(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

ALYSON DIPASQUALE,

Plaintiff-Appellant,

v.

HACKENSACK UNIVERSITY

MEDICAL CENTER,

Defendant-Respondent.

January 13, 2015

Submitted December 9, 2014 – Decided

Before Judges Messano and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7905-10.

George J. Cotz, attorney for appellant (Lydia B. Cotz, on the brief).

Epstein, Becker & Green, P.C., attorneys for respondent (Carmine A. Iannaccone, of counsel and on the brief; Daniel R. Levy, on the brief).

PER CURIAM

Plaintiff Alyson DiPasquale, a registered nurse, was terminated from her position as a case manager at defendant Hackensack University Medical Center. Claiming she was discharged because of her disabilities, specifically, acid reflux that caused esophagitis and gastritis, and incipient multiple sclerosis, she filed suit alleging violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (the LAD). Throughout the litigation, defendant contended, among other things, that plaintiff was terminated because of misconduct involving a patient's prescription.

After discovery, defendant moved for summary judgment, arguing that plaintiff failed to provide any expert medical testimony regarding her disability. Plaintiff countered by arguing that, as a nurse, she was competent to prove her disability through her own testimony, and, alternatively, that defendant had already acknowledged her disability by providing her with leave under the Family and Medical Leave Act, 29 U.S.C.A. § 2612 and N.J.S.A. 34:11B-1 to -16 (the FMLA), whenever her medical conditions flared up.

In a written decision, the judge denied defendant's motion, noting that defendant "d[id] not dispute" plaintiff's contention regarding approval of "intermittent leave" because of her various medical conditions. He further reasoned:

> If plaintiff's disability was so apparent that she was allowed intermittent leave as the result, then the proof requirements, clearly stated in [Viscik] v. Fowler [Equip.] Co., 173 N.J. 1, 16 (2002)[,] should not apply.
>
> Whether the plaintiff was recognized as being so disabled is a question of fact to be resolved by the jury.
>
> Absent an affirmative finding of fact by the jury, it will be the trial judge's obligation to decide whether a nurse who suffers from a medical condition may testify that she suffers from disability.

Defendant also argued plaintiff had failed to raise a genuine factual dispute that its non-discriminatory reason for terminating her was a pretext. However, the judge noted that, although plaintiff did not dispute she altered an email pertaining to a patient's prescription, she "disputed . . . [the] reason for altering it." The judge found there was a genuine disputed fact as to whether plaintiff was terminated because of her supervisor's resentment over the use of family leave. On August 31, 2012, he entered an order commemorating these rulings and denying summary judgment.

Sometime in February 2013, defendant filed a motion for reconsideration based upon purportedly newly-discovered evidence. Specifically, defendant became aware that plaintiff had

secured new employment in October 2012, and, as part of the employment process, she was required to undergo a physical examination. Plaintiff was cleared for employment "without restrictions."

Although the motion was returnable on March 8, the civil presiding judge denied defendant's motion without argument. In a short letter opinion dated March 1, 2013, he reasoned that defendant was procedurally barred from seeking reconsideration of the August 2012 order. The presiding judge concluded that defendant should have renewed its motion for summary judgment, particularly since it acknowledged receipt of the information in October 2012. He further noted that, since trial was set for March 11, and there was no showing of good cause why the time requirements of Rule 4:46-1 should be waived, as a request for summary judgment, defendant's motion was untimely.[1] The presiding judge limited his ruling to "procedural grounds," noting that "[t]he trial judge has the discretion to entertain consideration of a request for disposition . . . in the interests of judicial economy and . . . justice."

On the date of trial, defendant filed a formal motion for judgment based upon the newly discovered evidence regarding plaintiff's pre-employment physical. Defendant also filed a motion in limine to "preclude [p]laintiff from introducing [certain] evidence, and making [certain] arguments at trial." Ten specific items were listed, including: "testimony concerning [p]laintiff's alleged medical conditions" and "testimony or any other evidence that references [p]laintiff's application for leave under the [FMLA]." The trial judge, who was not the motion judge or the presiding judge, gave plaintiff the remainder of the day to respond to defendant's motions.[2]

On March 14, the trial judge entertained oral argument on defendant's applications. Defendant argued plaintiff admitted that she did not intend to call any medical expert, nor was one identified in plaintiff's pre-trial exchange. See R. 4:25-7(b). Defendant also argued that

plaintiff could not prove she was disabled for purposes of the LAD simply because defendant had granted her leave under the FMLA.

Apparently, as part of the submissions filed in response to defendant's motions, plaintiff for the first time listed one of her treating physicians, Dr. Frank Candido, as a potential witness. Dr. Candido's name was contained in plaintiff's original answers to interrogatories as one of her treating physicians whose documentation had been subpoenaed by defendant, although plaintiff acknowledged Dr. Candido was not listed as a potential witness on the pre-trial exchange. Plaintiff also stated that Dr. Candido would be called as a fact witness, not an expert. Plaintiff reiterated her contentions that defendant's grant of FMLA leave was sufficient to prove its knowledge of her disability, and that plaintiff's testimony alone was sufficient to prove she was disabled for purposes of the LAD.

In a comprehensive oral opinion, the trial judge first noted that the August 2012 order denying summary judgment did not foreclose her consideration of the issue in the interests of justice "based on all of the evidence presented by the parties." The judge noted plaintiff did not submit Dr. Candido as a fact witness "until last night."

The judge rejected plaintiff's claim that she could sustain her burden of proof through her own testimony, stating "[w]hat plaintiff is offering here . . . is her own description of her pain." Citing Viscik, supra, the judge concluded that plaintiff failed to prove she "ha[d] a specific disability because given the fact that this disability is not readily apparent, medical expert testimony is required and . . . is not present." Later in her opinion, the judge noted that listing Dr. Candido as a witness was "insufficient[,] [b]ecause plaintiff must present . . . the existence of a handicap or a disability by expert medical testimony." The judge entered an order granting defendant judgment and dismissing plaintiff's complaint.

Plaintiff filed a timely motion for reconsideration which defendant opposed. R. 4:49-2. In her certification, plaintiff's counsel noted, among other things, that she was first served with defendant's motion to dismiss on the morning of March 13, court was not adjourned until approximately 2:30 p.m. that day, and she was required to submit a response not only to the motion to dismiss, but also to the motion in limine, by 5:00 p.m.

The judge considered oral argument on the reconsideration motion on April 5, 2013. Plaintiff reiterated some of the arguments previously made and also contended that Dr. Candido could have provided the necessary expert medical testimony to prove a prima facie case of disability. Plaintiff argued that she was examined during her deposition about her treatment with Dr. Candido, and the doctor's complete records had been turned over to defendant during discovery. When the judge queried why Dr. Candido was not named as a witness in the original pre-trial exchange, plaintiff replied that, based upon the motion judge's August 2012 order and the law of the case doctrine, she did not believe any medical testimony, other than her own, would be necessary. Plaintiff argued that defendant could not claim surprise when Dr. Candido was listed as a witness, and the appropriate remedy would have been to postpone the start of trial so defendant could depose the doctor.

On June 7, the trial judge denied plaintiff's motion, explaining her reasons in a written opinion attached to the order. The judge once again rejected plaintiff's arguments that she could establish proof of her disability through her own testimony because she was a registered nurse, or through defendant's grant of leave under the FMLA. Citing Lombardi v. Maso, 207 N.J. 517 (2011), the judge also rejected plaintiff's argument that consideration of defendant's trial-day motion was barred by the law of the case doctrine.

Turning specifically to plaintiff's proffer of Dr. Candido as a witness, the judge concluded that "[w]hether or not Dr. Candido is allowed to testify . . . is not relevant [because] [p]laintiff

concedes that Dr. Candido would not be testifying as an expert medical witness, but instead as a fact witness." Thus, Dr. Candido's testimony

> would not change the underlying issue that was the basis for the . . . [o]rder to dismiss, namely that the nature of the alleged disabilities requires expert testimony both to establish plaintiff actually suffers from the conditions alleged and whether these conditions should be considered disabilities as defined by the definition contained in the [] LAD . . . [.]

The judge also concluded "[t]he last-minute inclusion of a treating doctor . . . as a fact witness not only was sudden and out of time, but [it] continued to be insufficient to satisfy a prima facie requirement for an expert to explain plaintiff's several, non-apparent conditions which she claims are 'disabilities'" under the LAD.

Before us, plaintiff argues that she should have been permitted to call Dr. Candido as a witness at trial, and, since defendant was not surprised or prejudiced, a short continuation, as opposed to dismissal with prejudice, was the appropriate remedy. Alternatively, plaintiff argues she presented a prima facie case of disability discrimination under the LAD even without Dr. Candido's testimony.

Defendant counters by arguing that plaintiff's appeal of the denial of her reconsideration motion is procedurally-barred because plaintiff filed her notice of appeal while the motion was pending, and therefore the trial judge lacked jurisdiction. Substantively, defendant argues that plaintiff's case could not proceed without expert medical testimony, and even if Dr. Candido were permitted to testify, his factual testimony was insufficient to prove a prima facie case of LAD disability. Lastly, defendant argues that even though it did not file a cross-appeal, we can

and should affirm judgment in its favor because plaintiff's termination was based upon her misconduct and not invidious discrimination.

We have considered these arguments in light of the record and applicable legal standards. We reverse.

I.

We take a moment to clarify the scope of our review by addressing defendant's procedural arguments.

A.

Contrary to defendant's assertion, plaintiff first filed a notice of appeal on April 25, 2013, which was after oral argument on the motion for reconsideration but before the trial judge issued her decision and order more than two months later. Plaintiff filed an amended notice of appeal on June 10, 2013, which sought review of both the March 2013 order for judgment and the June 2013 order denying reconsideration.

It is axiomatic that "the filing of a notice of appeal divests the trial court of jurisdiction." State v. Schneider, 156 N.J. Super. 53, 56 (App. Div. 1978); see also R. 2:9-1(a) ("[T]he supervision and control of the proceedings on appeal . . . shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed."); Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 2:9-1 (2015) ("[T]he trial court does not have jurisdiction pending appeal to entertain a motion for . . . reconsideration[.]").

We are faced, however, with a highly unusual circumstance. The Law Division clearly had jurisdiction to decide plaintiff's motion for reconsideration, but it did not actually decide the motion until plaintiff took the inexplicable step of filing the notice of appeal. Plaintiff's reply brief fails to explain why she took this course of action.

However, we glean from the trial judge's written opinion denying the motion for reconsideration that plaintiff believed the forty-five day time limit to appeal the March 14 order was about to expire. See R. 2:4-1(a) ("Appeals from final judgments of courts . . . shall be taken within [forty-five] days of their entry."). Apparently this concern was relayed to the trial judge prior to the issuance of her June 7 written opinion, because she correctly explained in detail that plaintiff's timely motion for reconsideration tolled the forty-five day clock. See R. 2:4-3(e).

Defendant was fully able to, and did, oppose the motion for reconsideration. The trial judge believed she had jurisdiction to consider and decide the issues presented. In short, we discern no prejudice to defendant if we review the entire record presented to the Law Division as if plaintiff had simply not filed her ill-time first notice of appeal.

B.

We next consider defendant's contention that we should affirm dismissal of the complaint because there can be no genuine dispute that plaintiff was terminated based on her misconduct. In this regard, defendant claims it was unnecessary to file a cross-appeal in order to preserve this argument. We disagree.

The appeal seeks review of the March 14 and the June 7, 2013 orders granting judgment and denying reconsideration. Because appeals are taken from orders, not decisions, Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001), a respondent may raise any legal theory in favor of affirming the trial court's judgment. Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 381 n.1 (App. Div. 2013) (citing Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984)), certif. granted, 217 N.J. 292 (2014). The question is whether defendant may do so in this case without filing a cross-appeal.

We have said that "without filing a cross appeal, a respondent may seek an affirmance of the judgment on any ground raised in the trial court." Smith-Bozarth v. Coal. Against Rape&

Abuse, Inc., 329 N.J. Super. 238, 244 n.1 (App. Div. 2000) (emphasis added) (citing Chimes, supra, 195 N.J. Super. at 443); accord Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 256 n.1 (App. Div. 2011) (considering respondent's alternative grounds for relief that were raised before, but not addressed by, the Law Division), certif. denied, 209 N.J. 98 (2012); but see Walrond v. Cnty. of Somerset, 382 N.J. Super. 227, 231 n.2 (App. Div. 2006) (noting that respondent's alternative arguments raised in the trial court in support of summary judgment were not properly before the panel "[i]n the absence of a defensive cross-appeal").

Here, however, defendant never asserted this particular ground for affirmance in the proceedings that gave rise to the orders under appeal. In other words, when defendant moved for judgment on the day of trial, defense counsel's certification in support of the motion was limited to the claim of newly-discovered evidence regarding plaintiff's pre-employment physical. Oral argument before the trial judge, however, immediately morphed into defendant's reassertion that plaintiff lacked necessary expert medical testimony. In neither instance did defendant reassert an argument last made in August 2012, i.e., that plaintiff could not raise a genuine factual dispute that defendant's non-discriminatory reason for terminating plaintiff was a pretext.

Defendant did not raise this argument in the trial court proceedings that led to the orders under review in this appeal. What defendant actually seeks now is review of the interlocutory order that denied it summary judgment on this ground. However, since no cross-appeal was filed, the issue has not been preserved.

III.

We first consider the merits of the issue that led to judgment in favor of defendant before addressing the procedural propriety of permitting defendant to seek summary judgment again on the day of trial.

A.

The LAD prohibits discrimination "against any person by reason of . . . disability." N.J.S.A. 10:5-3. The LAD defines "disability" as

> physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.
>
> [N.J.S.A. 10:5-5(q).]

To successfully allege an LAD claim based on disability, the plaintiff must first establish that "'[1] that [s]he was [disabled][3], [2] that [s]he was performing h[er] job at a level [25] that met h[er] employer's legitimate expectations, [3] that [s]he nevertheless was fired, and [4] that [the employer] sought someone to perform the same work after [s]he left.'" Viscik, supra, 173 N.J. at 14-15 (quoting Clowes v. Terminix Int'l Inc., 109 N.J. 575, 597 (1988)).

"Where the existence of a handicap is not readily apparent, expert medical evidence is required." Id. at 16. Thus, in Clowes, supra, 109 N.J. at 596-98, the plaintiff, alleging

discrimination resulting from his alcoholism, "failed to meet his burden of establishing a prima facie case of unlawful discrimination," because he failed to present any expert medical testimony establishing that he was in fact an alcoholic. Id. at 595. To the contrary in Viscik, supra, 173 N.J. at 17, the plaintiff met her burden of proving she was disabled for purposes of the LAD through the testimony of her treating doctor, who also qualified as an expert in internal medicine and weight loss. Id. at 10.

Here, there is no dispute that plaintiff's disability is not "readily apparent." To establish a prima facie claim, therefore, plaintiff needed expert medical testimony to prove she was, in fact, disabled. See Domurat v. Ciba Specialty Chems. Corp., 353 N.J. Super. 74, 90 (App. Div), certif. denied, 175 N.J. 77 (2002) ("In Clowes and more recently in Viscik, our Supreme Court held that a plaintiff must present expert medical testimony to prove the existence of a handicap where it is not readily apparent.") (internal citations omitted). [4]

The trial judge, however, erred in concluding that plaintiff could not make out a prima facie case through the testimony of her treating doctor, Dr. Candido, simply because he was denoted as a fact witness, not an expert. Our decisional law is replete with instances where the factual testimony of a treating doctor encompassed opinions regarding causation, diagnosis and treatment.

Although raised in a different context, in Stigliano by Stigliano v. Connaught Lab., Inc., 140 N.J. 305, 314 (1995), the Court stated that "[a]lthough the treating doctors are doubtless 'experts,' . . . they are more accurately fact witnesses . . . . As fact witnesses, the treating doctors may testify about their diagnosis and treatment . . . , including their determination of . . . cause. Their testimony about the likely and unlikely causes . . . is factual information, albeit in the form of opinion."

In Ginsberg v. St. Michael's Hosp., 292 N.J. Super. 21, 32 (App. Div. 1996), the decedent's treating physician "was not named as an expert witness . . . and had not provided a report to defense counsel." As a result, "he was not permitted to testify as to his opinions

regarding [the decedent's] condition or what he thought was the cause of [the decedent's] death." Ibid. We reversed, concluding "[i]t is well settled that treating physicians may testify as to any subject relevant to the evaluation and treatment of their patients." Ibid. (citing Stigliano, supra, 140 N.J. at 314).

We believe it clear that a plaintiff seeking to prove the existence of a disability under the LAD may do so through the testimony of her treating physician. We think it was error for the trial judge to conclude otherwise simply because plaintiff labeled Dr. Candido a "fact" witness.

We hasten to add two points. Whether Dr. Candido is qualified to offer an opinion that proves plaintiff was disabled for purposes of the LAD, and whether he is able to do so, cannot be discerned from this record. As the Court has made clear, the medical expert testimony must satisfy "each and every element of the relevant statutory test" set forth in the LAD. Viscik, supra, 173 N.J. at 17. Additionally, it is fundamental that plaintiff must notify defendant who she intends to call as a witness to prove her disability, and that defendant is entitled to full and complete discovery thereafter with respect to that witness. Plaintiff failed to comply with these basic requirements in this case. However, for the reasons that follow, we conclude that plaintiff's failures should not have led to dismissal of her complaint.

B.

As already noted, despite losing its summary judgment motion in August 2012, six months later defendant again sought dismissal of the complaint based upon newly-discovered evidence.[5] Although the presiding judge refused to hear the defendant's motion on procedural grounds, he left the door open for further consideration by the trial judge.[6]

Citing Lombardi, supra, the trial judge determined that the law of the case doctrine did not foreclose her reconsideration of defendant's motion for judgment premised on plaintiff's lack of an identified medical expert witness. "When applicable, [the law of the case doctrine] prohibits 'a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling[.]'" Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App. Div.

2012) (quoting Hart v. City of Jersey City, 308 N.J. Super. 487, 497 (App. Div. 1998)). However, "'[a] hallmark of the law of the case doctrine is its discretionary nature, calling upon the deciding judge to balance the value of judicial deference for the rulings of a coordinate judge against those factors that bear on the pursuit of justice and, particularly, the search for truth.'" Lombardi, supra, 207 N.J. at 538-39 (quoting Hart, supra, 308 N.J. Super. at 498) (internal quotation omitted).

The trial judge's ability to revisit a prior decision made by a different judge is not unbridled. For example, in Monaco v. Hartz Mountain Corp., 178 N.J. 401 (2004), the plaintiff in a personal injury suit successfully defeated summary judgment sought by the defendant-commercial property owner, the motion judge finding that the defendant owed the plaintiff a duty to maintain its land in reasonably safe condition, and that this duty extended to a sign that the landowner did not own or maintain that caused plaintiff's injury. Id. at 408. At the close of the plaintiff's case, however, the trial judge concluded the defendant owed no duty to the plaintiff with respect to the sign, and he granted judgment to the defendant. Id. at 411. In reversing our affirmance of the trial judge's decision, the Court said:

> As a preliminary matter, we note that the trial court overstepped its bounds when it ruled that [the defendant] had "no legal duty" with respect to a sign it did not own. That issue was resolved in [the plaintiff's] favor on [the defendant's] motion for summary judgment. In fact, the motion judge ruled that, as a commercial landowner, [the defendant] had a duty toward its invitees . . . to maintain a safe premises, including areas of ingress and egress and to inspect and give warning of a dangerous condition. A court of equal jurisdiction had no right to "reconsider" in the absence of substantially different evidence at a subsequent trial, new controlling authority, or specific findings

> regarding why the judgment was clearly erroneous. None of those conditions was satisfied here.
>
> [Id. at 413 (second emphasis added).]

In this case, the trial judge did not explicitly state that the initial motion judge's conclusions as to why medical expert testimony was unnecessary in this particular case were "clearly erroneous." However, she implicitly reached that determination. As noted above, we agree that absent such medical testimony, plaintiff failed to present a prima facie case of LAD discrimination based upon her disability. We do not, therefore, disagree with the trial judge's decision to revisit the issue. However, given the earlier ruling, plaintiff was simply unprepared to meet the challenge defendant re-asserted on identical grounds on the day of trial.

The circumstances are quite similar to those presented in Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292 (App. Div. 2004). There, the plaintiffs brought suit for personal injuries caused when an elevator in which they were riding fell three stories. Id. at 295-96. On the day of trial, the defendants advised the judge that they intended to seek dismissal of the complaints because the plaintiffs had no expert witness. Id. at 296.

The plaintiffs were surprised because two years earlier, they defeated defendants' summary judgment motion premised on the same grounds. Ibid. At that time, the motion judge determined "that summary judgment . . . was not warranted because the . . . principle of res ipsa loquitur was applicable." Ibid. Although

> [t]hose findings were unchallenged and undisturbed until the day of trial[,] . . . . [t]he trial judge elected to revisit the question, and to consider it as though raised upon motions for summary judgment, reasoning that it would be unwise to go through the

> cumbersome procedure of empaneling a jury and proceeding with the trial, if expert testimony supporting plaintiffs' complaints were to be deemed necessary. Ibid.

The trial judge specifically rejected application of the law of the case doctrine. Id. at 297. Citing our opinion in Gore v. Otis Elevator Co., 335 N.J. Super. 296 (App. Div. 2000), which was issued in the interim, the trial judge concluded that expert testimony was necessary because the elevator was a complex instrumentality. Ibid. He granted summary judgment to the defendants. Ibid. Although the plaintiffs did not, at the time, seek an adjournment to retain an expert, their motion for reconsideration sought that relief but was denied by the judge. Ibid.

We reversed, concluding the trial judge applied our holding in Gore too broadly. Id. at 305. More relevant to this case, we also held:

> Even if Gore was believed to govern the present case, however, such a discretionary call on a law of the case issue also required consideration of those factors that bear on the pursuit of justice and, particularly, the search for truth. Whether sua sponte, or by grant of the request contained in the [plaintiffs'] motion for reconsideration, we believe that [the] plaintiffs should have been granted the opportunity to submit an expert report on liability rather than [be] precluded from presenting their case by entry of summary judgment on the day of trial. Plaintiffs understandably relied upon the prior ruling of a court in the same case. The pursuit of justice and, particularly, the search for truth . . . presented a compelling basis to at least afford opportunity for plaintiffs to secure the expert opinion deemed necessary by the successor judge.

[Id. at 302-03 (citations omitted).]

Here, the procedural unfairness to plaintiff is patent. In August 2012, she defeated summary judgment when the motion judge rejected defendant's specific contention that she failed to prove a prima facie case because no medical expert was identified. She resisted an interim, procedurally-barred effort by defendant to have the presiding judge render summary judgment based upon new evidence. On the day of trial, plaintiff was served with a motion for judgment which, from our reading of the record, seemingly was premised on this new evidence, but, nonetheless, was transformed into a motion for summary judgment based upon the lack of expert medical evidence of her disability.

When she was given but a few hours to respond, plaintiff identified her treating doctor as the person who could supply such missing evidence, albeit insisting Dr. Candido was a fact witness. During argument on the motion for judgment, and again when she moved for reconsideration, plaintiff set forth the underlying procedural history that demonstrated Dr. Candido was previously named in interrogatories as her treating doctor, that defendant had obtained his complete medical records and that plaintiff had been questioned during her deposition about the treatment Dr. Candido rendered.

As noted, we believe the trial judge erred in concluding that Dr. Candido could not supply the missing evidence because he was a "fact" witness. Regardless, "when the testimony in question is 'pivotal' to the case of the party offering the testimony, a court should seek to avoid exclusion where possible." Wymbs v. Twp. of Wayne, 163 N.J. 523, 544 (2000). "Factors that would strongly urge the trial judge, in the exercise of h[er] discretion, to suspend the imposition of sanctions, are (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence." Ibid. (internal quotation and citation omitted).

Here, plaintiff had no design to mislead, defendant was not surprised and any prejudice could have been ameliorated by further discovery. Under the particular circumstances of this case, the trial judge's discretionary decision to reconsider the August 2012 denial of summary judgment should necessarily have been balanced with a commensurate exercise of discretion regarding plaintiff's identification of Dr. Candido as a potential witness. We therefore reverse.

We hasten to add that we express no opinion about whether Dr. Candido's testimony can ultimately satisfy plaintiff's burden of proof, and therefore, pending further discovery, we do not foreclose defendant from seeking summary judgment again. We also leave management of further necessary discovery to the sound discretion of the Law Division.

Reversed and remanded. We do not retain jurisdiction.

[1] Rule 4:46-1 requires that "[a]ll motions for summary judgment shall be returnable no later than 30 days before the scheduled trial date, unless the court otherwise orders for good cause shown."

2 We gather from the transcript of oral argument on March 14, that the case was not reached for trial on March 11 or 12, and, that on the day before, March 13, the judge had held settlement conferences on the case without success.

3 Since the Supreme Court's decision in Viscik, the LAD was amended to replace the word "handicap" with "disability." The words have the same meaning. See Ashton v. AT&T, 225 F. App'x 61, 66 n.5 (3d Cir. 2007).

4 Because the prima facie case required proof that plaintiff was in fact disabled as defined by the LAD, the trial judge correctly rejected plaintiff's argument that defendant's grant of family leave was sufficient. The judge also correctly rejected plaintiff's argument that, because she was a registered nurse, she could prove her disability through her testimony alone. See Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 521-22 (App. Div.) (noting that the plaintiff, who was a physician, likely was not qualified to prove the "specific disorder and its diagnosis" that made her disabled for purposes of the LAD), certif. denied, 170 N.J. 211 (2001). To the extent plaintiff urges these arguments before us, they lack sufficient merit to warrant any discussion. R. 2:11-3(e)(1)(E).

5 In reply to plaintiff's motion for reconsideration, defendant's counsel stated that defendant "expressly renewed its argument that [p]laintiff could not establish a disability because she did not have an expert." If that is so, the presiding judge did not address the issue, nor, as already noted, does counsel's certification in support of the trial-day motion for judgment expressly raise the issue.

6 In so doing, the presiding judge cited an unreported decision from a panel of our colleagues.
