

Kershaw v Hospital for Special Surgery
2013 NY Slip Op 08548
Decided on December 24, 2013
Appellate Division, First Department
Feinman, J.
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Decided on December 24, 2013

SUPREME COURT, APPELLATE DIVISION

First Judicial Department

Peter Tom, J.P.

Rolando T. Acosta

David B. Saxe

Helen E. Freedman

Paul G. Feinman, JJ.

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150416/07

9655A

[*1] Bruce Kershaw, Plaintiff-Respondent-Appellant, —

v

Hospital for Special Surgery, et al., Defendants-Appellants-Respondents, New York University Medical Center Hospital for Joint Diseases, Defendant-Respondent, Joshua Steinvurzel, Defendant.

Cross appeals from the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2012, which, insofar as appealed from as limited by the briefs, granted the summary judgment motion of defendants Hospital for Special Surgery, Peter Frelinghuysen, and Federico Pablo Girardi (collectively HSS) only to the extent of dismissing plaintiff's claim of lack of informed consent, and otherwise denied the motion, and from the judgment of the same court and Justice, entered August 20, 2012, dismissing the complaint as against defendant New York

University Medical Center Hospital for Joint Diseases.

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for appellants-respondents. [*2]

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), and Shoshana T. Bookson, New York, for respondent-appellant.

McAloon & Friedman, New York (Gina Bernardi Di Folco of counsel), for respondent.

FEINMAN, J.

Although raised in the context of a purported "cross motion," resolution of this appeal requires us to once again revisit the issue of untimely summary judgment motions. As defendant Hospital for Special Surgery (together with codefendants Frelinghuysen and Girardi, HSS) concedes, its cross motion was untimely, and it did not allege any good cause for its delay. Accordingly, the cross motion was properly denied, regardless of its merits.

In 1994, when plaintiff was 53 years old, he underwent spinal surgery at defendant Hospital for Special Surgery, to address multilevel cervical stenosis with myelopathy and radiculopathy, which, over the course of five years, had led to progressive weakness in his left shoulder and upper extremities. After surgery, he was pain-free but did not recover a full range of motion in his upper left arm.

About eight years later, in March 2002, plaintiff returned to HSS complaining of lower back pain and severe left leg pain; he was treated with a course of steroid injections. In April 2003, plaintiff again returned because he was experiencing increased weakness in his right upper arm. He

was found to have "significant" cervical stenosis and compression of his spinal cord, as well as cord signal change especially at C3-4 and C4-5. Plaintiff had "significant C-5 weakness of the right upper extremity." The clinic notes indicated that plaintiff "need[ed] a decompression at C3-4, C4-5 and C6-7," that "probably" this would be done in an anterior approach, and that "surgery will be booked in the near future." At a follow-up visit in June 2003, he was told that he might not fully recover his right arm motor loss; he was "somewhat disappointed" but acknowledged that his 1994 surgery had a similar result as to his left side. The clinic notes also indicate that plaintiff told the examining physician that he had recently secured a job and was not interested "whatsoever" in immediate surgery; plaintiff disputes this and says he was not working at that time.

Plaintiff returned to HSS in June 2004 complaining of increasing right shoulder dysfunction and neck pain, and decreasing balance. He was no longer working and was receiving social security disability benefits. The clinic notes of June 11, 2004 indicate that his "symptoms have progressed with increased right shoulder atrophy"; a new round of studies was scheduled. On October 1, 2004, plaintiff first met with defendants Peter Frelinghuysen, M.D. and Federico Pablo Girardi, M.D., both orthopedic surgeons at HSS. According to the clinic notes, the doctors advised plaintiff that surgery would likely not result in the return of muscle function, but that there was "a slight chance" of improvement.

He met with another HSS doctor on October 22, 2004, who wrote that the plan was to have plaintiff return in November to see Frelinghuysen "for booking of his anterior disc fusion surgery." At his next visit on November 12, 2004, a different doctor indicated in the clinic notes that Frelinghuysen and Girardi had recommended "what sounds like a two-level anterior cervical decompression and fusion," and that plaintiff would follow up in one week "to discuss surgery" [*3] with Frelinghuysen [\[EN1\]](#). The notes also indicate that this doctor explained to plaintiff that the reason to do surgery would be to prevent worsening of his symptoms. The doctor also noted that plaintiff's "only option" might be a future shoulder arthrodesis "to allow him to have a more functional lifestyle." On November 19, 2004, the clinic notes indicate that Frelinghuysen planned to review the patient films with Girardi and "we will plan for an anterior cervical decompression and fusion at a later date." According to plaintiff, he understood that surgery would be performed in late December, and he began obtaining the necessary medical clearances.

Plaintiff testified that on his third visit with Frelinghuysen in December 2004, the doctor told him that they could not do the surgery, but did not give him "a reason that made any sense." In Frelinghuysen's words, he and Girardi decided that surgery "would not help." According to Girardi,

after viewing the films, in his opinion the severity of plaintiff's spinal disease and the low prospect of improvement did not warrant the risks of surgery. If the issue had been compression, surgery would have been performed to prevent further progression, but due to the degeneration of the spinal cord, decompressive laminectomies would have done little or nothing to address plaintiff's upper extremity issues.

In February 2005, plaintiff sought treatment at defendant New York University Medical Center Hospital for Joint Diseases (HJD). According to the patient notes, the examining physician found severe upper extremity atrophy. After review of the MRI, he determined that no further surgery for the cervical spine was indicated and that there should be no lumbar spine surgery "at this time." Physical therapy, pain management and treatment in HJD's neurology, hand and shoulder clinics were recommended. Plaintiff undertook these programs through HJD's clinic, and was treated continuously until September of 2005. An MRI taken of his right shoulder in May 2005 showed "severe atrophy" of certain muscles and "mild atrophy" of other muscles, "likely due to the patient's cervical myelomalacia." An MRI of his cervical spine taken the same day found "severe central canal and severe neural foraminal stenosis," resulting in "severe myelomalacia of the spinal cord" from C3 to mid-C5 level.

While continuing at HJD, plaintiff also sought treatment at Mt. Sinai, where he was first seen in the orthopedic clinic on April 21, 2005. The progress notes from June 25, 2005 indicate, in part, that he had "marked stenosis throughout spine," and "marked atrophy at both shoulder girdles." In July 2005, he was examined by an orthopedic surgeon who determined that plaintiff needed surgery to prevent his condition from worsening, not in order to regain function. Plaintiff underwent a two-stage cervical spine surgery in December 2005. Post-operatively, in February and April 2006, plaintiff indicated that he felt returning strength in his right arm although not his left, and a general "slow improvement." The Mt. Sinai orthopedic surgeon observed that he did not "see a substantial neurologic improvement on [his] objective testing, but the patient does feel subjectively like he is improving."

Ten months after the surgery at Mt. Sinai, in October 2006, plaintiff returned to HJD's neurology clinic, reporting a lack of improvement in upper extremity strength, and some pain and numbness on the right arm and hand. Electrical studies performed on October 26, 2006 revealed no significant change from those done in 2005 although there was evidence of fibrotic changes; [*4] the studies showed the presence of moderate right and mild left carpal tunnel syndrome.

Plaintiff commenced his lawsuit in May 2007, claiming medical malpractice and failure to

secure informed consent. The gravamen of his claim is that HSS and HJD failed to timely perform surgery upon him, leaving him with neurological and muscular damage that would not have occurred had the surgery been performed earlier.

HJD timely moved for summary judgment on November 11, 2011. Its motion papers included an affidavit of a medical expert who discussed plaintiff's medical history as seen in the records. In the opinion of HJD's expert, surgery would have been an "unjustifiable and extraordinarily risky and aggressive treatment option," as no surgery would have been able to reverse plaintiff's "significant" neurological deficits that had existed for many years. The best that surgery could do was stop the myelopathy, but there was risk of permanent paralysis or death, "well beyond the standard for such risks for cervical spine cases." He further opined that there was no identifiable injury sustained in the four-month period between plaintiff's first visit at HJD and when he first went to Mt. Sinai.

By notice of cross motion dated January 10, 2012, HSS moved for summary judgment and dismissal, relying on HJD's expert's affidavit and that of defendant Girardi. HSS also argued that the claim of lack of informed consent should be dismissed, given that no procedure requiring consent had been performed. HSS admitted that its motion seeking summary judgment and dismissal of the complaint as against it was filed nearly two months after the court-imposed deadline for making dispositive motions, [\[FN2\]](#) but argued that it should be considered because it sought relief on the same issues raised in codefendant HJD's timely motion.

Plaintiff opposed defendants' motions for summary judgment, although he did not address the claim of lack of informed consent. He submitted the affidavit of his medical expert, Michael J. Murphy, M.D., an orthopedic surgeon practicing in Connecticut. According to the affidavit, Murphy reviewed the medical records and opined that surgery for plaintiff was "indicated as early as June 2003 when the diagnosis of cervical spondylitic myelopathy was made," and from that time until December 2005 when surgery was performed, plaintiff's neurological condition deteriorated. He further opined that had the surgery been performed in 2003, plaintiff's "final outcome would have been substantially improved and he would not have sustained such a severe degree of weakness and loss of function of his right upper extremity." Dr. Murphy stated that the delays were a departure from the standards of good medical practice.

The motion court granted HJD's motion and denied the motion of HSS. As to HJD, the court found that, "without any doubt, [its] moving papers, primarily through the thorough opinions expressed by [its expert], [made] out a prima facie case for the relief sought." In opposition, Murphy's opinions were "somewhat conclusory." He did not separate the claims plaintiff made

against HJD and HSS, and did not address the opinions of HJD's expert regarding causation. Thus, plaintiff failed to rebut HJD's prima facie entitlement to summary judgment.

As to HSS, the court clearly held that because the cross motion was filed impermissibly [*5]late with no reason offered for the lateness, it should be denied. The court then went on to comment in dicta that if its merits were examined, summary dismissal should be denied as there are substantial questions of fact, barring summary resolution. It wrote,

"The question remains whether HSS should remain a viable defendant in this case. The answer is yes. First of all, under the authority of [Brill \[2 NY3d 648 \(2004\)\]](#), the cross[motion] was clearly untimely without any explanation, and counsel is simply wrong when he argues that the cross[motion] raises the same issues as the motion timely made by [HJD]. Differences necessarily exist because [plaintiff] was a patient at HSS for an extended time before he came to [HJD]. At [HJD] he was a patient from only February 2005 to September 2005, and he was also a patient at Mt. Sinai for much of that time. Therefore, the motion must be denied as untimely."

Thus, the rationale for the court's denial was articulated as being that the "cross motion" was untimely.

HSS appealed from the denial of its "cross motion" and plaintiff cross-appealed from the grant of HJD's motion.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg., Inc. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept 2000]).

The motion court properly dismissed the case as against HJD. HJD met its burden of showing prima facie entitlement to summary judgment, proffering evidence that plaintiff was not caused to suffer any injury between February 2005 when HJD found that surgery was not indicated, and April

2005 when he first consulted with Mt. Sinai. In opposition plaintiff's expert did not offer an opinion as to what specific injury plaintiff endured as a result of HJD's decision not to perform surgery and made only broad conjectures which were insufficient to defeat HJD's motion ([see Foster-Sturupp v Long, 95 AD3d 726](#) [1st Dept 2012]; [Callistro v Bebbington, 94 AD3d 408](#) [1st Dept 2012], *affd* 20 NY3d 945 [2012]). In addition, the motion court correctly dismissed the second cause of action alleging lack of informed consent as plaintiff's papers did not address this claim.

The motion court also correctly denied summary judgment to HSS because its motion was untimely made without any explanation for its untimeliness, let alone good cause (*see* CPLR 3212[a]).

Plaintiff filed his note of issue on August 24, 2011. Thereafter, the motion court issued an order which provided that "[t]he time for the various defendants to move for summary judgment is extended through November 14, 2011." On November 11, 2011, HJD moved for summary judgment, making its motion returnable on December 14, 2011. On January 10, 2012, [*6] well after the deadline for dispositive motions had passed, HSS "cross-moved" for summary judgment without providing any explanation whatsoever for its delay. HSS argued to the motion court, as it does to this Court, that its motion should be considered on the merits because it merely presents the same arguments made by HJD. In opposing the "cross motion," the plaintiff argued that it was untimely, and, secondarily, that it was devoid of merit.

Brill v City of New York (2 NY3d 648 [2004]) addressed the "recurring scenario" of litigants filing late summary judgment motions, in effect "ignor[ing] statutory law, disrupt[ing] trial calendars, and undermin[ing] the goals of orderliness and efficiency in state court practice" (2 NY3d at 650). *Brill* holds that to rein in these late motions, brought as late as shortly before trial, CPLR 3212(a) requires that motions for summary judgment must be brought within 120 days of the filing of the note of issue or the time established by the court; where a motion is untimely, the movant must show good cause for the delay, otherwise the late motion will not be addressed ([see Isolabella v Sapir, 96 AD3d 427](#), 427 [1st Dept 2012]). In *Brill*, the City of New York moved for summary judgment on the basis that it never had notice of the defect and therefore could not be liable for the plaintiff's personal injuries by law. Quite likely, the City's legal argument would have been dispositive. However, the City gave no explanation for why its motion was made close to a year after the trial calendar papers were filed. Accordingly, the Court of Appeals refused to address the motion on its merits, pursuant to CPLR 3212(a).

Brill draws a bright line based on the two elements of CPLR 3212(a): the statutorily imposed

or court-imposed deadlines for filing summary judgment motions, and the showing of good cause by a late movant in order for its motion to be considered. In *Brill* the Court of Appeals indicated that late-filed summary judgment motions are "*another example* of sloppy practice threatening our judicial system" (2 NY3d at 652, emphasis added), and pointed to its earlier decision, *Kihl v Pfeffer* (94 NY2d 118 [1999]), which affirmed dismissal of the complaint because the plaintiff failed to respond to a court order within the court-ordered time frame. *Brill* reiterates *Kihl's* statement that, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (2 NY3d at 652-653, quoting *Kihl* at 123).

While the *Brill* rule may have caused some practitioners and courts to wince at its bright line, by the time the motions at issue in this case were made, the Court of Appeals had already reiterated on more than one occasion, and in varying contexts, that it meant what it said (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010], citing *Brill* [dismissal after repeated failures to serve bill of particulars and noncompliance with enforcement order]; *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C. [Habiterra Assocs.]*, 5 NY3d 514 [2005], citing *Brill* [dismissal after ongoing failure to comply with discovery orders]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004], citing *Brill* [denying untimely filed summary judgment motion because although the plaintiff argued she had meritorious case, no reasonable excuse was provided as to the motion's late filing]; *see also Casas v Consolidated Edison Co. of N.Y., Inc.*, 105 AD3d 471 [1st Dept 2013] [upholding order striking answer where the defendant offered no reasonable excuse for its failure to comply with discovery order and provide a meritorious defense]). [\[FN3\]](#) [*7]

As most recently articulated in *Gibbs*:

"The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well" (16 NY3d at 81).

The dissent considers our application of *Brill* in this instance to be "rote," and that our

interpretation is antithetical to that decision's policy considerations of preventing eve-of-trial summary judgment motions. It contends that in the interest of judicial economy we should not depart from "prior authority" that affords the court discretion to entertain a "marginally late filing" when there is merit to the application and no prejudice has been demonstrated, citing *Burns v Gonzalez* (307 AD2d 863 [1st Dept 2003]), and *Garrison v City of New York* (300 AD2d 14 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]). The dissent would seemingly limit the reach of *Brill* to those actions where a party files a motion for summary judgment long after the deadline for dispositive motions and the matter is on the trial calendar. In our view, *Brill* expresses the Court's overall desire to curb "sloppy" litigation practices, one of them being late summary judgment motions. The dissent's approach of judging a motion's merits without consideration of why it was untimely, can only lead to uncertainty and additional litigation as motions clearly barred by *Brill* become arguably permissible because one of the litigants perceives the motion to have merit and perceives no prejudice to the other side. But most importantly, the dissent's approach is in derogation of CPLR 3212(a).

The dissent expresses concern about an extra burden to the courts and litigants if we strictly enforce *Brill* "without taking into consideration the circumstances of the case." It reasons that because *Brill* emphasizes the advantages of summary judgment, with which we of course agree, those advantages outweigh a consistent application of the statute. However, bending the rule results in the practical elimination of the "good cause shown" aspect of CPLR 3212(a), and the clear intent of *Brill*.

Unlike the dissent, we do not find that a straightforward interpretation of the statute, or *Brill*, leads to "absurd and unintended consequences," especially as the Court of Appeals acknowledges in *Brill* that if the strictures of CPLR 3212(a) are applied "as written and intended," there may be situations where a meritorious summary judgment motion may be [*8]denied, "burdening the litigants and trial calendar with a case that in fact leaves nothing to try" as was the result in *Brill* (2 NY3d at 653). However, the solution, the Court of Appeals explains, is not for the courts to overlook or bend CPLR 3212(a) to fit the particular circumstances, but for "practitioners [to] move for summary judgment within the prescribed time period or offer a legitimate reason for the delay" (*id.*). In other words, *Brill* calls on the courts to lead by enforcing the words of the statute, rather than let attorney practice slowly eat away at the integrity of our judicial system. When the courts consistently "refus[e] to countenance" violation of statutory time frames, there will be fewer instances of untimely, improperly labeled motions, because "movants will develop a habit of compliance" with the statutory and court-ordered time frames, and late motions will include a good

cause reason for the delay (*id.*).

We do not hold that when a summary judgment motion is filed past the deadline, the court must automatically reject it. Rather, we enforce the law as written by the legislature, and as explained in *Brill*. It is up to the litigant to show the court why the rule should be flexible in the particular circumstances, or, in the words of the statute, that there is "good cause shown" for the delay. Indeed, in our view, the dissent wrongly interprets the statute by claiming that the "good cause shown" prong is not always a part of the CPLR 3212(a) analysis. There is nothing in the language of the statute to suggest this and it opens the door to abuse; once one movant has timely filed, any other party can argue that its motion, no matter when filed, should be addressed. The value of enforcing the terms of the statute as written is that attorneys will make sure their motions are timely filed or that there is a good reason for the lateness. Nonmovants will suffer no prejudice. The courts will no longer have to address the kinds of questions we address here. The result will be judicial economy, as well as lawyerly economy.

In the case at bar, HSS relies on [Lapin v Atlantic Realty Apts. Co., LLC \(48 AD3d 337 \[1st Dept 2008\]\)](#), for the principle that there is an exception to *Brill* for cases where a late motion or cross motion is essentially duplicative of a timely motion. However, the Court of Appeals intended no such exception, and to the extent this Court has created one, it did so, whether knowingly or unwittingly, by relying on precedents which predate *Brill* and which, if followed, will continue to perpetuate a culture of delay. This is clear by tracing *Lapin's* antecedents.

Lapin is one in a line of cases holding that an untimely cross motion may be considered on its merits when it and the timely motion address essentially the same issues. *Lapin* relied on [Altschuler v Gramatan Mgt., Inc. \(27 AD3d 304 \[1st Dept 2006\]\)](#), which held it proper to consider the untimely "cross motion," in particular because it was "largely based" on the same arguments raised in the timely motion for summary judgment, and the same findings would apply for both it and the timely motion. *Altschuler*, in turn, relied on a *pre-Brill* decision, *James v Jamie Towers Hous. Co.* (294 AD2d 268, 272 [1st Dept 2002], *affd* 99 NY2d 639 [2003]). In *James*, the defendant moved for summary judgment and the codefendant served its cross motion late but before the original motion had been decided; *James* held that the untimely cross motion should have been considered as the original motion was still pending and both could have been decided together.

James, in turn, relied on *Rosa v R.H. Macy Co.* (272 AD2d 87 [1st Dept 2000]), where Macy moved for summary judgment and two other defendants untimely cross-moved against it for indemnity; the motion and another timely cross motion were still pending, and we held that the

untimely cross motions should have been considered. In sum, an outdated, pre-*Brill* interpretation of the amended CPLR 3212(a) continued to hold sway in *Lapin*. [*9]

It is true that since *Brill* was decided, this Court has held, on many occasions, that an untimely *but correctly labeled* cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause (*see e.g. Palomo v 175th St. Realty Corp.*, 101 AD3d 579 [1st Dept 2012]; *Conklin v Triborough Bridge and Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281-282 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]). Some decisions also reason that because CPLR 3212(b) gives the court the power to search the record and grant summary judgment to any party without the necessity of a cross motion, the court may address an untimely cross motion at least as to the causes of action or issues that are the subject of the timely motion (*see Filannino*, 34 AD3d at 281, citing *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]). The problem in the case at bar is that HSS's motion, in addition to being untimely, is not a true cross motion.

A cross motion is "merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1; *see* CPLR 2215). A cross motion offers several advantages to the movant. There is a shorter minimum notice requirement, three or seven days, as compared with the minimum eight-day notice requirement in CPLR 2214(b). The cross movant may rely on the papers submitted with the main motion to support the relief sought. By making a cross motion, the party saves an extra day in court, and quite possibly the time and trouble of amassing fresh proof, if it happens that all or part of the evidentiary foundation on which the cross motion is based has already been produced for consideration (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1, 2215:2).

To the extent HSS's motion was directed at the complaint, as opposed to any cross claims by HJD, and was not made returnable the same day as the original motion, it was not a cross motion as defined in CPLR 2215. The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party (*Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]). While courts have deemed this mislabeling a "technical" defect which will be disregarded, particularly where the nonmovant does not object and it results in no prejudice to the nonmoving party (*see Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]), in this case the nature of

nonmovant plaintiff's opposition is that there was prejudice because to the extent the court deems HSS's motion a cross motion, the *Brill* rule is ignored.

Allowing movants to file untimely, mislabeled "cross motions" without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay. Moreover, the exception discussed in *Filannino* allowing the courts to consider proper but untimely cross motions, at least as to issues shared with the original motion, addresses the dissent's concern that a cross-moving party might be caused to file its motion late because it had insufficient time before the deadline occurred. Of course, it must be pointed out that the cross-movant would have good cause for its late motion in that situation, and the cross motion would be evaluated on its merits (*see e.g. Parker v LIJMC-Satellite Dialysis Facility*, 92 AD3d 740, 741-742 [2d Dept 2012] [failure to receive significant outstanding discovery before the deadline for making motion for summary judgment provides good cause for allowing a late-filed motion for summary judgment]; *see also Kase v H.E.E. Co.*, 95 AD3d 568, 560 [1st Dept 2012] [court's clerical error, [*10] explained through an affidavit of the paralegal, provided good cause for granting the motion seeking renewal of the motion for summary judgment]).

The argument that HSS's motion should be considered on the merits because it "sought relief on the same issues raised in HJD's timely motion," ignores the distinction in the CPLR between motions and cross motions and perpetuates an increasingly played end run around the Court of Appeals' bright line rule in *Brill*. Even if we were to find that the Court of Appeals intended for an exception to be carved out of *Brill* for incorrectly labeled "me too cross motions," that is, motions relying on the arguments and evidence of the originally filed motions, to the extent HSS's motion against a nonmoving party can be properly considered such a motion, the motion court correctly found that it is not merely a duplication of HJD's timely motion. HSS did not merely rely on the papers amassed by HJD, and as the motion court correctly noted, "[d]ifferences [in the factual record] necessarily exist because [plaintiff] was a patient at HSS for an extended time before he came to [HJD]" and he was "a patient [at HJD] from only February 2005 to September 2005."^[FN4] There are sufficient discrepancies in the record and in the experts' opinions that raise questions of fact regarding HSS's course of treatment beginning in 2004, if not earlier. In particular, the records suggest that HSS believed surgery was appropriate and helpful in as early as 2003, surgery is repeatedly mentioned in the records of 2004, and plaintiff believed that surgery had been scheduled. Plaintiff was a patient a much longer time at HSS than at HJD, surgery was positively discussed by the HSS defendants, and thus there are factual differences between the two defendants' treatments.

This is also reflected in their individual motion papers. The HSS "cross motion," which runs from page 842 to page 1002 of the record on appeal, is comprised of many items not contained in the HJD motion papers, not the least of which is additional medical records not submitted by HJD. In short, the HSS "cross motion" was more than a late "me too" motion and should not have been considered on its merits.

Nor is this court's recent holding in [Levinson v Mollah \(105 AD3d 644](#) [1st Dept 2013]) on point. In *Levinson* we held that there was no reason to address whether one of the "cross motions" was untimely because the moving defendants' timely motion had put plaintiff on notice that he needed to rebut the prima facie showing that he had not met the serious injury threshold; when the plaintiff in *Levinson* failed to do this, the complaint was correctly dismissed as to all codefendants. Here, however, because HSS and HJD have different treatment histories with plaintiff, HJD's timely motion did not clearly put plaintiff on notice of the need to gather evidence in opposition to the arguments ultimately proffered by the HSS defendants.

We are concerned that the respect for court orders and statutory mandates and the authoritative voice of the Court of Appeals are undermined each time an untimely motion is considered simply by labeling it a "cross motion" notwithstanding the absence of a reasonable explanation for its untimeliness. We therefore affirm the branch of the motion court's order which denied HSS summary judgment as untimely made without consideration of its merits.

Finally, we note the dissent's concern that allowing this litigation to proceed based on plaintiff's particular theory of negligence could result in placing surgeons in an impossible situation either of performing a procedure that is deemed ill-advised and being subject to any liability for aggravation of a condition, or declining and being subject to liability for refusing to [*11] assume the risk that the surgery entails. Our decision is not one on the merits of plaintiff's claim, and it is therefore premature to bemoan that we have opened a Pandora's box for surgeons. Rather, it will be for a trial court and a jury to hear plaintiff's case, and should plaintiff prevail, then, assuming a timely appeal is taken and perfected, and only then, will we have occasion to consider the merits of the claim against HSS.

Accordingly, the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2012, which, insofar as appealed from as limited by the briefs, granted the summary judgment motion of defendants Hospital for Special Surgery, Peter Frelinghuysen, and Federico Pablo Girardi (collectively HSS) only to the extent of dismissing plaintiff's claim of lack of informed consent, and otherwise denied the motion, should be affirmed, without costs; the

judgment of the same court and Justice, entered August 20, 2012, dismissing the complaint as against defendant New York University Medical Center Hospital for Joint Diseases, should be affirmed, without costs.

Opinion by Feinman, J. All concur except Tom, J.P. and Freedman, J. who dissent in part in an Opinion by Tom, J.P.

TOM, J.P. (dissenting in part)

I respectfully disagree with the majority's holding and would dismiss plaintiff's claim of medical malpractice against defendants Hospital for Special Surgery and its physicians (collectively, HSS).

Plaintiff had a history of severe cervical disc disease going back to 1989. In December 1994, plaintiff had surgery at HSS to address multilevel cervical stenosis with myelopathy and radiculopathy, a condition that existed for a period of time which caused plaintiff continuous weakness of his upper extremities including left shoulder. The surgery consisted of a decompressive laminoplasty at C3-C7, bone graft reconstruction at C3-C6, and halo vest application.

In March of 2002, plaintiff returned to HSS with complaints of pain in his lower back and left leg. He underwent a course of steroid injections. Plaintiff continued to complain of cervical and lumbar discomfort and worsening of the pre-existing weakness in his right upper extremity. On April 11, 2003, an MRI revealed a narrowing of the spinal canal and the neural foramen with disc protrusions. Plaintiff did not return to HSS for slightly over one year after this visit. In June 2004, plaintiff returned to HSS with continuing complaints of progressive right shoulder weakness, increased neck pain and decreased balance.

On October 1, 2004, plaintiff saw defendant Dr. Peter Frelinghuysen, an orthopaedic surgeon at HSS, who noted that he was "very concerned" that there was only a small chance that surgery would improve plaintiff's condition. Dr. Frelinghuysen testified that, in or about December 2004, after he reviewed plaintiff's film with Dr. Frederico Girardi, another HSS orthopaedic surgeon, he decided that surgery was not an option for treating plaintiff because it would expose plaintiff to myriad risks, and not improve his condition. It was also Dr. Girardi's opinion that, given plaintiff's extensive spinal disease and the prospect of low improvement, the risk of surgery including quadriplegia or even death, was clearly not warranted. Moreover, "because of a phenomenon called rebound myelopathy, an operation . . . with the kind of [*12] degeneration of the spinal cord

[plaintiff] had, risk[ed] creating symptoms in the hands or feet."

In February 2005, plaintiff began treatment at defendant New York University Medical Center Hospital for Joint Disease (HJD). Dr. Anthony Petrizzo of HJD examined plaintiff on February 11, 2005, finding severe upper extremity atrophy, with deltoid strength at 1/5, and 2/5 strength to the biceps. Plaintiff's MRI was reviewed and it was determined that surgery was not indicated. Dr. Petrizzo testified that the overwhelming majority of patients with cervical myelopathy do not regain function after decompression surgery. Since surgery carried serious risks and would likely not benefit the patient, conservative management with physical therapy and pain management would be more appropriate. Plaintiff was referred for pain management and to HJD's neurology and hand clinics, with the notation that "no further surgery for the cervical spine [was] indicated."

In July, 2005, plaintiff saw orthopaedic surgeon Dr. Andrew Hecht of Mt. Sinai where plaintiff later underwent a two stage revision cervical laminectomy with fusion. After surgery, Dr. Hecht observed that he did not "see a substantial neurologic improvement on [his] objective testing, but the patient does feel subjectively like he is improving." In October, 2006, plaintiff returned to HJD again complaining of continued lack of strength in upper extremity and numbness and pain in the right arm and hand. Electronic tests revealed that plaintiff's cervical condition was significantly the same as in 2005 which supported Dr. Hecht's post surgical findings.

Plaintiff commenced this action against HSS and HJD claiming, in essence, that defendant hospitals were negligent in declining to timely perform the surgery he sought, particularly, that their delay caused him to sustain injury that otherwise might have been avoided.

The motion court granted defendant HJD's motion for summary judgment and denied HSS's motion for the same relief. As to HSS, the court noted that the motion was clearly untimely, without explanation. However, disregarding the untimeliness of HSS's motion, the court held that issues of fact precluded HSS from being granted summary judgment. The court noted that Dr. Girardi at HSS "explained clearly that he believed that the cord was so damaged that the surgery would not have improved anything" and Dr. Hecht, who performed the surgery, acknowledged that plaintiff did not have any objective improvement. Nevertheless, the court observed that plaintiff's expert Dr. Michael J. Murphy clearly opined that the surgery was necessary, not so much to improve plaintiff's condition, but to prevent it from worsening. Thus, there were issues of fact raised "as to the advisability of surgery ... sufficient to defeat the motion for summary judgment on the merits."

The majority concludes that plaintiff failed to demonstrate any injury sustained as a result of the delay in surgery and upholds the dismissal of the complaint as against HJD on this ground — a result in which I wholly concur. However, for reasons bereft of any sound basis in law or judicial policy, it refuses, primarily on procedural grounds, to apply the same reasoning to dismiss the complaint as against HSS.

On the merits, discounting the supporting opinion of plaintiff's expert as conclusory, the majority finds that the evidence demonstrates that plaintiff suffered no injury as a result of HJD's February 2005 determination that surgical intervention was unwarranted. Logically, if plaintiff did not sustain injury as a result of HJD's February 2005 decision, it follows that he did not sustain injury as a result of the similar December 2004 determination, approximately 2 months earlier, by HSS physicians to forego surgery, especially in light of plaintiff's long history of [*13]cervical disc disease.

While defendants have not raised the question of whether the complaint is actionable, the issue should nevertheless be decided preliminarily. As this Court recently noted in [Williams v New York City Tr. Auth.](#) (108 AD3d 403, 404 [1st Dept 2013])

"It is well settled that the duty owed by one member of society to another is a legal issue for the courts' (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). Only after the extent of a duty has been established as a matter of law may a jury resolve — as a question of fact — whether a particular defendant has breached that duty with respect to a particular plaintiff" (citing *Kimmell v Schaefer*, 89 NY2d 257, 264 [1996])."

Before this matter may proceed to trial, it will be necessary to decide, as a matter of law, whether a doctor has a duty to perform a surgical procedure requested by a patient despite, in the professional opinion of the doctor, the high risk and absence of benefit that such surgery entails.

This is an aberrant medical malpractice action brought against two hospitals for declining to provide additional surgical treatment to plaintiff because, in their estimation, further surgical intervention presented an unjustifiable risk of quadriplegia or death and offered little to no prospect of relieving his symptomatology. Plaintiff subsequently underwent the subject procedure at nonparty Mt. Sinai Hospital in December 2005, with no objective sign of improvement in physical function after over 10 months, according to his surgeon's report and tests taken at HJD's neurology clinic in October, 2006. Plaintiff cites no precedent for imposing liability under these circumstances, and no comparable New York case has been located. To lend legal support to plaintiff's theory would place the surgeon in an impossible situation — perform a procedure that is

deemed to be ill-advised, taking into consideration the individual physician's experience and the available hospital facilities, and be subject to liability for any aggravation of the patient's condition or decline to operate and face liability for refusing to assume the substantial risk that surgery entails. The course adopted by plaintiff of locating a medical team possessing the requisite skills at a hospital equipped with the appropriate facilities represents a seemingly optimal outcome which, as a matter of policy, should not be compromised by the threat of litigation.

The majority sustained the action as against HSS as a result of the hospital's submission of its summary judgment motion after the date set by the trial court pursuant to CPLR 3212(a). The majority concludes that summary disposition is precluded by the Court of Appeals' decision in [Brill v City of New York \(2 NY3d 648 \[2004\]\)](#), without reference to the judicial policy espoused in the opinion. Because of the particular procedural posture of this matter, the order directing that it proceed to trial is ultimately futile, but application of the majority's rationale will unnecessarily burden both courts and litigants.

As to the procedural issue raised, the majority has devised a solution to a problem recognized neither by the Legislature nor the Court of Appeals. We are in agreement that this action was properly dismissed as against HJD; however, a procedural bar is perceived by the majority to prevent this Court from summarily disposing of the action as against HSS. Particularly, the majority holds that the summary judgment motion interposed by HSS was untimely and beyond the motion court's power to entertain pursuant to *Brill*. Under the circumstances presented by this matter, this view constitutes an unnecessarily rigid application of [*14]CPLR 3212(a), contravening the sound policy considerations underlying the decision and the intent expressed by the Legislature in amending the statute.

The practice sought to be deterred in *Brill* is delay occasioned by the submission of a summary judgment motion on the eve of trial, thereby staying proceedings to the prejudice of litigants who have applied their resources in preparation for trial of the issues (*Brill*, 2 NY3d at 651). Here, at the time HSS submitted its untimely motion for summary judgment, the proceedings were already stayed by the concededly timely summary judgment motion brought by HJD. Thus, the primary objective of *Brill* to discourage dilatory conduct is not implicated (*see Fofana v 41 W. 34th St., LLC, 71 AD3d 445*, 448 [1st Dept 2010], *lv denied* 14 NY3d 713 [2010]). Granted, the HSS motion is not a cross motion, as denominated, and as such it is untimely (CPLR 2215). But to reject the motion on that ground, under the facts herein, ignores the adverse consequences of imposing an overly restrictive rule, specifically, consequences that are especially adverse to the courts.

The motion by HJD was submitted on November 11, 2011, three days before the deadline of November 14, 2011 imposed by the motion court under CPLR 3212(a). The motion by HSS was submitted shortly after the end of the holiday season on January 10, 2012, and the respective motions were finally decided by the motion court on July 16, 2012, over seven months later. Neither the motion court nor the majority identifies any prejudice that was incurred by any party due to HSS's motion that might warrant requiring HSS to forfeit summary determination. Particularly absent from the discourse is any consideration of the significant burden to be imposed on the court in presiding over a trial against HSS as opposed to proceeding summarily by way of motion.

Brill emphasizes that summary judgment is advantageous to the parties by "avoiding needless litigation cost and delay" and constitutes "a great benefit both to the parties and to the overburdened New York State trial courts" since it "may resolve the entire case" (*Brill*, 2 NY3d at 651). Thus, *Brill* cannot be said to reflect an intent to abandon the conspicuous advantages of summary judgment for the sake of procedural formalism. In that regard, the majority's disposition is antithetical, directing a party to try a case under circumstances to which *Brill* is inapposite because trial has been delayed not by an eleventh-hour summary judgment motion, but by one that is altogether timely. The majority thereby dispenses with the salutary aspects of summary disposition acknowledged in *Brill* for no apparent purpose.

An overly expansive application of *Brill* invites unintended consequences following from the Legislature's 1996 amendment of CPLR 3212(a). Rote application of the summary judgment provision, which permits the court to "set a date after which no such motion may be made," leads to the result advocated by the majority — strict rejection of the motion as untimely without taking into consideration the circumstances of the case, relegating the moving party to litigating its position at trial. However, it is a well-established rule of statutory construction that a court should avoid any interpretation that leads to absurd and unintended consequences (*see Matter of Friedman-Kien v City of New York*, 92 AD2d 827, 828-829 [1983], *affd* 61 NY2d 923 [1984], citing *Matter of Chatlos v McGoldrick*, 302 NY 380, 387-388 [1951]; McKinney's Cons Laws of NY, Book 1, Statutes, §§ 92, 145, 147). If it was indeed the Legislature's intent to preclude dilatory conduct, not to deprive a court of the ability to resolve an entire case summarily, then it falls within the observation of the United States Supreme Court in *Holy Trinity Church v United States* (143 US 457, 472 [1892]) that "however broad the language of the statute may be, the act, [*15] although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

The undesirable practice sought to be prevented by revision of CPLR 3212(a) is the waste of resources expended in preparation for trial as the result of a belated summary judgment motion staying the proceedings. In addressing this problem, the Court of Appeals noted that "the Legislature struck a balance, setting an outside limit on the time for filing summary judgment motions, but allowing the courts latitude to set an alternative limit or to consider untimely motions to accommodate genuine need" (*Brill*, 2 NY3d at 651). Significantly, *Brill* deals with the straightforward situation in which an initial summary judgment motion is filed well after a matter has been certified as ready for trial "in violation of legislative mandate" (*id.* at 653). In that context, where "[t]he violation is clear," the "good cause" required to obtain relief from the statutory time limit is "a satisfactory explanation for the untimeliness" in filing the motion (*id.* at 652).

Likewise, the legislative memorandum in support of the amendment to CPLR 3212(a) is concerned with the disruption to court calendars by a motion interposed on the eve of trial (Sponsor's Mem, L. 1996, ch 492 reprinted in 1996 McKinney's Session Laws of NY at 2432-2433). Furthermore, both the memorandum and *Brill* identify an adversarial party's lack of adequate time to prepare a response to the motion as the problem to be addressed. Here, HJD's submission of its moving papers a mere three days before the final date set by the trial court contravenes the spirit of *Brill* by depriving HSS of an adequate opportunity to timely file its own application for similar relief because, at such point in time, HSS is presumed to have been devoting its resources to preparation for trial (*Brill*, 2 NY2d at 651). Unfairness to one party is not remedied by applying the statute to the detriment of another. [\[EN1\]](#)

There is no suggestion that the narrow interpretation imposed upon the term "good cause" in *Brill* is meant to apply in circumstances, such as here, where a timely motion is followed by a corresponding motion that is not. As the Court of Appeals has admonished, "No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association" (*Matter of Staber v Fidler*, 65 NY2d 529, 535 [1985], quoting *Dougherty v Equitable Life Assur. Socy.*, 266 NY 71, 88 [1934]). Unlike *Brill*, the circumstances presented by the instant matter do not furnish a compelling reason to depart from prior authority affording a court discretion to entertain a marginally late filing where the party's application has merit and no prejudice has been demonstrated by an adversary (see *e.g. Burns v Gonzalez*, 307 AD2d 863, 864-865 [1st Dept 2003]; *Garrison v City of New York*, 300 AD2d 14, 15 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]). To the contrary, the compelling interest is judicial economy, which militates in favor of summary disposition of even an untimely motion made in response to one timely filed (see *Burns*, 307 AD2d at 864), [\[*16\]](#) especially if that "summary

judgment motion may resolve the entire case" (*Brill*, 2 NY3d at 651). Given the budgetary constraints presently confronted by the court system, this is hardly a fitting time to require trial of a matter devoid of apparent merit and otherwise amenable to disposition on motion, and the "genuine need" to be accommodated is that of the court to proceed expeditiously (*id.*).

Contrary to the majority's assertion, I do not advocate limiting application "of *Brill* to those actions where a party files a motion for summary judgment long after the deadline for dispositive motions and the matter is on the trial calendar." It is a distorted analysis of my position. I simply note that *Brill* is inapposite to the facts of this matter and that both the decision and the statute it construes apply only to a party whose motion has the effect of staying and delaying trial. Since trial of this matter was already stayed by HJD's timely motion for summary judgment at the time HSS submitted its marginally late summary judgment motion which raises the same dispositive issue as the timely motion, refusing to entertain the subsequent motion does nothing to avoid the delay of trial and waste of judicial resources, the primary purposes of *Brill*, by requiring trial of a virtually identical lawsuit ripe for summary disposition.

Strict and rigid application of *Brill* is even less understandable given the similarity of the grounds advanced by the respective hospitals in support of their summary judgment motions and the ground upon which disposition rests. A late motion filing is properly entertained when it raises nearly identical issues to one timely made ([see *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 337 \[1st Dept 2008\]](#); [see *Alexander v Gordon*, 95 AD3d 1245, 1246-1247 \[2d Dept 2012\]](#); [see *Grande v Peteroy*, 39 AD3d 590, 591-592 \[2d Dept 2007\]](#)). Here, the modestly late motion submitted by HSS sought relief on the same issues raised in HJD's timely motion. Under the circumstances presented, the motion court was within its discretion to review HSS's motion on the merits ([see *Alexander*, 95 AD3d at 1247](#); [see *Grande*, 39 AD3d at 591-529](#)). Both seek dismissal of the complaint on the identical ground — that it was not a departure from good and accepted medical practice to forego surgery in favor of a conservative treatment plan, i.e., based on the severity of plaintiff's existing spinal disease and the low prospect of improving his condition, the decision not to subject plaintiff to the risk of quadriplegia or death was a sound medical decision. In support of its motion, HSS even relies on the same affidavit by Dr. Olsewski submitted in support of HJD's motion.

Dr. Olsewski opined that based upon plaintiff's medical, diagnostic and surgical history, further cervical surgery would have been an "unjustifiable and extraordinarily risky and aggressive treatment option." No surgery would have been able to reverse plaintiff's neurological deficits, "which were significant by the time he presented at HJD, and had already existed for many years."

According to Dr. Olsewski, the best case scenario "was to stop further progression of the cervical myelopathy"; the worst could have resulted in permanent paralysis or death, risks "well beyond the standard. . . for cervical spine cases."

As to the delay causing any injury, the doctor stated that there was no identifiable injury caused by any alleged delay during the four month period between when plaintiff was first seen at HJD and when he first went to Mt. Sinai. The doctor also noted that plaintiff did not objectively regain any strength or function after having the surgery at Mt. Sinai, and the only change in his condition was numbness in his right arm and hand, likely due to the development of carpal tunnel syndrome. This was supported by Dr. Hecht's finding that there was no substantial neurological improvement in plaintiff's condition after his surgery at Mt. Sinai. [*17]

Both HSS and HJD established their prima facie entitlement to summary judgment, proffering evidence that plaintiff did not sustain any injury resulting from the respective institutions' independent decisions to recommend against further surgery. In response, plaintiff's expert merely averred that if the subject cervical revision surgery had been performed earlier, plaintiff's ultimate outcome would have been substantially improved and he would not have sustained such a severe degree of weakness and loss of function of his right upper extremity. However, the expert failed to support his assertion with an analysis of the multiple diagnostic tests and physical examinations conducted over the years. Dr. Murphy conclusively states that plaintiff's condition progressively deteriorated during the period of treatment at defendant hospitals, yet he points to no objective evidence supporting this statement, despite the fact that the record contains numerous diagnostic tests over that period of time. Thus, his opinion is an ambiguous statement of causation, amounting to bare conjecture, which is insufficient to defeat a motion for summary judgment (*see Foster-Sturup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]; *Callistro v Bebbington*, 94 AD3d 408, 410-411 [1st Dept 2012], *affd* 20 NY3d 945 [2012]).

The majority suggests that an independent basis for finding HSS to have been negligent might be found in the expert's opinion that "surgery for [plaintiff] was indicated as early as June 2003." With the advantage of hindsight, the doctor offers that "[w]hile further diagnostic studies were not inappropriate, they did not contribute any substantial information which would alter the indicated treatment." This statement concedes that HSS properly conducted further studies; that the results failed to afford any further diagnostic insight that was not predictable, and neither the tests themselves nor the time expended in conducting them are rendered improper as a result of that outcome. Moreover, while there is mention of a surgical option in the 2004 hospital records, the

evidence does not show that evaluation of the attendant risks and benefits was undertaken until October 2004, culminating in the December 2004 decision that the associated risk was too great. Likewise, there is no indication that plaintiff was prepared to undergo the procedure prior to October 2004, when he first consulted with Dr. Freylinghuysen. Plaintiff's expert does not even address the question of whether, taking plaintiff's obviously compromised physical condition into account, it was a departure from good and accepted medical practice to pursue a conservative course of treatment rather than assume the risk of surgical intervention. Again, in hindsight, he formulates a conclusory opinion that the more aggressive approach to treatment was the proper one; the competing medical factors to be considered in deciding whether to perform the surgery are simply not addressed. Finally, the majority adopts the trial court's conclusion that the expert's opinion is imprecise with respect to the nature of the alleged deterioration in plaintiff's condition and the extent to which each hospital bears responsibility. The plaintiff's expert's opinion is equally conclusory whether it is applied to the asserted negligence of either [*18] facility, and if it does not suffice to sustain the action as against HJD, it does not suffice to sustain the action as against HSS.

Accordingly, the order should be modified to the extent of granting defendant HSS's motion for summary judgment.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2012, affirmed, without costs. Judgment, same court and Justice, entered August 20, 2012, affirmed, without costs.

Opinion by Feinman, J. All concur except Tom, J.P. and Freedman, J. who dissent in part in an Opinion by Tom, J.P.

Tom, J.P., Acosta, Saxe, Freedman, Feinman, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Footnotes

Footnote 1: Girardi testified that the notation that he and Frelinghuysen had recommended any particular surgery was "incorrect."

Footnote 2: Supreme Court's extension of the time to file dispositive motions had given the parties

a total of 82 days after the filing of the note of issue on August 24, 2011. As a point of reference, the statutory 120-day maximum expired on December 22, 2011.

Footnote 3: In [*Cadichon v Facelle* \(18 NY3d 230](#) [2011]), the Court reversed a "ministerial" dismissal based on the failure to timely file the note of issue because the trial court did not provide notice to the parties or issue a formal order; the decision notes that the record showed that neither set of parties acted "with expediency in moving the case forward," and that deadlines must not be disregarded (*id.* at 236, citing *Andrea, Miceli, Brill, and Kihl*).

Footnote 4: The dissent overlooks the very different lengths of treatment offered to plaintiff by HSS and HJD.

Footnote 1: To reiterate, it was the timely motion by HJD that delayed trial, not the motion submitted by HSS while HJD's motion was pending, a situation addressed neither by the statute nor *Brill*. To the extent that good cause is even material under these circumstances, it is the sheer impossibility of preparing a dispositive motion during the remaining time established by the court for its submission.