**SUPREME COURT OF NEW JERSEY**

Docket No.

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| JOSEPH M. GUIDO and TERESA GUIDO, husband and wife,<br><br>Plaintiffs,<br><br>vs.<br><br>DUANE MORRIS, LLP, a Limited Liability Partnership, FRANK A. LUCHAK, ESQ., PATRICIA KANE WILLIAMS, ESQ., and JOHN DOES 1-10,<br><br>Defendants-Movants. | Civil Action<br><br>On Interlocutory Appeal From the New Jersey Superior Court Appellate Division, Docket No. A-1162-08T3, On Interlocutory Appeal From the New Jersey Superior Court, Law Division, Docket No. OCN-L-677-07<br><br>Sat Below:<br><br>Hon. Ariel A. Rodriguez, J.A.D.<br>Hon. Alexander P. Waugh, Jr., J.A.D.<br><br>And<br><br>Hon. Edward M. Oles, J.S.C. |

# BRIEF OF DEFENDANTS-MOVANTS DUANE MORRIS, LLP, FRANK A. LUCHAK, ESQ. AND PATRICIA KANE WILLIAMS, ESQ. IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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**TABLE OF CONTENTS**

**TABLE OF CITATIONS**

Cases

State Statutes

## PRELIMINARY STATEMENT

Defendants-Movants Duane Morris, LLP ("Duane Morris" or the "Firm"), Frank Luchak, Esq. and Patricia Kane Williams, Esq. (collectively, "Defendants") submit this brief in support of their Motion for Leave to Appeal the interlocutory order of the Appellate Division dated July 15, 2009.

The Appellate Division's order, if left standing, will (i) sanction and encourage the practice of clients suing their lawyers whenever they second guess their prior decisions to settle litigation; (ii) undermine New Jersey's strong policy favoring the finality of settlements; and (iii) damage the trust underlying the attorney-client relationship. The Appellate Division saw the need to intervene on an interlocutory basis. For the same reasons this Court should also intervene.

This legal malpractice action raises a narrow legal question: Under what circumstances should a client be allowed to sue his or her attorney after having knowingly and voluntarily accepted a settlement placed on the record by the trial court while two motions to enforce a similar prior settlement was pending. There is persistent uncertainty surrounding this question stemming primarily from the inconsistent lower court interpretations of this Court's decisions in Puder v. Buechel, 183 N.J. 428 (2005), and Ziegelheim v. Apollo, 128 N.J. 250 (1992).

The settlement at issue in this case is the second iteration of a settlement that Plaintiffs had voluntarily and knowingly agreed to. In fact, Plaintiff Joseph Guido negotiated the settlement himself, without the Defendants, and then fired the Defendants as his counsel. Plaintiffs read and approved the settlement documents, despite receiving three warnings from Defendants - two written and one oral - advising against the settlement. Plaintiffs then waived their right to have decided two pending motions to enforce the original settlement that Mr. Guido negotiated directly with their adversaries. Moreover, Plaintiffs told the trial judge (Judge Clyne) on the record that they understood the terms of the settlement and agreed to those terms. Plaintiffs made an informed, strategic decision to settle the matter rather than await the outcome of the motions to enforce.

Given the facts of this case and the rulings of the lower courts, unless this Court intervenes now, lawyers will be unable to assist clients in settling cases without the threat that their clients, if they decide they do not like a settlement, will sue their lawyer for legal malpractice. The uncertainty created by the Appellate Division, in this and other cases, must be removed for the benefit of lower court judges, attorneys, and litigants who are currently in need of this Court's guidance.

## PROCEDURAL HISTORY

This legal malpractice action was commenced on February 15, 2007, by Plaintiffs' filing of a Complaint against Defendants. (Da22). On June 7, 2007, Defendants filed an Amended Answer and Counterclaim for unpaid legal fees totaling $413,790.69. (Da39). Limited discovery ensued, and on April 11, 2008, Defendants filed a Motion for Summary Judgment based, in part, upon the holdings of the Supreme Court in Puder and the Appellate Division in Pinto v. McGovern, Provost & Colrick, 2008 WL 564719 (App. Div. 2008). (Da55). The trial court granted summary judgment in favor of Defendants relying on Puder and distinguishing Ziegelheim. (Da418, Da456).

Plaintiffs moved for reconsideration. (Da460). Following oral argument, the trial court denied the motion for reconsideration. (Da749-751). However, after the court rendered its decision, Plaintiffs' counsel orally raised the opinion of Hernandez v. Baugh, 401 N.J. Super. 539 (App. Div. 2008), which was cited by Plaintiffs for the first time on reply. (Da751). However, because the court had not received Plaintiffs' reply brief before the argument, the court asked what the Hernandez case was about and then indicated that it would reserve decision on the motion despite having already denied the motion. (Da751-755). Thereafter, by Order and Opinion dated September 16, 2008,

the court granted Plaintiffs' motion for reconsideration relying on Hernandez. (Da18).

On October 6, 2008, Defendants' filed a motion for leave to appeal with the Appellate Division. On November 3, 2008, the Appellate Division, recognizing the significance and urgency of the matter, granted Defendants' motion for leave to appeal the trial court's interlocutory order. (Da758). On February 25, 2009, oral argument was held via telephone before the Appellate Division panel. On July 15, 2009, the Appellate Division rendered its opinion affirming the trial court's September 16, 2008, order, ironically finding Hernandez inapplicable and relying on Ziegelheim while distinguishing Puder. (Da757).

## STATEMENT OF FACTS

### A. Mr. Guido's Previous Employment Agreement

Mr. Guido was a founder of Allstates Air Cargo, Inc., having served as its President and CEO from 1961 until 1999. In 1999, that company merged into Audiogenesis Systems, Inc., and was subsequently renamed Allstates WorldCargo, Inc. ("Allstates" or the "Company"). (Da64). At that time, Mr. Guido was the beneficial owner of 18,250,000 shares, or 56.1%, of the issued and outstanding shares of common stock of Allstates. (Da64). On August 24, 1999, Mr. Guido executed an employment agreement negotiated by his prior counsel that enabled him to serve as Chairman of the Board of Allstates. (Da64). However, this

employment agreement, along with those executed by the other Board members, eventually froze Mr. Guido out by restricting his right to control Allstates - a company he co-founded over thirty years prior.

On or about January 22, 2003, Mr. Guido executed an Agreement for Services with Duane Morris. Mr. Guido asked Duane Morris to attempt to mitigate the harm created by his initial employment agreement and to advise him of his rights as majority shareholder and Chairman of the Board of Allstates. (Da78). At the time Mr. Guido retained Duane Morris, Allstates had four members on its Board of Directors: Sam DiGiralomo, Barton C. Theile, Craig D. Stratton and Mr. Guido. The other board members were hostile toward Mr. Guido, and they were exploiting the original employment agreements to freeze him out of the business.

**B. The Dispute Between Mr. Guido And The Company**

Notwithstanding the limited options available to Mr. Guido due to his prior employment agreement negotiated by prior counsel, he and Defendants decided to put a plan into effect to diminish the power of the other board members. On August 16, 2004, in accordance with the New Jersey Business Corporations Act, N.J.S.A. 14A:5-6 ("BCA"), Guido, as the majority shareholder of Allstates, delivered to the Company an executed Written Consent in Lieu of A Special Meeting of The Stockholders

of Allstates WorldCargo, Inc. dated August 16, 2004 ("Written Consent") and other corporate documents. (Da65, Da81). The Written Consent sought to, among other things, amend and restate the Company's Bylaws to increase the size of the Board of Directors from four to seven members by appointing three independent members. (Da65). Despite Mr. Guido's actions and repeated demands, the Company refused to notify the shareholders of the Written Consent. (Da66).

**C. Mr. Guido Negotiates A Deal Without Counsel**

On October 14, 2004, on behalf of Mr. Guido, Duane Morris filed a Verified Complaint by way of Order to Show Cause with Temporary Restraints against the Company and Messrs. DiGiralomo, Theile and Stratton in the Superior Court of New Jersey, Chancery Division, Ocean County, entitled Joseph M. Guido v. Allstates WorldCargo, Inc., et. al., Docket No. OCN-C-305-04. (Da63, Da68). The Complaint sought to compel the Company to distribute the notice of the Written Consent as required by the BCA. (Da66). On October 18, 2004, the Hon. James D. Clyne, P.J.Ch. heard oral argument in connection with Mr. Guido's application for temporary restraints and denied the application for temporary restraints. (Da124, Da142, Da143).

After the Court recessed, counsel for the parties convened and composed an Order embodying Judge Clyne's ruling. (Da143, Da144). While counsel was busy preparing the Order, Mr.

DiGiralomo and Mr. Guido met without counsel in a nearby hallway. Despite not having their counsel present, they came to an agreement to resolve the matter. (Da144, Da145). Thereafter, the Court was told of the tentative agreement of the underlying action (the "Guido Deal"). (Da144-Da156). However, James Ferrelli, Esq. of Duane Morris expressed concern about potential coercion of Mr. Guido by Mr. DiGiralomo during their private discussions. In response, Judge Clyne scheduled a case management conference for October 28, 2004. (Da147-Da150).

**D. Mr. Guido's Short-Lived Termination of Duane Morris**

On the same day he independently negotiated the Guido Deal, Mr. Guido terminated Duane Morris as his counsel. Even though he was terminated as counsel, on October 27, 2004, Mr. Ferrelli faxed a letter to Mr. Guido in which he advised against the Guido Deal because it would limit Mr. Guido's rights as majority shareholder of Allstates and diminish the value of his stock. (Da387)("[W]e advise against any agreement with Sam [DiGiralomo] and the defendants that includes as a term any limitation on your rights as a majority shareholder of Allstates"). Nevertheless, Mr. Guido ignored Mr. Ferrelli's advice and determined to proceed with the Guido Deal. Shortly thereafter, Mr. Guido rehired Duane Morris to help close the Guido Deal.

**E. The Guido Deal Is Placed on the Record**

On October 28, 2004, counsel appeared for the conference before Judge Clyne. Immediately before to the conference, in accordance with Mr. Guido's wishes, Mr. Ferrelli filed a voluntary dismissal without prejudice of the Verified Complaint. At the conference, counsel advised Judge Clyne that the parties settled the claims asserted in the Verified Complaint based on the agreement made between Mr. Guido and Mr. DiGiralomo, without counsel. (Da162). Judge Clyne placed the terms of the Guido Deal on the record. (Da163).

Mr. Guido negotiated three main terms with Mr. DiGiralomo. First, the parties agreed that the Board of Directors of the company could not be expanded except by unanimous consent of all directors. (Da163). Second, a shareholder agreement would be prepared and executed requiring that each member of the Board of Directors would vote for one another to continue to serve as members of the Board of Directors. (Ibid.) Third, Mr. Guido and the individual defendants would all receive new employment contracts for an additional five-year term plus a one-year severance. (Ibid.) However, Mr. Guido's goal of installing three new independent directors remained unfulfilled.

**F. Duane Morris's Second Warning to Mr. Guido**

On November 3, 2004, Mr. Ferrelli again wrote to Mr. Guido and confirmed his conversation with Mr. Guido before the case

management conference in which Mr. Ferrelli expressed his reservations about the settlement. (Da169). Mr. Ferrelli again expressly warned Mr. Guido against any settlement with the underlying defendants that would limit Mr. Guido's rights as majority shareholder of Allstates. (Da169). Mr. Guido again chose to disregard this advice.

**G. Mr. Guido's "Second Thoughts" About the Guido Deal**

In accordance with Mr. Guido's wish to proceed with the Guido Deal - against his counsel's advice – the parties began to put the terms of the Guido Deal into writing. On or about December 27, 2004, counsel for the defendants forwarded to Duane Morris the proposed settlement documents reflecting the terms of the Guido deal, including a voting agreement ("First Settlement"). (Da638). Contrary to the factual findings made by the Appellate Division (Da764), the initial draft of the Voting Agreement, as negotiated by Mr. Guido, contained a requirement that any purchaser of Mr. Guido's shares would be bound by the Voting Agreement. (Da654).

In January 2005, Mr. Guido reviewed a draft of the First Settlement. (Da213-Da214). Despite his initial agreement with its terms, Mr. Guido subsequently had "second thoughts" about the terms of the First Settlement. (Da220). Specifically, after "a lot of soul searching and thinking," Mr. Guido decided he did not want the number of members of the Allstates Board of

Directors to remain at four. Instead, he wanted to go back to his original course and expand the Board to seven members. (Da220). Notably, at his deposition ordered in connection with the pending motions to enforce, Mr. Guido admitted that he reviewed the Voting Agreement and had no problem with it as written. (Da214-216).

Based on Mr. Guido's "second thoughts" and desire to avoid the First Settlement, on February 10, 2005, Duane Morris filed a second Verified Complaint on behalf of Mr. Guido, again asking the Court to compel the same relief that was sought in the first Verified Complaint. (Da253).

**H. The Motions to Enforce the First Settlement**

On March 16, 2005, the Company and Messrs. DiGiralomo, Theile and Stratton filed separate motions to enforce the First Settlement. (Da626; Da703). Although the motions were originally returnable before the trial court on April 1, 2005, the hearing was adjourned specifically to allow the parties to mediate the matter on April 4, 2005.

**I. Mediation With Judge Havey And The Second Settlement**

Facing the motions to enforce the prior settlement agreement, Mr. Guido and his counsel from Duane Morris participated in a marathon mediation before the late Honorable James M. Havey, P.J.A.D. (Ret.) that lasted late into the evening on April 4, 2005. (Da269). As a result of the mediation

session, Mr. Guido again agreed to settle the case (the "Second Settlement"). (Da269-Da270). As part of the Second Settlement, the motions to enforce the First Settlement reached on October 28, 2004, were withdrawn on April 5, 2005.

On April 5, 2005, the parties and their counsel, along with Judge Havey, appeared before Judge Clyne, and the Second Settlement was placed on the record. (Da266-Da274). Mr. Guido and his wife, Theresa, were sworn and *voir dired* with respect to the settlement. Mr. and Mrs. Guido affirmatively stated under oath that they understood the terms of the settlement, agreed to be bound by the settlement terms, were both reasonably healthy and competent to understand and accept the terms, and had no further questions regarding the settlement. (Da272).

The Second Settlement was almost identical to the Guido Deal and the First Settlement except that Duane Morris was able to negotiate a better deal in which the Court would appoint three independent directors to reduce the power of the other hostile directors – the initial reason for bringing the lawsuit.

Notably, paragraph 4(a) of the Voting Agreement is identical to the original Voting Agreement Mr. Guido negotiated and reviewed in January 2005 regarding the transfer of shares:

| **First Settlement Share Transaction Provision** | **Second Settlement Share Transaction Provision** |
|---|---|
| 4. (a) During the term of this Agreement, the Voters shall not sell, dispose of (including by | 4. (a) During the term of this Agreement, the Voters shall not sell, dispose of (including by |

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| means of gift), pledge, assign the rights to, or encumber any of the Shares, or enter into any contract, option or other arrangement or understanding with respect to the Shares or consent to the offer for sale, sale, transfer, tender, pledge, hypothecation, encumbrance, assignment or other disposition of any shares or any interest therein in an manner (any of the foregoing being referred to as a "Share Transaction"), without the prior written consent of all the Voters, unless the other party to any such Share Transaction agrees in writing to join and be bound by all of the terms of this Agreement. Any transferee to whom Shares are transferred by any Voter, whether voluntarily or by operation of law, shall be bound by all off the obligations imposed upon the transferor under this Agreement, to the same extent as if such transferee were a Voter hereunder. No Voter shall transfer any Shares unless the transferee agrees in writing to be bound by this Agreement. Notwithstanding the foregoing, the anticipated and upcoming transfer by DiGiralomo of 1,000,000 shares to his ex-wife Albina DiGiralomo, pursuant to the Property Settlement Agreement and Judgment of Divorce in the divorce action between them is specifically excluded from the operation of this provision. (Da654). | means of gift), pledge, assign the rights to, or encumber any of the Shares, or enter into any contract, option or other arrangement or understanding with respect to the Shares or consent to the offer for sale, sale, transfer, tender, pledge, hypothecation, encumbrance, assignment or other disposition of any shares or any interest therein in an manner (any of the foregoing being referred to as a "Share Transaction"), without the prior written consent of all the Voters, unless the other party to any such Share Transaction agrees in writing to join and be bound by all of the terms of this Agreement. Any transferee to whom Shares are transferred by any Voter, whether voluntarily or by operation of law, shall be bound by all off the obligations imposed upon the transferor under this Agreement, to the same extent as if such transferee were a Voter hereunder. No Voter shall transfer any Shares unless the transferee agrees in writing to be bound by this Agreement. Notwithstanding the foregoing, the anticipated and upcoming transfer by DiGiralomo of 1,000,000 shares to his ex-wife Albina DiGiralomo, pursuant to the Property Settlement Agreement and Judgment of Divorce in the divorce action between them is specifically excluded from the operation of this provision. (Da375-76). |

During the process of documenting the Second Settlement, a dispute arose between the parties. (Da283). As a result, on May 27, 2005, counsel for the parties appeared before Judge Clyne, at which time Judge Clyne entered an Order for Judgment that provided that the Court was enforcing the settlement

reached by the parties as reflected in the transcript from the April 5, 2005, proceeding, and that "[The] Order and Agreement reflected in the attached transcript is deemed binding on all parties notwithstanding the lack of any signatures." (Da281, Da305).

Clearly, the terms of the Second Settlement, and the documents ancillary to it, were thoroughly negotiated and the settlement was reached under the watchful eyes of Judge Clyne and with the active and conscientious involvement of mediator Judge Havey.

## LEGAL ARGUMENT

### I. DEFENDANTS' MOTION FOR LEAVE SHOULD BE GRANTED BECAUSE THE APPELLATE DIVISION'S INTERLOCUTORY ORDER UNDERMINES THE ATTORNEY-CLIENT RELATIONSHIP AS WELL AS NEW JERSEY'S STRONG POLICY FAVORING SETTLEMENTS.

#### A. Standard for Granting Motions for Leave to Appeal Interlocutory Orders

An interlocutory appeal may be taken to the Supreme Court from a decision of the Appellate Division "when necessary to prevent irreparable injury." R. 2:2-2(b). There is little decisional law elaborating on what constitutes "irreparable injury." This Court has granted such applications in those instances where the issues involved would significantly affect the public interest. See, e.g., In re Guardianship of Dotson, 72 N.J. 112, 115, 116 n. 1 (1976); Township of Chester v. Panicucci, 62 N.J. 94, 98 n. 3 (1973) (stating that leave to

appeal was appropriate "[b]ecause of the general public importance of the issue presented"). In In re Pennsylvania R.R., the Court held that leave to appeal should be granted where the order sought to be appealed "invoke[s] rights 'too important to be denied.'" 20 N.J. 398, 409 (1956)(quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1536 (1949)); see also Romano v. Maglio, 41 N.J. Super. 561, 568 (App. Div. 1956).

Here, it is squarely within the purview of this Court to address significant legal issues that require a balancing of several competing policies in order to provide clarification and guidance to the lower courts, counsel and litigants when inconsistencies arise from lower court decisions. See e.g., Olds v. Donnelly, 150 N.J. 424, 437 (1997)(clarifying and modifying previous New Jersey Supreme Court decisions - Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995) and Grunwald v. Bronkesh, 131 N.J. 483 (1993) - that addressed legal malpractice and the entire controversy doctrine). Accordingly, Defendants' motion for leave to appeal should be granted.

### B. The Appellate Division's Decision Manifests the Uncertainty That Has Arisen Since This Court's Decisions in Ziegelheim and Puder and Undermines the Attorney-Client Relationship

The Appellate Division's grant of interlocutory review correctly recognizes that this case falls squarely into the category of cases that should be appealed on an interlocutory basis. While the Appellate Division followed the correct appellate procedure, it reached the wrong result. The Appellate Division's decision has profound implications that extend far beyond the facts of this case and shows the uncertainty created by the lower courts' inconsistent interpretations and applications of this Court's decisions in Puder, supra, 183 N.J. at 428, and Ziegelheim, supra, 128 N.J. at 250.

In Ziegelheim, supra, the plaintiff sued her former matrimonial counsel for malpractice, claiming that the attorney negotiated, and advised that she accept, an inadequate divorce settlement agreement. 128 N.J. at 257. The plaintiff's motion to set aside the disputed settlement was denied by the trial court, leaving her with only one remedy, a malpractice suit against her former counsel. Id. at 258. Accordingly, this Court reversed the Appellate Division's affirmance of the trial court's grant of summary judgment in favor of the defendant law firm.

Thirteen years later, this Court addressed a similar issue in Puder, supra. Similarly, plaintiff, Mrs. Buechel, brought counterclaims against her former matrimonial counsel for malpractice, alleging that counsel committed malpractice by negotiating a bad settlement and failing to inform Mrs. Buechel of the shortcomings of the proposed settlement. Id. at 432. Mr. Buechel filed a motion to enforce the settlement. While the Court's decision was pending on the motion to enforce the initial settlement, Mrs. Buechel entered into a second settlement with Mr. Buechel. Id. at 433. This Court reversed the Appellate Division's denial of summary judgment for the law firm finding that fairness and public policy favoring settlements dictated that Mrs. Buechel was bound by her representation to the trial court that the divorce settlement agreement was "acceptable" and "fair." Id. at 437. The Court posited that to allow Mrs. Buechel to pursue Puder for "greater monetary gain" would "contravene principles of fairness and a policy in favor of encouraging conclusive settlements[.]" 183 N.J. at 438-39.

In the wake of Puder, the Appellate Division has rendered several inconsistent decisions that reflect the ambiguities created by the lower courts' varying interpretations of Puder and Ziegelheim. See, e.g., Hernandez, supra, 401 N.J. Super. at 539 (reversing trial court's dismissal of malpractice action and

distinguishing Puder because attorney's alleged malpractice was the primary factor behind client's decision to settle early); Prospect Rehab. Servs., Inc. v. Scquitieri, 392 N.J. Super. 157, 167-68 (App. Div.) certif. denied, 192 N.J. 293 (2007)(reversing trial court's dismissal of legal malpractice action because plaintiff did not settle the underlying suit prior to the trial court ruling on her motion to amend the complaint); but see Pinto, supra, 2008 WL 564719 at *15-16 (upholding dismissal of malpractice action where the "facts, policy considerations, and equities" were "more akin to Puder than to Ziegelheim or Scquitieri" because malpractice claim was not plaintiff's only remedy); Burke v. Skoloff & Wolfe, P.C., 2008 WL 2841150 (App. Div. 2008); Newell v. Hudson, 376 N.J. Super. 29, 38 (App. Div. 2005).

The judicial inconsistency in the application of Ziegelheim and Puder is manifested in the three strikingly different decisions rendered by the courts below in this matter. The trial court initially granted summary judgment relying on Puder and distinguishing Ziegelheim. (Da455). On reconsideration, the trial court then reversed itself based exclusively on Hernandez. (Da19). The Appellate Division then found that Hernandez was wholly inapplicable, but still affirmed relying on Ziegelheim and distinguishing Puder – a decision diametrically opposed to the initial ruling of the trial court. (Da776). The

Appellate Division came to its conclusion after pages of analysis that only adds another layer of inconsistency to a body of contradictory lower court decisions.

As a result of these inconsistent interpretations, the attorney-client relationship has been jeopardized by an inherent conflict of interest that could induce attorneys not to recommend settlements in order to eliminate the threat of legal malpractice actions advising of clients' later desire to get a better deal. Moreover, the Appellate Division's interpretation of Ziegelheim and Puder emboldens clients to seek monetary gain through inappropriate malpractice lawsuits. In light of this inherent conflict of interest and its negative effect on attorney-client relationships, this Court's guidance is needed to clarify the limits of Ziegelheim and scope of Puder.

### C. The Appellate Division's Decision Will Have A Chilling Effect On Settlement In New Jersey

The Appellate Division's decision not only weakens the attorney-client relationship; it also undermines New Jersey's long-standing public policy in favor of the negotiated settlement of disputes. Nolan v. Ho, 120 N.J. 465, 472 (1990); Cap City Prods. Co. v. Louriero, 332 N.J. Super. 499, 508 (App. Div. 2000); Zuccarelli v. State, Dep't of Envtl. Prot., 326 N.J. Super. 372, 380 (App. Div. 1999). Indeed, "voluntary settlement of disputes is a central policy dictate of the judiciary and is

expressly encouraged." Lerner v. Laufer, 359 N.J. Super. 201, 217 (App. Div. 2003). Moreover, "[a]n integral part of the increasingly prevalent practice of alternative dispute resolution (ADR), mediation is designed to encourage parties to reach compromise and settlement." State v. Williams, 184 N.J. 432, 446 (2005).

As a matter of policy, if the Appellate Division's decision stands, attorneys will inevitably be discouraged from pursuing mediation and settlements on behalf of their clients because even those settlements mediated by retired judges and duly placed on the record are not safeguarded. Rather than risk potential liability for malpractice, attorneys will advocate for trying cases to conclusion to avoid having clients sue them when the clients "second guess" the settlements to which they had agreed. Even a small decrease in the percentage of civil cases settled each year (99,794 cases filed in the 2008-09 judicial term) could wreak havoc on the judicial system and severely deplete the already strained resources at the judiciary's disposal (i.e. judges and jurors).

### D. The Appellate Division's Decision Is Based On A Misunderstanding of Two Critical Facts

Finally, the Appellate Division made two critical errors without which the trial court's ruling could not have been affirmed. First, it stated baldly that "there was no effort by

any party to enforce the most recent settlement proposal." (Da763). This is untrue. In fact, there were two motions to enforce the First Settlement that were filed by defendants in the underlying action. (Da626; Da703). Second, the Appellate Division stated that the proposed Second Settlement "required that the parties enter into a voting agreement that differed from the one previously proposed [in the First Settlement]." This is also incorrect because paragraph 4(a) of the Voting Agreement - the provision Mr. Guido now objects to in this litigation (Da25) – is identical to the Voting Agreement in the First Settlement, supra. These facts, when properly understood, make it clear that the Appellate Division's decision - relying on Ziegelheim and rejecting Puder - cannot stand. Allowing Plaintiffs to sue under the facts of this case endorses a standard that lawyers will simply be unable to meet. As a result New Jersey lawyers will be unable to advise their clients to settle cases.

## II. PLAINTIFFS' CLAIM FOR LEGAL MALPRACTICE IS BARRED AS A MATTER OF LAW BY THIS COURT'S DECISION IN PUDER v. BUECHEL.

The allegations against Defendants suffer from a fatal flaw: the settlement, in particular the provisions of the Voting Agreement, was knowingly and voluntarily entered into twice between Plaintiffs and the defendants in the underlying action. Moreover, the Second Settlement was agreed to by Plaintiffs

while there were motions to enforce the substantially similar prior settlement pending before the trial court. As such, this case is directly on point with Puder, supra, 183 N.J. at 428, and the Appellate Division's attempt to distinguish it fails.

In Puder - in response to Mr. Buechel's motion to enforce - the trial court conducted a plenary hearing to determine whether the parties to the underlying divorce action had reached a binding settlement and, if so, whether it was enforceable. Id. at 433. During the plenary hearing, Mrs. Buechel entered into a second settlement. Id. at 433. Puder then moved for summary judgment on the legal malpractice counterclaim. Id. at 435. The trial court granted Puder's motion for summary judgment. On Buechel's appeal from the grant of summary judgment, the Appellate Division reversed and remanded the matter to the trial court. In reversing the Appellate Division, this Court underscored that Mrs. Buechel understood, bargained for, received, and acknowledged in open court what she believed was an equitable distribution of the marital estate. Puder, supra, 183 N.J. at 438-39.

Significantly, the second settlement in Puder was enforced because the plaintiff knowingly and voluntarily agreed to resolve her claims instead of waiting for the trial court to issue its ruling on her husband's motion to enforce the settlement. Id. at 434. That is exactly what happened here.

Plaintiffs in this case could have awaited the outcome of defendants' motions to enforce the First Settlement, which were still pending as of April 5, 2005 – a crucial fact overlooked by the Appellate Division. (Da763). Instead, Mr. and Mrs. Guido knowingly chose to enter into the more beneficial Second Settlement and waive their right to proceed to trial. As in Puder, Plaintiffs are bound by their knowing and voluntary decision to settle the matter as indicated by their assent to its terms in open court.

In affirming the trial court's decision to reconsider its grant of summary judgment, the Appellate Division erroneously held that the facts of this case are more akin to Ziegelheim than Puder. In Ziegelheim, supra, the plaintiff's complaint alleged that the attorney "failed to discover important information about the husband's assets before entering into settlement negotiations." Id. at 255. The Appellate Division affirmed the trail court's grant of summary judgment, but the Supreme Court reversed, holding that the plaintiff could proceed with her malpractice action because the trial court denied her motion to set aside the disputed settlement leaving her with only one remedy - a malpractice suit against her former counsel. Id. at 257-58.

This case, when all the undisputed facts are considered, is wholly inapposite to the facts presented in Ziegelheim. Unlike

Ziegelheim, the instant malpractice action was not the Guidos' only option. Instead, the Guidos, like the plaintiff in Puder, made a calculated decision to accept another settlement before the trial court decided whether to enforce the First Settlement. They could have waited for the trial court's decision on the motions to enforce the First Settlement before they agreed to the Second Settlement that was placed on the record on April 5, 2005. Plaintiffs' decision to abandon their attempt to avoid the First Settlement was a tactical decision that precludes them from now criticizing their attorneys simply because, once again, they are having "second thoughts" – this time about the Second Settlement.

**III. THE APPELLATE DIVISION ERRONEOUSLY IGNORED ITS RULING IN PINTO v. MCGOVERN, PROVOST & COLRICK ON THE ISSUE OF WHETHER THE GUIDOS WERE OBLIGATED TO MOVE TO SET ASIDE THE TERMS OF THE SETTLEMENT.**

Plaintiffs not only chose to accept the Second Settlement while two motions to enforce the First Settlement were pending, but also later failed to move to vacate the Second Settlement. Their failure to exhaust all corrective remedies bars Plaintiffs' legal malpractice claims. In her dissent from the majority opinion in Puder, supra, Justice Long concurred with the need for an express policy requiring plaintiffs to exhaust corrective remedies before seeking retribution from their attorneys for otherwise valid and enforceable settlements:

> I agree with the Court that, as a matter of policy, a party in Mrs. Buechel's position should in the future be required to pursue an enforcement motion to disposition.
>
> [183 N.J. at 448 (Long, J., dissenting) (emphasis added).]

The Appellate Division recently applied this rationale in Pinto, supra - a case strikingly similar to the matter at hand. In Pinto, the plaintiff sought to devise 40% of her estate to her son, Paul. She retained the defendant attorney to prepare a will for her. Plaintiff contended that her son inaccurately advised her that she was executing a will when, in reality, she was executing deeds that transferred various properties from her name to a joint tenancy with her son. 2008 WL 564719, at *1 (Da413). Plaintiff then filed a Chancery action to set aside the conveyances and a separate action against the defendant law firm for legal malpractice. Ibid. The Chancery matter was settled and the terms placed on the record. Id. at *2. (Da414). Plaintiff affirmed under oath her understanding and voluntary acceptance of the settlement and the potential impact of the settlement on her pending malpractice case. Ibid. (Da414).

The law firm defendant moved for summary judgment, arguing that plaintiff's legal malpractice action was barred by the Court's decision in Puder. The trial court granted defendant's motion and the Appellate Division affirmed, stating that plaintiff could have sought to vacate the settlement on duress

or related grounds at any time during the intervening eighteen months since the time of the settlement. Pinto, supra, 2008 WL 564719 at *6 (Da417).

Notwithstanding the Appellate Division's failure to consider Pinto, that decision is on par with the facts of this case. If Mr. Guido was under duress or unable to understand the terms of the agreement due to mental incapacity – as argued before the trial court by Plaintiffs – they could and should have sought to vacate the settlement on a number of grounds. As a direct consequence of the Pinto holding, Plaintiffs' decision not to pursue any available remedies bars them from proceeding with the instant malpractice claim.

## CONCLUSION

Based on the important public issues presented herein, Defendants respectfully request that the Court grant the instant motion for leave to appeal.

Respectfully submitted,

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