of that April order. We presume that the 2008 PTI Order incorporated provisions of the earlier order and confirmed events that already had occurred.

complete 800 hours of community service and pay $50,000 "as charitable restitution to a rape crisis/therapy center to be approved by the Bergen County Prosecutor."

On October 30, 2008, the Attorney General filed an amended complaint[9] with the Board, charging [redacted] with twelve counts of professional misconduct. Counts one through ten of the amended complaint concerned the accusations that [redacted] had sexual contact with various women when they were his patients. Counts eleven and twelve referred to his alleged false statements on the two hospital reappointment applications.

On December 12, 2008, [redacted] filed an answer to the amended complaint in which he substantially denied all allegations and briefly explained why particular examination procedures he used with selected patients were appropriate. Concerning the falsification of the Jacobi Hospital application—count eleven—[redacted] admitted to submitting the application but denied any "false intent or knowing submission of false information." He did not address count twelve, referring to the HUMC application, but at oral argument before the Board, his counsel represented that this was merely a clerical error. The

[9] We have not been provided with the original complaint and do not know if the amended complaint relates back to a pleading filed in 2003, which resulted in the Final Consent Order dated March 16, 2006, or to another unspecified pleading.

Board accepted this explanation and presumed that count twelve had therefore been expressly denied.

Finally, [redacted] asserted nine affirmative defenses in his answer. In brief, he averred that at all times he complied with the standard of care for the treatment of his patients; any full body examinations were done in the presence of a chaperone; the patients' recollections of events were not factually accurate; five of the complaining patients returned to [redacted] office even after the alleged inappropriate examinations; some of the complaining patients referred family members to [redacted] even after the alleged inappropriate examinations; [redacted] always asked and received permission before touching a private part of a patient's body; any touching that he did was medically appropriate and done with consent; and the charges were "unduly stale, fundamentally unfair, in violation of his due process rights, and barred by laches."

Only twelve days after this answer was filed, the Attorney General moved for summary decision. The motion announced its reliance upon the amended complaint; the Board's orders from 2003, 2004 and 2006; [redacted] hospital renewal applications; a

New York consent order[10]; the 2006 indictment; the 2008 PTI Order; the transcript of the 2007 grand jury proceedings; and statements made to the Prosecutor under oath by [redacted] numerous complaining patients.

A week later, on December 30, 2008, [redacted] counsel sent a letter to the Board asserting that the Attorney General's motion was premature, and therefore procedurally improper. He noted that pursuant to N.J.A.C. 1:1-4.1 the Board was required to "promptly determine whether the matter is a contested case." He further argued that such a determination would also include a decision whether or not to refer the case to the OAL pursuant to N.J.A.C. 1:1-8.1(a). [redacted] counsel indicated that without these crucial determinations by the Board, a motion for summary decision was premature pursuant to N.J.A.C. 1:1-12.5, and was an attempt by the Attorney General to preempt the Board's independent determination as to whether to refer the case to the OAL. Lastly, he requested that the motion be either denied without prejudice or held in abeyance until the Board had the

[10] On June 21, 2006, a Consent Order was entered by the New York State Board for Professional Medical Conduct that confirmed [redacted] no contest to three specifications, including "practicing the profession fraudulently" and "professional misconduct." The underlying factual allegations related to much of the same conduct that was already the subject of the then-extant Board proceeding in New Jersey, plus allegations related to [redacted] reapplication to Jacobi Hospital.

opportunity to determine properly whether this was a contested case and whether to refer the case to the OAL for "further handling and proceedings."

A Deputy Attorney General replied the next day with a letter, conceding that "[t]his matter is clearly contested." However, she argued that the contested case could remain within the jurisdiction of the Board unless the Board specifically requested transfer to the OAL pursuant to N.J.S.A. 52:14F-8.[11]

Deciding not to await the Board's resolution of the question as to who should decide the summary decision motion or when, [redacted] filed opposition to the motion along with three certifications on January 29, 2009. [redacted] own certification asserted that the Attorney General was misreading the 2008 PTI Order to prevent [redacted] from defending himself against charges, instead of merely preventing him from forcing the patients to testify in the proceedings. He noted that the 2008 PTI Order contained no admission of guilt and that he never agreed that the patient statements were accurate, just that he would not contest their introduction into evidence. The certification generally

[11] The Board did not expressly address the transfer or contested case issues until its final decision, which simply stated in conclusory terms that the Board was exercising "its discretion to retain the case for the purpose of a Summary Decision Motion." It never adequately explained its rationale for this exercise of discretion.

referenced the point-by-point denials previously submitted in the answer to the amended complaint. Lastly, and most significantly, [redacted] stated the following:

> As the answer that my attorneys have filed on my behalf reflects, I deny having engaged in any inappropriate touching of any female patients, and deny having engaged in fraudulent conduct. Much as I wish for the nightmarish events of the past six years to end, I believe I am entitled to defend myself against the charges that have been preferred against me, and ask that the Board afford me that right.

In like vein, [redacted] criminal defense attorney provided a certification that made similar claims about the 2008 PTI Order. Importantly, it noted that "[t]he [o]rder reserved [redacted] right to defend himself against the disciplinary charges that are now pending against him, including the right to contest the accuracy of the statements of the complaining witnesses. The wording of the PTI Order was carefully framed to preserve those rights."

[redacted] counsel in this matter also submitted a certification. In it, he attached the October 5, 2004 letter requesting that the Board restrict [redacted] practice to only male patients, which resulted in the entry of the Board's Second Interim Consent Order, dated November 15, 2004. Additionally, the certification included the 2005 PTI Order and a copy of [redacted] answer to the amended complaint filed before the Board.

Finally, the certification contained a copy of the various interrogatories and document requests served upon the Attorney General on January 19, 2009, all in an effort to persuade the Board that discovery was incomplete and a summary decision would therefore be improvident.

By letter on January 27, 2009, the Board alerted the parties to the fact that a hearing would be held on February 11, 2009, to permit the parties to present oral argument on the question of the propriety of granting summary disposition. The correspondence informed both sides that if summary decision were to be granted (and a statutory basis for the imposition of sanctions existed), the Board would then "immediately continue to a penalty phase" where the parties would be permitted to present testimony, including any mitigating evidence, and make arguments limited to the question of what sanctions, if any, should be imposed.

As promised, the motion was orally argued on February 11, 2009. After brief deliberations took place in a closed session, the Board returned with an oral statement regarding counts one through ten, finding that

> [redacted] conduct constitutes sexual contact with a patient with whom [he] had a physician/patient relationship in violation of N.J.A.C. 13:35-6.3(c) and (d)[,] professional misconduct in violation of N.J.S.A. 45:1-21(e)[,] and evidence of an incapacity to discharge the functions of a licensee in a manner consistent with the

public health, safety and welfare in violation of N.J.S.A. 45:1-21(i).

The Board also found that [redacted] used or engaged in misrepresentation when completing the reappointment applications that made up counts eleven and twelve.

During the penalty phase hearing immediately following, [redacted] his wife, and his criminal defense attorney all testified as to [redacted] character and fitness to practice medicine. [redacted] also submitted a packet of information that included recommendations, letters of appreciation, monitor reports from 2003, and positive evaluations.

After the penalty phase hearing concluded, the Board again recessed into closed session to consider the advice of its attorney and to deliberate. When the Board returned to the public from its private session, it declared that proper punishment involved a three-year suspension of [redacted] medical license, with only one year as active and the remaining two years "as a period of stayed suspension." Additionally, the Board continued the previously established ban on treating female patients, required [redacted] to undergo psychosexual evaluation, and ordered payment of $40,000 in civil penalties. The Board's order was to be given prospective effect, not applicable until March 16, 2009.

Immediately after the decision was rendered, [redacted] counsel requested a stay of the Board's decision and sanctions, but the application was denied. This court granted a stay pending appeal on February 23, 2009, despite [redacted] not then being in possession yet of a final written order from the Board.

The Board eventually entered its Order of Summary Decision (Final Order) on March 9, 2009. The Final Order stated:

> [redacted] had ample time if he wished to provide certifications specifically addressing the allegations central to the Motion for Summary Decision or to otherwise corroborate his own generalized denial. However he did not. Instead the certification of the criminal attorney and counsel in this forum focus on a strained, implausible interpretation of the PTI conditions relevant to Counts I through X.
>
> . . . .
>
> In reaching its decision, the Board [found] the statements of the nine victims strikingly similar, compelling and credible. [The Board found] that [redacted] has agreed in the context of the criminal proceeding not to object to their admission in this administrative proceeding, and has not provided answering affidavits specifically countering the facts set forth in the [c]omplaint.
>
> [(Emphasis added).]

In regard to the final two counts of the complaint, the Board found that [redacted] had engaged in misrepresentation while completing the reapplication forms, and "[w]e do not find the

need to address the issue of intent," notwithstanding [redacted] affirmative assertion that he had not committed any fraudulent conduct. The Board determined that [redacted] was thus guilty under those counts as well.

II.

A.

We cannot approach the issues in this appeal without an appreciation for our narrow role in the review of administrative determinations. Judicial review of agency decisions is limited in scope. In re Herrmann, 192 N.J. 19, 27 (2007). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Id. at 27-28. This standard also applies to the appellate court's review of disciplinary sanctions. Id. at 28; see also Div. of Alcohol and Beverage Control v. Maynard's, Inc., 192 N.J. 158, 183-84 (2007) (appellate review of an agency's choice of sanction is limited, and such decisions will be afforded substantial deference).

Nevertheless, this appeal actually turns more upon the Board's fidelity to the regulations that implement adjudicative procedures within the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -25, than upon the substantive allegations

contained in the amended complaint. It requires us to parse the summary decision process authorized by N.J.A.C. 1:1-12.5, which is simply a procedural mechanism for determining whether a proposed administrative action turns on disputed and material adjudicatory facts. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

B.

We first address [redacted] contention that the Board erred by granting summary decision regarding counts one through ten. Summary decision should be granted where

> the pleadings, discovery materials and affidavits "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Once the moving party presents sufficient evidence in support of the motion, the opposing party must proffer affidavits setting "forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. This standard is substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation. Frank v. Ivy Club, 228 N.J. Super. 40, 62 (App. Div. 1988), rev'd on unrelated grounds, 120 N.J. 73 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed. 2d 860 (1991).
>
> [Contini v. Bd. of Educ., supra, 286 N.J. Super. at 121-22.]

Motions for summary decision in agency actions must be analyzed "in accordance with the principles set forth by the Supreme Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)." Nat'l Transfer, Inc. v. N.J. Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). In Brill, the Court explained that

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. . . . The import of our holding is that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment.
>
> [Brill v. Guardian Life Ins. Co. of Am., supra, 142 N.J. at 540 (internal quotation omitted).]

When reviewing a grant of summary decision, we use the same standards that have been developed for the review of summary judgment. N.J. Div. of Taxation v. Selective Ins. Co., 399 N.J. Super. 315, 322 (App. Div. 2008) (appellate court's review of a grant of summary judgment is de novo); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.) (movant must show that there does not exist a genuine issue as to a material fact, not simply one of an insubstantial nature; a non-

movant will be unsuccessful merely by pointing to any fact in dispute), certif. denied, 154 N.J. 608 (1998).

Other civil litigation-inspired practices further inform our analysis. For example, "[m]ere sworn conclusions of ultimate facts, without [a] material basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand a motion for summary judgment." James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 443 (App. Div. 1964). The party opposing summary judgment must do more than simply demonstrate some abstract doubt about material facts. O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 606-07 (App. Div.) (citations omitted), certif. denied, 169 N.J. 606 (2001). "[S]peculation," "fanciful arguments" and "disputes as to irrelevant facts" will not bar summary judgment." Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.), certif. granted, 183 N.J. 592 (2005), appeal dismissed, Jan. 3, 2006. The "'opponent must do more than simply show that there is some metaphysical doubt as to the material facts.'" Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993)).

Moreover, we adhere to the rule that "[g]enerally, summary judgment is inappropriate prior to the completion of discovery." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003). A party opposing summary judgment on that basis is nonetheless obligated to establish "'with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.'" Ibid. (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Furthermore, the party opposing summary judgment "must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007).

Finally, summary judgment should be denied where a determination of material disputed facts depends primarily upon credibility evaluations, which should await consideration by the trier of fact. Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13 (App. Div. 2007) ("In the context of a summary judgment motion, the judge does not weigh the evidence, or resolve credibility disputes. These functions are uniquely and

exclusively performed by a jury."); Tennenbaum & Milask, Inc. v. Mazzola, 309 N.J. Super. 88, 93 (App. Div. 1998) (same).[12]

The main friction point between the parties lies in an analysis of whether [redacted] fulfilled his obligation to uncover a genuine issue of material fact. The Board largely discounted the three certifications he submitted in response to the Attorney General's motion. The Board found that "[redacted] affidavit references his Answer which contains scant explanations as to the essential allegations regarding only two of the nine victims. In regard to the counts concerning provision of false information there is only a general denial of engaging in fraudulent conduct. Absolutely no specifics have been provided." The Board gave little effect to [redacted] unambiguous averment, "I deny having engaged in any inappropriate touching of any female patients, and deny having engaged in fraudulent conduct." This denial was submitted very early in the proceedings: barely one month after the answer was filed and in the absence of any discovery; it plainly created triable issues, making summary decision then inappropriate.

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[12] We have some concern, under the lens of this jurisprudence, that the Board, in fact, expressly made important credibility findings when it commented upon the statements of the victims as "strikingly similar, compelling and credible." The use of such language signals a failure to adhere to the summary decision process, which eschews the assessment of the believability of witnesses and their evidence.

We also differ with the Board's legal conclusion, to which we owe little deference, regarding the ripeness of the matter for summary decision. Not only did [redacted] initiate appropriate discovery requests, N.J.A.C. 1:1:10.2(a)(1), but he demanded the right to "contest the accuracy of the statements of the complaining witnesses." The Board would have required [redacted] to produce a detailed analysis and refutation of the statements even before receiving his rightful discovery responses. We believe, at the very least, that [redacted] was entitled to collect his discovery requests in order to meet the Attorney General's proofs before responding to the motion for summary decision.

More significantly, we cannot discern how the Board did not appreciate the palpably genuine dispute of fact that [redacted] admittedly cursory affidavit created. [redacted] was not equivocal when he denied outright that he engaged in either inappropriate conduct with patients or fraudulently reapplied for hospital privileges. His denials did not create attenuated or mere metaphysical doubt about his accusers' accuracy; rather, those denials framed the basic question—relating to counts one through ten—that the Board would ultimately have to decide: did [redacted] engage in inappropriate and unwarranted touching of the female patients during physical examinations? The answer was clearly in dispute.

Further, we find nothing in the 2008 PTI Order that would preclude [redacted] from interposing his defense of inaccuracy or misapprehension by the complainants. Pursuant to the APA, a holder of a professional license is entitled to due process to present evidence to show that his license should not be revoked. N.J.S.A. 52:14B-11 provides in pertinent part:

> No agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases.
>
> [Ibid.; see also In re Fanelli, 174 N.J. 165, 172 (2002).]

In addition, N.J.S.A. 52:14B-9(c) provides that "[o]pportunity shall be afforded all parties to respond, appear and present evidence and argument on all issues involved." Fanelli, supra, 174 N.J. at 173 (internal citation omitted).

The 2008 PTI Order may well operate as a waiver to preclude [redacted] from calling unwilling former patients as witnesses. However, we do not view the 2008 PTI Order as a surrender of any of his other due process rights. What [redacted] seeks to present does no violence to the reasonable expectations of those who crafted the 2008 PTI Order or to the public interest. The Board's undue emphasis upon the supposed rights bargained away by [redacted] deprived him of the benefit of the principle that collateral estoppel and other issue-preclusionary doctrines do not generally

prevent a person in a civil proceeding from taking a position inconsistent with his guilty plea. State Farm Fire & Cas. Co. v. Connolly, 371 N.J. Super. 119, 125-26 (App. Div. 2004). We recognize, of course, that there was no guilty plea whatsoever in this matter, which further erodes the Board's exaggerated view of the supposed preclusionary effect of the 2008 PTI Order.

Another basic rule that emerges from our case law is that a criminal conviction may be conclusive proof of commission of a crime, but not of the underlying facts. Allstate Ins. Co. v. Schmitt, 238 N.J. Super. 619, 632 (App. Div.), certif. denied, 122 N.J. 395 (1990); Dep't. of Law & Pub. Safety, Div. of Gaming Enforcement v. Gonzalez, 273 N.J. Super. 239, 245, (App. Div. 1994), aff'd, 142 N.J. 618 (1995). Surely, the more benign circumstance of admission into PTI should not be more disadvantageous to [redacted] than if he had entered a plea of guilty.

Pretrial intervention is a procedure by which an individual may "earn a dismissal of charges for social reasons and reasons of present and future behavior, legal guilt or innocence notwithstanding." Pressler, Current N.J. Court Rules, Official Comment to Guideline 4 to R. 3:28 at 1067 (2010). The program works as a postponement of criminal proceedings that may ultimately result in dismissal as long as the defendant abides by

the terms of the PTI order for the given time period. R. 3:28(b); (c)(1). [redacted] admission into PTI, even for a second time, is conclusive proof of nothing, except the hope that the defendant will fulfill all obligations of the diversionary program. Although it may be evidence of consciousness of fault, even the tailored mandatory apology is not irrefutable proof of culpability. Cf. Garden State Fire & Casualty Co. v. Keefe, 172 N.J. Super. 53, 60-61 (App. Div.), certif. denied, 84 N.J. 389 (1980) (observing that "a plea-entry proceeding is not and does not purport to constitute a full and fair litigation of the issues. To the contrary, it represents a defendant's option to forego such litigation and usually for reasons having little or nothing to do with the nature of the issues themselves.").

C.

Turning to the misrepresentation issues contained in counts eleven and twelve, we again disagree with the Board's legal conclusions. The Board discounted the relevancy of [redacted] state of mind in its decisional calculus, yet the amended complaint speaks in terms of [redacted] supposed "dishonesty, fraud, deception, misrepresentation, false promise, or false pretense." Plainly, the complaint accused [redacted] of quasi-criminal activities, not mere laziness, negligence, or stupidity.

State of mind is an essential element to the Attorney General's theory of liability in this case.

Where, as here, a pivotal issue concerns an actor's state of mind, our courts are reluctant to grant or sustain summary judgment without a plenary hearing or trial, unless the proofs concerning the state-of-mind issue are so one-sided or conclusive to render such an evidential proceeding unnecessary. See, e.g., Cumberland Mut. Fire Ins. v. Beeby, 327 N.J. Super. 394 (App. Div. 2000) (reversing summary judgment in an insurance coverage dispute where the facts reasonably could support an insured's claim that his objectively assaultive conduct was not intended to cause harm); see also Prudential Prop. & Cas. Ins. Co. v. Karlinski, 251 N.J. Super. 457, 467 (App. Div. 1991) (cautioning against summary judgment where an action or defense requires a state-of-mind assessment).

Additionally, summary judgment should not ordinarily be granted when the action entails a determination of a state of mind such as bad faith. Auto Lender v. Gentilini Ford, 181 N.J. 245, 271-72 (2004); Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2004). Moreover, a fraud or misrepresentation claim would be subject to the clear and convincing standard of proof, and, for that reason, generally would not be susceptible to summary judgment, see generally, McBarron v. Kipling Woods L.L.C., 365

N.J. Super. 114 (App. Div. 2004). Granting summary decision on counts eleven and twelve without regard to [redacted] state of mind was plainly erroneous.

D.

We lastly note that Fanelli fortifies our conclusion that the summary decision procedure was improperly deployed in this matter. There, the Court held that a physician had a statutory right to a hearing prior to the revocation of his license even though he had pleaded guilty to a federal criminal statute prohibiting the unlawful disposition of funds in an employee benefit plan. The Board had revoked his license based upon the plea and denied him the right to a hearing because the conviction could not be disputed. Dr. Fanelli, however, disputed the Board's characterization of his admitted criminal conduct as involving moral turpitude and relating adversely to his profession. Focusing upon N.J.S.A. 52:14B-11, the Court concluded that he was statutorily entitled to a hearing before the Board. Fanelli, supra, 174 N.J. at 173. "Because Fanelli's license is subject to revocation, N.J.S.A. 52:14B-11 states that he must be afforded the opportunity to have a hearing conducted pursuant to the procedures for contested cases. Thus, he may 'respond, appear and present evidence and argument on all issues involved.'" Id. at 173-74 (quoting N.J.S.A. 52:14B-9). Among

other things, "the Board should be informed of, and reconcile if necessary, the underlying facts that resulted in" the disqualifying conduct as they relate not only to the basis for revocation, but the proper sanction. Id. at 174.

Although we do not read Fanelli as obviating the summary decision procedure in every professional license revocation action, it nevertheless stands as a formidable bulwark against precipitous action against the holder of such a license. We believe that its principles counsel in favor of somewhat greater generosity and indulgence towards non-movants than the ordinary rules of summary judgment and summary decision already command.

To be sure, the accusations in this case are very serious. We can appreciate why the Board, in the public interest, would want to take swift and decisive action in response to reports by multiple patients that their doctor had sexually accosted them. Nevertheless, in its haste to protect the public, the Board essentially presumed the doctor's guilt without affording him a full and fair chance to defend himself. The doctor has identified numerous reasons why the credibility of the allegations may be suspect. The summary decision procedure was simply the wrong mechanism in this case to pursue the public good.

Our opinion should not be misread as a general condemnation of the summary decision rule. Summary decision is and should

remain an important option for expediting administrative dispositions in cases where there are truly no disputed issues of material fact. For example, if a doctor licensed in New Jersey has admitted the very same wrongdoing to another state's licensing agency and sanctions have been imposed, we do not think the Board necessarily needs to retry that admitted wrongdoing. Summary decision in such a situation may well be appropriate. The present circumstances are entirely different.

In our system of justice, due process of law is a prerogative enjoyed by knave and knight alike. Because we conclude that the Board misused the summary decision process, we reverse the Board's action and remand for further proceedings.[13]

[13] We decline to address the provocative issue of the effect of the 2008 PTI Order, if any, on the residuum rule, leaving the parties to wrestle in the administrative tribunal with Weston v. State, 60 N.J. 36 (1972) and its progeny. We discern that there may be distinct factual disputes regarding ambiguities in the 2008 PTI Order that will need to be addressed by both sides before a determination of the issue may be decided in a principled and sufficiently developed fashion.