Superior Court of New Jersey

Appellate Division

Docket No. A-000307-23T4

THE ESTATE OF MACKENZIE JENNINGS by its Administratrix MICHELLE JENNINGS, *Plaintiff-Appellant,* vs. DIANA VITALE, M.D., PETER BALAZS, M.D., ASHLEY PAPAPETROU, D.O., VITALE WOMEN'S HEALTH OBSTETRICS AND GYNECOLOGY, L.L.C., ST. JOSEPH'S REGIONAL MEDICAL CENTER, "JOHN/JANE DOES 1-10" (Fictitious Names) and/or "ABC CORPORATIONS 1-10" (Fictitious Names), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO. PAS-L-812-18 Sat Below: HON. VICKI A. CITRINO, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff/Appellant The Estate of Mackenzie Jennings, by its administratrix Michelle Jennings, submits this brief in support of her appeal from the Law Division's orders dated July 17, 2023 and September 29, 2023 (the "Orders on Appeal"). This case arises from the defendants' medical malpractice in failing to deliver the infant Mackenzie Jennings through a timely emergency c-section on the night in question. As a result, the baby Mackenzie was born with severe brain injuries, eventually leading to her death at age four.

The Orders on Appeal granted reconsideration from orders from 2020 denying applications for summary judgment. Back in 2020, defendants Diane Vitale, M.D. ("Dr. Vitale") and Vitale Women's Health Obstetrics and Gynecology (collectively the "Vitale Health Defendants"); and (ii) defendants St. Joseph's Regional Medical Center ("St. Joseph's Hospital") and Dr. Ashley Papapetrou, D.O. ("Dr. Papapetrou") (collectively the "St. Joseph's Defendants") originally filed motions for summary judgment.

On the record of November 5, 2020, the Case Management Judge decided a number of motions, in each instance demonstrating intimate knowledge of the case. When it came to the motions for summary judgment, the judge recited a number of reasons, from his review of the record and the briefs, that summary judgment could not possibly be granted. When denying the motions, the Case

Management Judge, expressed his incredulity that the defendants brought the motions in the first place, observing that "[i]f I were to grant summary judgment, two years from now you'd be back here again" because "the Appellate Division is going to look at it and say, you mean, this trial judge didn't think there was a genuine issue of material fact…"

Ordinarily the case would have then proceeded to trial. But then the COVID delay persisted, the Case Management Judge retired and, seizing the opportunity, the defendants moved for "reconsideration" *nearly three years later* before another judge (the "New Motion Judge"). Those motions for reconsideration did not really comply with applicable procedural rules and should have been denied on procedural grounds alone. Moreover, the opportunistic use of Rule 4:42-2(b) in these circumstances constituted improper use of rule. If the defendants had legitimate grounds to seek reconsideration "in the interest of justice" under that rule, they would have done so far more promptly before the Case Management Judge, as actually contemplated by the rule. The invocation of the rule to seek a "do over" once the original judge has retired, should not be permitted.

Even so, the New Motion Judge did not grant relief based on the arguments actually raised by the defendants. By way of an order and decision entered on July 17, 2023, the New Motion Judge raised and then decided an

issue neither briefed by the parties nor even raised by the court at oral argument. The New Motion Judge did so without argument or further submissions of counsel. Plaintiff moved for reconsideration on the basis that the court had *sua sponte* raised and decided an issue without the benefit of briefing or oral argument, and had reached an erroneous conclusion.

The New Motion Judge retreated from the most critical aspect of its July 17, 2023 decision, writing that "the Court strikes it comments" concerning the "staffing issue" on which the prior decision had been predicated "[s]ince this was not an issue raised in the original motion." But the court did so only after identifying a whole new series of purported reasons why summary judgment should be granted. Quite remarkably, after recognizing the infirmity of its July 17, 2023 decision having been decided on issues neither raised nor argued, the New Motion Judge nonetheless did it again in its September 29, 2023 decision.

PROCEDURAL HISTORY[1]

As established by the Procedural History below, the sole legal argument pursued by defendants, in support of their 2020 and 2023 motions, was that

[1] This case arrives at this Court with a troubling procedural history. In order to demonstrate what legal arguments were actually made, and when they were made; and further to demonstrate that the New Motion Judge raised and decided issues that were not actually pursued, Plaintiff must include the legal briefs submitted by the parties during the motion practice of 2020 and 2023. See R. 2:6-1(a)(2).

Plaintiff could not, as a matter of law, establish proximate causation. [See Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442].

1. The Initial Pleadings

Plaintiff Mackenzie Jennings, by her parents and natural guardians Michelle Jennings and Charles Jennings, filed her complaint on March 9, 2018 [Pa60-71) and an Affidavit of Merit on that same day. [Pa72-75]. The complaint originally named as defendants Dr. Vitale; her practice, Vitale Health; Peter Balazs, M.D.[2]; Dr. Papapetrou; St. Joseph's Hospital; and various John Does. No application was subsequently made to add "John Doe" defendants. Dr. Balazs and St. Joseph's Hospital filed an Answer with Crossclaims on March 28, 2018. [Pa82-87]. Dr. Vitale and Vitale Health filed an Answer with Crossclaims on April 10, 2018. [Pa89-97].

On November 17, 2018, plaintiff/infant Mackenzie Jennings died at the age of four. [Pa106; Pa111]. On April 17, 2019, Plaintiff filed a motion to amend the caption and the complaint in order (i) to identify the Plaintiff as The Estate of Mackenzie Jennings, by its administratrix Michelle Jennings, and (ii) to assert additional claims in wrongful death and survival. [Pa105-135]. That motion was

[2] Dr. Balazs was the attending physician that night. When discovery later demonstrated that he called for Mackenzie to be delivered by a c-section the moment he was first advised of the deceleration on the fetal strip readings, and that he completed that procedure within fifteen minutes, Plaintiff voluntarily agreed to stipulate to his dismissal from the case.

granted on June 13, 2019. [Pa136-37]. Plaintiff's first Amended Complaint was filed on June 27, 2019. [Pa138-149]. Defendants Dr. Papapetrou, Dr. Balazs, and St. Joseph's Hospital filed an Answer with Crossclaims on July 3, 2019. [Pa150-157]. Defendants Dr. Vitale and Vitale Health filed an Answer with Crossclaims on July 11, 2019. [Pa170-176].

On December 12, 2019, Dr. Balazs filed a motion for partial summary judgment. [Pa177-183]. Plaintiff filed opposition to that motion on the basis of prematurity, as the deadline for expert reports had not yet passed. [Pa190-191]. That motion was denied at that time; however, after the lapse of the deadline, Plaintiff consented to dismissal when it became clear that the Vitale Defendants would not be pursuing crossclaims against Dr. Balazs. [Pa197-198].

2. The Motions For Summary Judgment

On August 17, 2020, defendants Dr. Papapetrou and St. Joseph's Hospital (vicariously) filed a motion for summary judgment. [Pa199-257]. Their brief consisted of two brief points arguing *only* that Plaintiff could not, as a matter of law, establish proximate causation. Their first brief point was as follows:

> DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE UNDISPUTED MATERIAL FACTS CONFIRM PLAINTIFF CANNOT PRESENT A *PRIMA FACIE* CASE OF MALPRACTICE

[Pa210]. Under this brief point, the movants argued nothing but the *Brill* standard for summary judgment, the point of which was "affording Plaintiffs

[sic] all favorable inferences, Plaintiffs simply cannot satisfy the necessary element of proximate causation" and this was "as discussed more fully in Point II, *infra*." [Pa211]. Their second brief point was addressed to proximate causation alone:

> PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE UPON WHICH A JURY COULD FIND PROXIMATE CAUSE

[Pa212]. This brief point argued "even accepting" Plaintiff's expert testimony, Plaintiff still could not show that the delay in delivery was a proximate cause of the injuries, because they asserted the outcome would have been the same if the baby had been timely delivered, based on Dr. Thompson's testimony. [Pa212-213].[3]

On August 27, 2019, Dr. Vitale and Vitale Health filed what they mislabeled a "cross motion" for summary judgment. [Pa258-355]. They likewise argued that Plaintiff could not, as a matter of law, prove proximate causation. Their brief consisted of two headings, as follows:

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[3] These counter-factual averments were nothing but representations, for which no citations to the record were made [*see* Pa212-213] and which, in fact, were contradicted by the actual record. Even so, the movants advised the Court that Plaintiff's version of the facts should be accepted and that summary judgment was appropriate "even accepting" Plaintiff's version of the facts – or what they argumentatively called "speculation." [Pa213].

> THIS MATTER IS RIPE FOR SUMMARY JUDGMENT AS THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT

[Pa266]. This argument was a recitation of the *Brill* standard, asserting again a lack of proof of proximate causation. [Pa266-267]. Their second point heading argued:

> PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE UPON WHICH A JURY COULD FIND PROXIMATE CAUSE

[Pa267]. Under this point, these movants similarly averred that Plaintiff's facts were lacking in credibility and presented their counter-facts[4], but argued that "even accepting" Plaintiff's version of the facts, Plaintiff could not establish proximate causation because the outcome would have allegedly been the same even if the baby had been timely delivered, based on Dr. Thompson's testimony. [Pa268].

Plaintiff filed opposition [Pa356-390] which argued that "[t]he Motions are based, purely and simply, on a mischaracterization of the expert report and expert testimony of Plaintiff's causation expert, Dr. Stephen Thompson, M.D."

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[4] Likewise, these counter-factual averments were nothing but representations, for which no citations to the record were made [*see* Pa268-269] and which, in fact, were contradicted by the actual record. Even so, the movants advised the Court that Plaintiff's version of the facts should be accepted and that summary judgment was appropriate "even accepting" Plaintiff's version of the facts – or what they argumentatively called "speculation." [Pa268].

On November 5, 2020, the Honorable Joseph S. Conte, J.S.C., held hearings on various motions before the Court that day. He noted, given the record: "If I were to grant summary judgment, two years from now you'd be back here again" because it was clear that "the Appellate Division is going to look at it and say, you mean, this trial judge didn't think there was a genuine issue of material fact." [1T51:2-6]. The motions were denied by way of an Order dated November 5, 2020. [Pa21-24].

3. The Motions For Reconsideration

After the original motion judge retired, however, the defendants decided to re-file their motions nearly three years after the motions were originally denied. [Pa391-446].

(a) The reconsideration motion of St. Joseph's Hospital/Dr. Papapetrou

(b)

On May 18, 2023, St. Joseph's Hospital and Dr. Papapetrou filed their motion for "reconsideration" with a brief that asserted three legal headings. [Pa391-430]. The first brief point asserted:

> DENIAL OF A MOTION FOR SUMMARY JUDGMENT DOES NOT PRECLUDE THE FILING OF THIS SECOND MOTION FOR SUMMARY JUDGMENT

[Pa403]. Under this heading, the movants argued that they could bring a motion for reconsideration under Rule 4:42 because the prior orders were interlocutory. The second brief point asserted:

> DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE UNDISPUTED MATERIAL FACTS CONFIRM PLAINTIFF CANNOT PRESENT A *PRIMA FACIE* CASE OF MALPRACTICE

[Pa406]. Under this brief point, the movants argued nothing but the *Brill* standard for summary judgment, the point of which was "affording Plaintiffs [sic] all favorable inferences, Plaintiffs simply cannot satisfy the necessary element of proximate causation" and this was "as discussed more fully in Point II, *infra*." [Pa407]. The third brief point asserted:

> PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE UPON WHICH A JURY COULD FIND PROXIMATE CAUSE

[Pa409-410]. This brief point argued "even accepting" Plaintiff's expert testimony, Plaintiff still could not show that the delay in delivery was a proximate cause of the injuries, because they asserted the outcome would have been the same if the baby had been timely delivered, based on Dr. Thompson's testimony.

(c) The "cross motion for summary judgment" by Dr. Vitale and Vitale Health

On May 25, 2023, Dr. Vitale and Vitale Health filed what they again mislabeled a "cross motion" for summary judgment. [Pa430-446]. They likewise argued that Plaintiff could not, as a matter of law, prove proximate causation. Their brief consisted of two headings, as follows:

> THIS MATTER IS RIPE FOR SUMMARY JUDGMENT AS THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT

[Pa438]. This argument was a recitation of the *Brill* standard, asserting again a lack of proof of proximate causation. [Pa438-439]. Their second point heading argued:

> PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE UPON WHICH A JURY COULD FIND PROXIMATE CAUSE

[Pa440]. Under this point, these movants similarly averred that Plaintiff's facts were lacking in credibility and presented their counter-facts[5], but argued that "even accepting" Plaintiff's version of the facts, Plaintiff could not establish proximate causation because the outcome would have allegedly been the same even if the baby had been timely delivered, based on Dr. Thompson's testimony. [Pa440-442].

As this Court can see, nowhere in these briefs did these movants analyze the prior decision in accordance with the provisions of Rule 4:42-2(b); nor did the movants even file a copy of the transcript of the prior decision for the new

[5] Likewise, these counter-factual averments were nothing but representations, for which no citations to the record were made [*see* Pa268-269] and which, in fact, were contradicted by the actual record. Even so, the movants advised the Court that Plaintiff's version of the facts should be accepted and that summary judgment was appropriate "even accepting" Plaintiff's version of the facts – or what they argumentatively called "speculation." [Pa268].

motion judge's review. [Pa391-430]. Moreover, as this Court can see, the briefs filed by the movants were nearly identical to the briefs initially filed in support of the 2020 motions. Since the original judge had retired, the defendants essentially arrogated themselves a total "do over" without making any effort to assess the reasoning of the original case management judge within the "interest of justice" standard of Rule 4:42-2(b).

4. Oral Argument of July 14, 2023

At the oral argument of July 14, 2023, the new motion judge became fixated with an issue not raised by any of the motions: what expert proof did Plaintiff have to contradict the expert report of a Dr. Stavis, who had claimed in his report that the cause of Mackenzie's injuries was a maternal hemorrhage. [3T19:6o21:23]. Even though this issue had not been raised in the papers and, in fact, the movants had conceded that Plaintiff's expert, Dr. Thompson, had offered opinions sufficient to create a factual issue that Mackenzie's injuries had not been the result of the hemorrhage. [Pa213; 268-269].

5. The Post-Argument Submission

Within the short period of time between the end of the oral argument on the afternoon of July 14, 2023 and the close of business, Plaintiff filed a detailed four-page, single-spaced letter brief, the point of which was to demonstrate that the defendants had properly conceded the issue upon which the court had seemed

eager to rule at oral argument. [Pa502-505]. Among other points, Plaintiff argued that the inclusion of Dr. Stavis' report as an attachment to a reply brief was improper; and that it would be improper for the court to decide the case on an issue that had been, at best, raised by way of a reply. [Pa502-505].

6. The July 17, 2023 Decision and Order

The court granted both motions by way of a decision and order dated July 17, 2023. [Pa13-20]. Even though the court declined to rule on the newly asserted issue discussed at oral argument – saying it would be improper to do so -- the court nonetheless went ahead and granted summary judgment for *another* reason that had never been raised or briefed before. [Pa13-20].

7. Plaintiff's Motion For Relief From a Final Order

On August 7, 2023, Plaintiff filed a motion for relief from a final order pursuant to Rule 4:49-2, seeking reversal of the July 14, 2023 orders. [Pa506-512]. That motion was denied by way of the new motion judge's September 29, 2023 decision and order. [Pa1-12].

STATEMENT OF FACT

Below, Plaintiff will set forth the essential factual narrative critical to the affirmative case for medical malpractice. A detailed recitation of the facts, along with specific citations to the record, must by necessity be included within Plaintiff's response to the "factual" postulations by the New Motion Judge set

forth in the September 29 and July 17, 2023 decisions. Therefore, these recitations will be set forth in the Argument section of this brief, in a point-by-point fashion. Accordingly, for the Court's convenience, this factual statement has been edited and shortened to avoid redundancy. Plaintiff respectfully requests, however, that the factual statements included within this brief be deemed incorporated within this Statement of Facts.

Dr. Papapetrou was a resident monitoring the pregnancy of Michelle Jennings, who had experienced a significant maternal hemorrhage that day previously. [Pa622-623; Pa231, 56:1 to 57:8]. While engaged in this task, Dr. Papapetrou observed an alarming deceleration on a fetal monitoring strip at 9:48 p.m., which among other things indicated that the baby Mackenzie, within the womb, was being deprived of access to oxygen. [Pa622-623; Pa231, 56:1 to 57:8]. Dr. Papapetrou contacted Dr. Vitale, Michelle's doctor, to advise her of the emergency. Dr. Vitale was at home at the time but told Dr. Papapetrou that she was on her way to the hospital. [Pa622-623; Pa231, 56:1 to 57:8].

Neither Dr. Papapetrou nor Dr. Vitale called for an emergency C-section at that time. Neither even advised the attending physician of the emergency. In fact, neither ever called for an emergency C-section. [Pa618-624]. As per the applicable standard of care established by Plaintiff's expert, Dr. Richard Luciani, M.D., the defendants Dr. Papapetrou or Dr. Vitale, Michelle's doctor,

needed to call for an emergency C-section immediately and at that time. . [Pa618-624]. Mackenzie, the infant, needed to be delivered in fifteen minutes thereafter, as per the standard of care. . [Pa618-624]. The defendants failed to do so. In actual fact[6], the C-section was not called at that time. [Pa618-624].

In actual fact, Mackenzie was not delivered within fifteen minutes thereafter. [Pa618-624]. In actual fact, no one notified the attending physician of the alarming and abnormal strip reading until about 10:12 p.m. – long after it was possible to deliver Mackenzie within fifteen minutes. [Pa285]. At about 10:12 p.m., the charge nurse, possibly by the name of Rhoda, approached the attending physician, Dr. Peter Balazs, and expressed concern over the Jennings situation and readings. Dr. Balazs asked the nurse to call up the Jennings readings on a screen as he completed another C-section at about 10:12 p.m.

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[6] Plaintiff will use the words "in actual fact" before an event that actually happened. The New Motion Judge erred, among other things, by holding that Plaintiff must prove that the emergency c-section "would" have occurred *assuming* that an emergency c-section had been called at 9:48 p.m. Plaintiff argued, on reconsideration, that this case – and all cases, for that matter -- must be decided on the actual facts, not based on a hypothetical which assumes the occurrence of an event that did not happen.

What "would," or more accurately "might," have happened if the c-section had been called at 9:48 p.m. is, simply irrelevant, immaterial speculation. Motions for summary judgment cannot be decided on hypothetical fact patterns. Here, the c-section was not called until 10:12 p.m. Therefore, the c-section could not have been completed within 15 minutes of 9:48 p.m.

[Pa285-286]. In actual fact, the attending physician called for the emergency C-section almost immediately upon his review of fetal strip reading. [Pa285-286].

In actual fact, the attending physician completed the C-section and delivered Mackenzie at 10:27 p.m., a full 39 minutes after the abnormal strip was first observed, but fifteen minutes after he was first notified of the situation. [Pa285-286]. At his deposition, Dr. Balazs explained how he was first notified of the Jennings' emergency. [Pa285-286]. At about 10:12 p.m., the charge nurse, probably Rhoda, entered a C-section procedure being performed by Dr. Balazs. She told him that she was concerned about the Jennings' readings and that he really needed to look at them. [Pa285-286]. This was already at least 24 minutes after the alarming 9:48 p.m. readings. [Pa285-286].

Dr. Balazs asked her to call up the tracings on a nearby screen as he continued his other work. [Pa285-286]. At his deposition, Dr. Balazs testified about the events of that evening, and his first notice that something was gravely wrong:

> A. I was in the operating room finishing up with my Cesarean section when the nurse physically came into the operating room and she told me that, or can I look at the tracing and, and then I looked at the tracing and she told me that probably they need me in the room so since my case was about to finish there, the Cesarean section, I just talked to the resident just to finish it and make sure everything is fine with that patient, then I walked from the operating room to the room with the nurse.

Q. Okay. Now, you said you were finishing up the other C-section?

A. Yes.

Q. Does that mean the baby was out already?

A. Yes.

* * * * *

Q. Did this nurse have with her a strip?

A. No. In the OR you have an electronic monitoring system that you can click on different rooms so I asked her to pull up that room and look at the tracing.

Q. Okay. Did she come in alone?

A. I don't remember the circumstances, but I assume she came alone, correct.

Q. Okay. After she came in and she told you to look at the tracing, how soon was it before you looked at the tracing?

A. I looked at it right ahead, because also she wanted me to come through and meet her so she came in, look at the tracing and if you could come in the room.

Q. Okay. So was it within seconds that you looked at the tracing?

A. Yes. It takes like five seconds, ten seconds.

Q. So was it within seconds that you looked to at the tracing in the OR you were in on the screen?

A. I think so, yeah.

[Pa285-286; Balazs Deposition, 39:9 to 42:12]. Dr. Balazs became alarmed by the deceleration he observed on the screen [Pa285-286; Balazs Deposition, 42:23 to 45:5]. In less than two minutes, Dr. Balazs was in Michelle Jennings' room, observed her quickly, and called for the C-section that should have been called at 9:48 p.m. by Dr. Vitale or Dr. Papapetrou. [Pa288, Balazs Deposition, 50:3-21]. Dr. Balazs made the incision at 10:25 p.m. and completed delivery at 10:27 p.m. [Pa294, Balazs Deposition, 75:11-19]. Dr. Balazs also testified that he called the emergency C-Section almost immediately, "it was a very quick decision making." [Pa288, Balazs Deposition, 50:3-21]. Thus, the reason why Dr. Balazs was unavailable at time any prior to perform the C-section was because neither Dr. Vitale nor Dr. Papapetrou called for the procedure at 9:48 p.m.; and he was not notified of the emergency until about 10:12 p.m. [Pa285-288].

As established by the testimony, once Dr. Balazs was on notice, he called the C-section and Michelle Jennings was immediately moved and prepared. Dr. Balazs made the incision at 10:25 p.m. and delivered Mackenzie at 10:27 p.m. [Pa285-288; Pa294]. This all happened within 15 minutes of Dr. Balazs finally being told that there was a grave problem with the Jennings mother and baby. [Pa285-288; Pa294].

Concerning proximate cause, Plaintiff's expert, Dr. Stephen Thompson, opined deliveries occurring more than 25 to 30 minutes after a deceleration, of the kind observed on the 9:48 p.m. reading, will result in the outcome that occurred in this case with certainty. [Pa626-628]. Quite remarkably, the New Motion Judge determined that there was no plausible case for Plaintiff to assert that a delayed delivery of 39 minutes, during which the infant Mackenzie was being deprived of oxygen in the womb, resulted in sufficient deprivation to have caused the lack-of-oxygen induced brain injuries suffered by Mackenzie. [Pa1-20].

ARGUMENT

Introduction

This is a serious medical malpractice case in which an infant has died. In its decision of July 17, 2023, the New Motion Judge granted summary judgment to Defendants based on issues that were not advanced by defendants in support of their motions. [Pa13-20; see Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442]. Plaintiff contends, respectfully, that it was improper to have decided this case on issues not specifically identified as grounds for the motion; or without at least allowing the parties adequate opportunity to address those concerns of the New Motion Judge by way of additional written submissions.

In the decision of September 29, 2023, the New Motion Judge upheld the outcome of the July 17, 2023, but did so in an extraordinary manner. [Pa1-12]. The New Motion Judge rendered factual findings, adverse to Plaintiff, that accepted at face value numerous assertions made in the defendants' submissions that had been demonstrated to be inaccurate or contested. The New Motion Judge treated the reconsideration motion, limited to issues raised by the July 17, 2023 decision, as a basis to issue new reasons to hold against Plaintiff, many of which were in fact explicitly conceded by defendants.

As one mere example, in the September 29, 2023 decision, the New Motion Judge actually ruled that Mackenzie's injuries were attributable to the maternal hemorrhage. [Pa10-11]. But the defendants' moving papers had ***conceded*** that Dr. Thompson's opinion created a jury for the issue to determine over whether Mackenzie's injuries were the result of the hemorrhage or the thirty-nine minutes of oxygen deprivation. [See, e.g., Pa213; 268-269].

Plaintiff has presented what are, frankly, compelling proofs of medical malpractice and, given the loss of life of an infant, it was not fair – and ultimately erroneous – for the motion to have been decided on grounds other than the proximate cause issue specified in Defendants' briefing. [*See* Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442].

On the actual facts, an abnormal and alarming strip reading at 9:48 p.m. indicated that Mackenzie was at risk and being denied access to oxygen.

An immediate C-section needed to be performed and was not.

A standard of care expert has opined that delivery should have occurred via the C-section by no later than 10 to 15 minutes thereafter. The C-section did not begin until significantly later, and Mackenzie was delivered 39 minutes later. Defendants breached the standard of care due to the significant delay in Mackenzie's delivery.

A causation expert has opined that the 39-minute delay caused significant injuries to Mackenzie; and that delays of over 25 to 30 minutes will almost certainly cause the injuries Mackenzie suffered.

As Judge Conte observed, there is no way summary judgment can be granted for the reasons being argued.

The errors of the New Motion Judge, when rendering the July 17 and September 29, 2003 decisions, are three-fold on their face.

First, the New Motion Judge's decisions of July 14, 2023 and September 29, 2023 are rooted in hypothetical speculation. The reasoning employed by the court – a ruling based on what the judge claimed *would* have happened "assuming" that the defendants had timely called for a C-section at 9:48 p.m. – constitutes reversible error.

Cases are decided on actual facts, not hypotheticals. As the proof established, Dr. Papapetrou and Dr. Vitale deviated from the applicable standard of care by failing to call for an emergency C-section at 9:48 p.m. In actual fact, the C-section was not called until about 10:12 p.m. This fact made it impossible to complete the C-section within fifteen minutes subsequent to 9:48 p.m. These facts must go to the jury.

The New Motion Judge's hypothetical, asking what might have happened *assuming* that the standard of care had been met at 9:48 p.m., was remarkably prejudicial to Plaintiff.

When a hypothetical fact pattern is postulated so as to excise from the factual record a material and significant deviation from the standard of care, then the hypothetical proposes a dramatically different case, to say the least. In actual effect, the New Motion Judge held that Plaintiff must "prove" her case under this alternative, hypothetical fact pattern, rather than under the actual facts.

Truth be told, it is impossible to know what might have happened if the standard of care had been met at 9:48 p.m. This is why cases must be decided on actual facts.

Second, the New Motion Judge turned logic upside down through her speculation that the C-section still would not have occurred within the fifteen

minutes, even if timely called -- and that this "finding" somehow constitutes a *defense* to a malpractice claim.

The New Motion Judge speculated that there may not have been a doctor available *assuming* that the C-section had been called, and faulted Plaintiff for not disproving this speculation -- which was understandable in that Plaintiff never had any notice that she needed to disprove this speculation.

The law holds that patients entrust their care to medical specialists based on the implicit representation that they are competent, capable, and possess the requisite skill and resources to render medical services in accordance with the standard of care. Defendants' stray references in their briefings, to the effect that they were not staffed as to meet the standard of care should been seen as the damning admission which it is – no more a defense to a malpractice claim than a lawyer's contention that he missed the statute of limitations because his legal assistant was sick that day.

Further still, the law does not place the Plaintiff to the burden of proving her case under a hypothetical fact pattern that assumes events that didn't happen. For this reason, the hypothetical under which the New Motion Judge ruled is irrelevant. In actual fact, the C-section needed to be called at 9:48 p.m., and it

was not called until 10:12 p.m. Thus, the procedure could not have been completed within fifteen minutes of 9:48 p.m[7].

Third, the July 17 and September 29, 2023 decisions are based on material facts that are incorrect or which are plainly disputable. The New Motion Judge did not comply with the requirement that, when assessing a motion for summary judgment, the court must accept the plaintiff's version of the facts along with all

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[7] This is not to say that that it could never have been an affirmative defense that a doctor was not available to perform this procedure. In another case, one in which a c-section had been actually called, if the defendants plead, as an affirmative defense, unavailability of staff due to other unforeseen or emergency circumstances, then Plaintiff would have had proper notice of the defense and discovery would proceed on that basis. Here, though, unavailability cannot be a defense, because the c-section was not called.

It bears highlighting that nothing remotely suggesting discretionary use of existing staff to address other medical concerns or emergencies was set forth as an affirmative defense in Defendant's answers. [*See* Pa84-85; Pa90-93; Pa266-267; Pa153-154; Pa162-165].

If proper notice of this defense had been given, Plaintiff would have taken discovery directed at issues such as whether staffing was not available due to that other emergency. Of course, contrary to the opinions below, it would have been the burden of Defendants to prove this defense. The decisions below placed Plaintiff under the improper burden of establishing proofs tending to show that a doctor was available, when the law places no such burden on Plaintiff at all.

Even without notice of this so-called "issue," Plaintiff did show that a doctor likely would have been available to perform the procedure, assuming the New Motion Judge's speculation that the c-section had been called at 9:48 p.m. Without a hint of irony, the New Motion Judge dismissed Plaintiff's efforts as speculation insufficient to defeat the court's own speculatory fact pattern.

reasonable inferences flowing from those facts. The September 29, 2023 decision, most notably, is replete with factual "findings" that are plainly disputable through competent evidence. Additionally, along these same lines, assuming the occurrence of a fact, which in fact did not occur, so as to create a hypothetical differing from the actual facts, is an explicit renunciation of the court's obligation to assess the facts in the light most favorable to the plaintiff.

POINT I

THE JULY 17 2023 ORDER ERRONEOUSLY GRANTED RECONSIDERATION OF THE 2020 ORDERS; AND IMPROPERLY GRANTED SUMMARY JUDGMENT

[raised at Pa506-511; Ruled at Pa13-20]

The New Motion Judge granted summary judgment to Defendants based on an issue that was not raised in any of Defendants' briefs, and was not even raised by the Court at oral argument. The July 17, 2023 decision and order were reached without the benefit of input from Plaintiff on the issue specified by the Court. For these reasons, Plaintiff filed her motion under *R*. 4:49-2.

A. Plaintiff Did Not Have The Burden of Proving A Doctor Would Have Been Available to Perform The Emergency C-Section, If It Had Been Timely Called

The errors of the July 17, 2023 decision were rooted in the court's incorrect assessment that the Plaintiff needed, as an affirmative element of her case, to prove that a doctor would have been available to perform the C-section

assuming the procedure had been timely called ay 9:48 p.m. The court wrote: "Yet ***even if*** the Defendants had called for the surgery 10, 15, or 30 minutes earlier, no attending obstetrician was available to perform it." [Pa19 (emphasis added]. The court contended even further: "Plaintiffs have not provided an expert report or opinion detailing what the proper standard of care is with regards to hospital staffing," adding:

> In contrast, the present case concerns the staffing procedures of a hospital in the department of obstetrics and gynecology on a certain date, with respect to the quantity of doctors available to perform surgeries, residents, and nurses. The Court finds that such procedures would not be readily comprehensible for a lay juror without the aid of expert testimony and Plaintiffs do not provide any expert reports or cite to any standards or regulations to support a claim of negligence.

[Pa19].

As an initial matter, neither of these legal contentions had been advanced in support of the motions. [See Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442]. All movants raised nothing but legal arguments pertaining to the alleged lack of proof of proximate causation, arguing that Plaintiff could not establish that Mackenzie's oxygen deprivation for a period of thirty-nine minutes could have resulted in the brain injuries that she suffered. [*Id*.].

1. The Court Violated Due Process By Raising and Deciding An Issue *Sua Sponte* Without Notice to Plaintiff

Moreover, the New Motion Judge raised and decided these "issues" without any notice to Plaintiff or without affording Plaintiff any chance to provide submissions addressing these points, thereby violating Plaintiff's due process rights. The New Jersey Supreme Court observed in *Doe v. Poritz*, 142 *N.J.* 1, 106 (1995): "Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. *Kahn v. U.S.*, 753 *F.*2d 1208, 1218 (3d Cir.1985). The minimum requirements of due process, therefore, are notice and the opportunity to be heard. *U.S. v. Raffoul*, 826 *F.*2d 218, 222 (3d Cir.1987) (citing *Goss v. Lopez*, 419 *U.S.* 565, 95 *S.Ct.* 729, 42 *L.Ed.*2d 725 (1975))." When a judge, *sua sponte*, raises and decides an issue without notice or an opportunity to be heard, the judge has deprived a party of the right to due process. *Id.*

2. Dr. Balazs Could And Would Have Performed The Jennings C-Section In A Timely Fashion – Except the C-Section Was Not Timely Called

As an initial matter, Plaintiff reminds this Court that she had no obligation to prove a doctor *would have been* available assuming "even if the Defendants had called for the surgery 10, 15, or 30 minutes earlier." [Pa19]. The record establishes with ultimate finality that the C-section was not called at 9:48 p.m.; and that it was, in fact, called at about 10:12 p.m. The law does not engage in

speculation over what might have happened ***even if*** the C-section had been timely called.

Instead, the law holds with ultimate finality that a C-section not called until 10:12 p.m. cannot possibly be completed within fifteen minutes of 9:48 p.m.

Yet even engaging the hypothetical world – a hypothetical world the New Motion Judge conceded that she was operating it [Pa8: "In a hypothetical world where Vitale did call for the c-section at 9:48 …."] – the facts of record show Dr. Balaczs could have timely performed the procedure, if it had been called in a timely fashion.

In addressing whether Dr. Balazs "would have" been available if the C-section had been timely called, Plaintiff does not concede that this matter is relevant or material under the facts of this case. In fact, this Court should not consider this hypothetical world at all. Conceivably, Dr. Balazs' availability to perform the C-section might have been relevant – as an affirmative defense – if the C-section had been properly called. But cases are not decided on hypotheticals. The C-section was not timely called; it is not really possible to know what might have happened if it had been called. All that is known is that the C-section was not called until it was far-too-late to complete it within fifteen minutes of the 9:48 p.m. deceleration. Further, for the same reasons, the

"staffing" issue identified by the New Motion Judge has no pertinence either. The "staffing" issue could have mattered, perhaps, only if the C-section had been timely called and only if thereafter, no was available to perform it.

Nonetheless, the New Motion Judge erred by concluding that the facts establish that Dr. Balazs would not have been available to perform the C-section, if it had been timely called. This can be gleaned from evidence in the record, as explained below.

At the outset of this case, Plaintiff believed that Dr. Balazs, the attending physician who delivered Mackenzie 39 minutes after the alarming 9:48 p.m. strip reading, was a target defendant. But something developed in discovery that surprised Plaintiff – that being that neither Dr. Vitale or Dr. Papapetrou called for the c-section at 9:48 p.m., as remarkable as that seemed at the start of the case. This rendered it impossible for Dr. Balazs to perform the c-section by 10:03 p.m., within the period of time established by the appropriate standard of care, since no one had notified him of the obvious emergency.

In fact, as it developed in discovery, because the C-section was not timely called, Dr. Balazs was unaware of the grave medical concerns faced by Michelle Jennings and her yet-to-be born daughter Mackenzie until about 10:12 p.m.. He was thus unavailable to help in the Jennings' case until that time due to lack of notice or information.

The totality of Dr. Balazs' testimony establishes, however, that if the C-section had been called at 9:48 p.m., he would have been able to perform it; complete it by 10:03 p.m.; and still arrived in the other procedure to deliver at about the same time. [Pa285-286; Balazs Deposition, 39:9 to 42:12].

At about 10:12 p.m., the charge nurse, probably Rhoda, entered a c-section procedure being performed by Dr. Balazs. She told him that she was concerned about the Jennings' readings and that he really needed to look at them. This was already at least 24 minutes after the alarming 9:48 p.m. readings. [Pa285-286; Balazs Deposition, 39:9 to 42:12].

Dr. Balazs asked her to call up the tracings on a nearby screen as he continued his other work. In less than two minutes, Dr. Balazs was in Michelle Jennings' room, observed her quickly, and called for the c-section that should have been called at 9:48 p.m. by Dr. Vitale or Dr. Papapetrou. [Pa285-286; Balazs Deposition, 50:3-21].

Dr. Balazs made the incision at 10:25 p.m. and completed delivery at 10:27 p.m. [PA294, Balazs Deposition, 75:11-19].

Thus, the reason why Dr. Balazs was unavailable until 10:12 p.m. to perform the C-section was because neither Dr. Vitale nor Dr. Papapetrou called for the procedure at 9:48 p.m. As established by the testimony, once Dr. Balazs was on notice, he called the c-section and Michelle Jennings was immediately

moved and prepared. Dr. Balazs made the incision at 10:25 p.m. and delivered Mackenzie at 10:27 p.m. This all happened within 15 minutes of Dr. Balazs finally being told that there was a grave problem with the Jennings mother and baby.

There are other aspects of Dr. Balazs' testimony that need to be considered.

First, Dr. Balazs' testimony establishes that, although c-sections can take up to 15 minutes, the delivering doctor's presence is not needed for the full period. As Dr. Balazs' testimony concerning the other procedure establishes, the doctor can arrive scrubbed, after the mother is fully prepped and anesthetized, in order to make the incision. [*See* Pa283-84, Balazs Deposition, 39:17 to 40:1]. He also can leave once the baby is delivered, the patient is stable, and the closing has begun. [*See* Pa283-84, Balazs Deposition, 39:17 to 40:1]. Dr. Balazs testified that his preferred and usual practice is to be there from the beginning of the procedure [Pa, 289, Balazs Deposition 57:18 to 58:1]; however, it is clear that sometimes circumstances can dictate otherwise. [See Pa283-84, Balazs Deposition, 39:17 to 40:1].

Second, Dr. Balazs testified that he had already finished the delivery for the other c-section when he spoke to the nurse at 10:12 p.m. [Pa284, Balazs Deposition, 40:2-6]. Accordingly, this places the initiation of this other

procedure at about 9:57 p.m. -- or at about nine minutes after the 9:48 p.m. strip reading.

Given the timelines Dr. Balazs confirmed concerning the performance of c-sections, there is no doubt that the procedure he was completing at 10:12 p.m. – when he was finally alerted to the Jennings' situation – started well ***after*** 9:48 p.m. In other words, Dr. Balazs had more than enough to respond to the Jennings' case, if the c-section had been timely called at 9:48 p.m.

Third, the record establishes that, in contrast to the Jennings' case, the other c-section presented no emergency. At his deposition, Dr. Balazs testified that the other patient was "fine" and "uneventful." [Pa284, Balazs Deposition, 37:17 to 39:8]. Accordingly, if the Jennings c-section had been timely and properly called at 9:48 p.m., that would have meant that Dr. Balazs, in the minutes before 10 p.m., would have been presented with two c-section procedures, with a decision as to which one to prioritize.

Dr. Balazs obviously would have prioritized the emergency. Moreover, given the timelines that Dr. Balazs acknowledged for the c-section, it is entirely possible that, given that the Jennings' procedure could have completed shortly after 10 p.m., he still could have managed to scrub and arrive at the other c-section even in time to deliver there by 10:12 p.m. Although, since that

procedure was non-emergent, it is more likely that he simply would have delayed the procedure for a few minutes.

Fourth, at his deposition, Dr. Balazs testified that, with respect to the priority of procedures" that he "treat[]s every Cesarean section that I call for fetal tracing as a C-section that I want to do it as quick as possible." [Pa291, Balazs Deposition, 65:17-21]. Thus, this Court does not even need to draw a factual inference in favor of Plaintiff. Dr. Balazs is, point blank, telling the factfinder he would have prioritized the Jennings' c-section in the minutes before 10:00 p.m. that evening.

In the end, this Court should reverse the July 17, 2023 decision, because it based on the misapprehension that "even if the Defendants had called for the surgery … minutes earlier, no attending obstetrician was available to perform it." And that determination is incorrect,

B. No Precedent Supports The Holding That Plaintiff Needed To Present An Expert To Establish A "Negligent Staffing" Claim

Case law is settled that, to those patients who entrust themselves to their care, medical professionals hold themselves out as possessing requisite experience and resources necessary for the patient's care. *See, e.g., Carbone v. Warburton*, 22 N.J.Super. 5, 9 (App.Div.1952) (*quoted in Carbone v. Warburton*, 11 N.J. 418, 426 (1953)). This New Motion Judge'ss holding that a medical malpractice plaintiff, in addition to demonstrating the breach of a

defined standard of care, must also provide expert opinion that the medical professional should have been staffed to meet the standard of care, finds no precedential support in New Jersey. It turns every medical malpractice case into a staffing case.

In fact, placing the words "negligent staffing" into a current Westlaw search returns but a single return, an unreported Appellate Division decision, *Rabinowitz v. Reyman,* 2010 *WL* 2867909 (N.J.App.Div. July 23, 2010). Yet that case, albeit not precedential, actually distinguishes a traditional medical malpractice claim, in which the expert opines to the standard of care and breach of that standard; from a case sounding in "negligent staffing." "Negligent staffing," to the extent even recognized by the appellate panel in that case, concerned something other than expert opinion as to the breach of a standard of care sufficient for a medical malpractice claim. Rather, "negligent staffing," to the extent that the claim even exists under New Jersey law[8], pertains to allegations that the medical center's staff do not meet the licensing requirements of the State of New Jersey. *See Rabinowitz v. Reyman,* 2010 *WL* 2867909 *8-10.

[8] Medical centers and associations in the state of New Jersey have argued that "negligent staffing" claims are preempted under state law due to SS ED Regulations pursuant to the Supreme Court's decision in *Lemelledo v. Beneficial Management Corp*, 150 *N.J.* 255 (1997)

In *Rabinowitz v. Reyman*, the plaintiff's medical malpractice claim was distinguished from the plaintiff's negligent staffing claim, and defendants did not even move for summary judgment on the medical malpractice. The claim for medical malpractice continued, based on the expert opinion that a standard of care was breached. *Rabinowitz v. Reyman,* 2010 *WL* 2867909 *1; *see also* discussion at *9.

Not only is there no precedent supporting this holding as to a medical malpractice claim, to the extent that defendants assert staffing was so stretched that it could not meet the appropriate standard of care, the burden falls on the defense to establish that as an affirmative defense.

To excuse their failure to meet the standard of care, defendants must show unforeseeable emergent events that taxed their existing staff at that moment; and an expert opinion proffered by defendants that they were adequately staffed, but for unforeseeable emergencies that precluded the defendants' ability to meet the applicable standard of care.

Of course, such a proffer is not possible in this case, because Dr. Balazs testified that the other patient was "fine" and "uneventful."

POINT II

THE NEW MOTION JUDGE ERRED IN ITS SEPTEMBER 29, 2023 DECISION BY EXPANDING THE GROUNDS ALLEGED TO PROVIDE A BASIS FOR A GRANT OF SUMMARY JUDGMENT, WHICH ISSUES HAD NOT BEEN FRAMED BY THE MOTION FOR RECONSIDERATION AND WHICH AGAIN DECIDED WITHOUT FURTHER NOTICE OR OPPORTUNITY TO BE HEARD

[Raised at Pa506-511; Ruling at Pa1-12]

Plaintiff moved for reconsideration from the July 17, 2023 order for three reasons:

(a) That the New Motion Judge had erred by engaging in a hypothetical of what would have happened if the C-Section had been timely called;

(b) That the New Motion Judge had erred by holding that Plaintiff had the burden of proving, as part of a medical malpractice case, that the medical professionals were actually staffed to provide the care required by the standard of care; and

(c) That the New Motion Judge had erred by holding that, in connection with the proof of "staffing," that Plaintiff had to serve an expert report.

Plaintiff contended as follows:

(a) That the actual facts were that the C-section was not called at 9:48 p.m. and was, in fact, not called until about 10:12 p.m., rendering it

impossible to complete that emergency C-Section within fifteen minutes of 9:48 p.m.;

(b) That the law holds that professionals hold themselves out to a patients who entrust themselves to their care that they are capable and ready to meet the standard of care; and

(c) That the law did not require Plaintiff to serve an expert report to the effect that defendants should have been staffed to meet the standard of care.

Rather than review the issues framed by the motion, the New Motion Judge used the motion for reconsideration to expand upon the purported reasons supposedly justifying a grant of summary judgment.

Although the court did walk back the claim that "staffing" was an issue which needed to be supported by expert opinion, the court substituted a whole new series of supposed reasons, none of which are supported or supportable for a grant of summary judgment. Thus, in the first instance, the New Motion Judge erred by considering issues not encompassed by the July 17, 2023 decision.

Each one of these new contentions are demonstrably not accurate and not supported by the record.

A. Dr. Papapetrou and Dr. Vitale Deviated From the Standard of Care

The New Motion Judge wrote:

In this case, Plaintiff alleges that the Court relied on the misapprehension that even if the Defendants had called for surgery "…minutes earlier, no attending obstetrician was available to perform it." What the Plaintiff neglects to acknowledge is that there is no expert testimony that the Defendant Papapetrou, deviated from the accepted standard of care of a resident obstetrician or that Dr. Balazs would have definitively performed the surgery earlier than he did. In this case, Plaintiff alleges that the Court relied on the misapprehension that even if the Defendants had called for surgery "…minutes earlier, no attending obstetrician was available to perform it." What the Plaintiff neglects to acknowledge is that there is no expert testimony that the Defendant Papapetrou, deviated from the accepted standard of care of a resident obstetrician or that Dr. Balazs would have definitively performed the surgery earlier than he did. Plaintiff argues that if Vitale had called for the c-section at 9:48, the outcome would have been different. Plaintiff's Brief repetitively states that if Vitale or Papapetrou had called for a c-section at 9:48, Dr. Balazs would have been available to do the surgery earlier. (See Pl. Brief , p. 3,6,7,13, and 14). This was impossible given the protocol in place for obstetrician residents. Plaintiff's own expert, Dr. Luciani, testified that residents need permission from their attending to call for a c-section; they cannot do so on their own. (Def. Exhib. B, 62:4-63:22). He stated the latest that the c-section could be completed was 10:10 (or 17 minutes earlier), if a resident had to follow protocol. (Def. Exhib. B, 63:4-18).

The facts are that Papapetrou could not have called the c-section. Papapetrou called Vitale, who was not at the hospital, when the fetal heartbeat decreased for a second time, Vitale left for the hospital. While she was on the way, Dr. Balazs was asked to review the decel. He was in surgery at that time (See Pl. Brief, p. 14 (stating, this places the initiation of this other procedure at about 9:57 p.m.")). In a hypothetical world where Vitale did call for the c-section at 9:48, she was not available to perform the procedure. There is zero

> *evidence that Dr. Balazs would have started Jennings' c-section prior to the one he was engaged in or before 10:1 2p.m.*
>
> *Therefore, the Court's decision to grant Defendants' motion for summary judgment was not arbitrary, capricious, or unreasonable.*

[Pa7]. In every material aspect, these observations are not supported by the record.

(i) The Deviations of Dr. Papapetrou and Dr. Vitale

Although conceding that Michelle Jennings had suffered a hemorrhage, Defendants assigned a resident, Dr. Papapetrou, to monitor her on the night in question. At 9:48 p.m., Dr. Papapetrou observed a significant abnormality on a fetal monitoring strip that indicated that a c-section needed to be performed immediately. Defendants contend that the hospital maintained a policy which prohibited Dr. Papapetrou from calling a c-section, which the New Motion Judge is accepting as a reason for claiming that Dr. Papapetrou did not deviate from the standard of care.

First, Defendants never proffered any authority from any medical governance organization holding that, even in an emergency, a resident cannot call for a c-section. Yet the New Motion Judge found that Dr. Papapetrou could have never called for a C-section. Second, what Defendants actually suggested in their briefs – although not explicitly arguing this as a reason to grant summary judgment -- was that there is some internal operating procedure of the hospital that placed some limitation on Dr. Papapetrou.

But the Defendants never proffered any written evidence of such an operating procedure.

In fact, Dr. Papapetrou testified that a second-year resident can "give orders" [Pa529, Papapetrou Dep., 85:13-15], so long as she consulted the attending physician. [Pa529, Papapetrou Dep., 85:23-86-1]. Accordingly, the court's finding that Dr. Papapetrou could not have called the c-section, as per the purported and unproven hospital procedures, is not correct. Even under the purported hospital policy, all she needed to do was consult with Dr. Vitale before giving the order. [Pa529, Papapetrou Dep., 85:13-15; 85:23-86-1]. Defendants admit that Dr. Vitale and Dr. Papapetrou spoke at 9:48 p.m., after Dr. Papapetrou observed the alarming strip reading, but neither called for the c-section, and that was a violation of the standard of care on the part of both of them. [Pa622, Luciani Report, p.6].

Moreover, the New Motion Judge suggests that Dr. Luciani ratified that Dr. Papapetrou could not call the C-section. But that it is not correct at all. It is true enough that Dr. Luciani indicated that it is fine for hospitals to have normal operating procedures. However, Dr. Luciani also testified: "But the standard of care is not dictated by the policies and the procedures of any given hospital." [Pa518, Luciani Dep., 19:16-18]. In fact, Dr. Luciani testified in a manner directly contrary to the way the court summarized.

Asked to assume the existence of such a policy – again, a policy which was never actually established -- Dr. Luciani further testified that a hospital's protocol of having another doctor consult with a resident when confronted with an emergency, must be relaxed in the interest of the health of the mother and the child. Far from acknowledging the validity of Dr. Papapetrou's actions in this emergency, Dr. Luciani testified that even given the desirability of consultation, "realistically, when you're in a residence program and you have a baby that has any sort of fetal distress," the resident must have "*carte blanche* to call for a section and expedite it before we even get phone calls or walk through the door because the only thing we're concerned about, and you would agree with this, is that we want a healthy mother and a healthy baby. So really there are two different things." [Pa518, Luciani Dep., 55:16-25].

Frankly, this seems so obvious that an expert would hardly need to say it: if the baby is facing an emergency that threatens her very life, the resident must act and, in this situation, make the call, or at least immediately notify the attending physician.

In the above passage, the New Motion Judge also gave Dr. Vitale a pass because she was not present at the hospital and could not deliver the baby. It was sufficient, the court suggested, for Dr. Vitale to have left for the hospital immediately upon receiving the phone call from Dr. Papapetrou. Nonetheless,

Dr. Luciani explicitly opined, and testified, that Dr. Vitale was nonetheless required immediately to call for the C-section upon being notified of the circumstances.

The point is that both Dr. Papapetrou and Dr. Vitale were duty bound to call for the C-section at 9:48 p.m., and neither one of them did. The New Motion Judge erred by holding, as a matter of law, that neither one deviated from the applicable standard of care. Under the standard applicable to motions for summary judgment, the Court erred when it found that no reasonable factfinder could have concluded that either Dr. Papapetrou or Dr. Vitale deviated from the standard of care.

(ii) The Inaccurate Characterization of Dr. Luciani's Testimony

The New Motion Judge also found that Dr. Luciani testified that the standard of care would have allowed for a delivery as late as 10:10 p.m. In fact, Defendants never asked Dr. Luciani that question at his deposition, and the record does not support such a finding.

First, all that Dr. Luciani testified was that, if the delivery had occurred by 10:10 p.m., he would have had no criticism of Dr. Papapetrou in this case. [Pa521, 63:5 to 65:11]. But as Dr. Lucian further observed, this observation is meaningless because, "even if we push it to the limit at 10:10, the baby was delivered at 10:27, that's 17 minutes." [Pa521, 63:19-22]. What Dr. Luciani may

or may not have opined concerning Dr. Papapetrou, in the event of a 10:10 p.m. delivery is immaterial, as a 10:10 p.m. delivery is not a fact.

Second, "depending on circumstances" at the hospital that night [Pa522, 64:6], Dr. Luciani also stated that he might not have had offered a critical opinion in this case if the delivery had occurred sometime between 10:05 and 10:10 p.m. [Pa521, 63:5-64:8]. In stating this. Dr. Luciani was emphasizing how severely the Defendants missed the timing required of the standard of care. The discussion about 10:10 p.m. occurred at pages 63 through 65 of his deposition. A review of those pages shows that Dr. Luciani never stated that it would have been within the acceptable standard of care for Mackenzie to have been delivered at 10:10 p.m.

Initially, Dr. Luciani was asked if "more likely than not" whether Mackenzie would have been delivered at 10:10 p.m. if everything had occurred within the standard of care. [Pa521, Deposition Testimony of Dr. Luciani, 63:5-9]. Dr. Luciani specifically rejected that contention, replying that the standard of care would have required delivery of Mackenzie earlier than 10:10 p.m. [Pa521, Deposition Testimony of Dr. Luciani, 63:10-11]. He specifically said that delivery should have happened a few minutes earlier than that. [Pa521, Deposition Testimony of Dr. Luciani, 63:10-11].

As if that answer did not happen, the next question posed that Dr. Luciani would have had no criticisms of anybody if Mackenzie had been delivered at 10:15 p.m. [Pa521, Deposition Testimony of Dr. Luciani, 63:12-14].

Dr. Luciani again rejected this premise, stating that the baby being delivered that late would have been longer than expected. [Pa521, Deposition Testimony of Dr. Luciani, 63:15-16]. Dr. Luciani then went on to explain that he would have expected that Mackenzie would have been delivered no later than 10:05 and 10:10 p.m. [Ps521, Deposition of Dr. Luciani, 63:17-18], which would have been on the "outside" of his expectation. [PA522, Deposition Testimony of Dr. Luciani, 64:6-8].

Dr. Luciani pointedly highlighted: "So, even if we push it to the limit at 10:10, the baby was delivered at 10:27 p.m., that's 17 minutes." [Pa521, Deposition Testimony of Dr. Luciani, 63:20-22]. And that was Dr. Luciani's point. Read accurately, Dr. Luciani was not testifying that the standard of care would have allowed a delivery as late as 10:10 p.m. What he was saying is that even if he indulged the premise of this line of questioning, Mackenzie was still delivered far beyond the time being proposed by the questioning as being acceptable.

(iii) The Collapsing of The Timeline

The New Motion Judge also wrote that while Dr. Vitale was *en route* to the hospital, Dr. Balazs was shown the Jennings readings. As discussed previously, that occurred at about 10:12 p.m., long after the 9:48 p.m. readings.

From this, the court claims that Dr. Balazs could not have performed the delivery within the applicable standard of care.

Plaintiff has already addressed this point. In fact, the court acknowledged that the procedure that Dr. Balazs was completing around 10:12 p.m. likely did not start until about 9:57 p.m. [Pa8: "this places the initiation of this other procedure at about 9:57 p.m."]. Accordingly, as briefed earlier, Dr. Balazs was not in that other procedure at 9:48 p.m., when the Jennings' emergency C-section should have been called.

Again, Plaintiff addresses this point without conceding the materiality of it. The Jennings' C-section was not called until 10:12 p.m. and, for this reason alone, could not have been completed in a timely fashion, as required by the standard of care.

(iv) The Court Contradicted Itself

On this motion for summary judgment, the New Motion Judge determined that Dr. Luciani's and Dr. Thompson's opinions were "suppositions" and "beliefs about situations which did not exist." [Pa9]. This is because it was not

possible, the court insists, for an emergency C-section to be completed within fifteen between the deceleration readings and the completion of the C-Section. [Pa9-10].

The court then immediately acknowledges thereafter that Dr. Balazs performed the Jennings' emergency C-section, called at about 10:12 p.m. upon seeing the readings, and completing at 10:27 p.m. [Pa9]. Obviously, emergency C-sections can be completed within fifteen minutes between reading and completion.

In the end, neither Dr. Papapetrou nor Dr. Vitale called for the emergency C-section at 9:48 p.m. In fact, Dr. Balazs was the one who called for that procedure, at about 10:12 p.m. This meant the procedure could not be completed within fifteen minutes of 9:48 p.m. Plaintiff established a deviation from the standard of care on the part of these doctors. The New Motion Judge erred by granting summary judgment to these defendants, and the entities which employed them are vicariously liable for their negligence.

B. The Court Misconstrued The Opinions and Testimony Of Dr. Thompson

Also in its September 29, 2023 decision, the New Motion Judge concluded that Dr. Thompson's opinions were "suppositions," but the court's summary of what Dr. Thompson stated in his report and at deposition are not accurate and do not fairly represent what Dr. Thompson contends.

Perhaps the best proof that the New Motion Judge inaccurately recites Dr. Thompson's testimony is the court's ultimate conclusion that, even if Defendants had performed within the standard of care, the outcome would have been the same, according to Dr. Thompson.

But the whole point of delivering Mackenzie within the standard of care was to avoid exposing her to a risk of a poor outcome. That's why both the fields of medicine and law define the standard of care in the first place: to impose a duty to perform before the risk of injury becomes unacceptably high. What Dr. Thompson was expressing was, that as time progressed and Mackenzie remained undelivered, Mackenzie faced a heightened risk of the bad outcome she ultimately suffered. This makes eminent sense: the longer one is deprived of oxygen, the greater the risk of a poor outcome.

Dr. Thompson opined that Mackenzie was delivered 39 minutes after the alarming strip reading. He testified, to a reasonable degree of medical probability, that this delay in delivering Mackenzie caused her injuries. In support of this, he testified that the injuries suffered by Mackenzie were a near certainty as a result of prolonged deprivation beyond 25 to 30 minutes.

At his deposition, Defendants asked Dr. Thompson to opine as to what the outcome would have been if Mackenzie had been born earlier. The questioning was inartful, and contained double negatives – something the court below seems

to have ignored -- so Dr. Thompson felt the need to clarify: "You asked me, do I agree that an earlier delivery would not have changed the outcome, and I don't agree that an earlier delivery would not have changed the outcome. My report opines that an earlier delivery would, in fact, have changed the outcome." [Thompson Dep., 50:10-15]. He stated again: "I want to make sure that, an earlier delivery would have made the outcome better for this child. That's my opinion in my report. That's what I'm trying to articulate here." [50:20-23]. And again: "I don't agree with your statement an earlier delivery wouldn't have changed the outcome. I believe an earlier delivery would." [50:25 to 51:2].

Even with all this, the New Motion Judge concluded that Dr. Thompson had testified that the outcome would have been the same if Mackenzie had been delivered earlier.

At his deposition, defendants posed hypotheticals to Dr. Thompson about what *might* have happened if Mackenzie had been delivered earlier. Defendants asked Dr. Thompson to consider what the outcome would have been if Mackenzie had been born at various points earlier than she did. Dr. Thompson testified that a delivery 25 minutes earlier, at 10:02 p.m. – within the 10 to 15-minute window of the standard of care – would have changed the outcome. [69:16-23]. Frankly, that's the only opinion that matters.

At other points, Defendants asked Dr. Thompson his thoughts about what was "more likely than not the outcome" if Mackenzie had been delivered at earlier points. Manifestly, Dr. Thompson said it was impossible to know; those were not the facts. Still, because it was a deposition, Dr. Thompson indulged the line of questioning.

In response to the questioning, Dr. Thompson stated that a poor outcome became increasingly likely as early as 20 minutes earlier, or by 10:07 p.m. – five minutes later than the time fixed by the standard of care. At that time Mackenzie had already gone 19 minutes without proper oxygen access. But Dr. Thompson could not, and would not, say that to a reasonable degree of medical probability. Instead, he firmly stated that it was not possible to know.

Tellingly again, Defendants did not ask Dr. Thompson whether he considered "more likely than not" the same as a "reasonable degree of medical probability." Plainly he did not, because when asked about a delivery at 10:07 p.m., he insisted that there was no way to know. In contrast, he observed that the actual delay in this case – 39 minutes, which is really the only time that matters – was certain to cause Mackenzie's injury.

The New Motion Judge, remarkably, rejected Dr. Thompson's opinions as "hypotheticals" even though, at his deposition, Dr. Thompson was asked these hypotheticals – and he explicitly rejected the hypothetical nature of the

questioning. Still, Dr. Thompson was asked to entertain hypotheticals, ultimately irrelevant, about varying times of birth and asked to assess, on a more likely than not basis, whether the outcome would have been the same. [Deposition Testimony of Dr. Thompson, 68:23-70:10]. In truth, Dr. Thompson's answers that the earlier Mackenzie might have been delivered, the better chance she had at a better outcome. The New Motion Judge misconstrued the import of these answers. The case concerns a fetus deprived of oxygen for a considerable period of time. Every additional minute of oxygen deprivation rendered a poor outcome an increasing risk

Thus, when asked if Mackenzie had been delivered 10 minutes earlier (10:17 p.m. and 15 minutes after the standard of care), would the outcome have been the same, Dr. Thompson replied "most likely, yes, but it is impossible to know." [Deposition Testimony of Dr. Thompson, 69:2-6]. Then the hypothetical was changed to 15 minutes earlier and then 20 minutes earlier, and was posed on a "more likely than not" basis, and Dr. Thompson said the outcome would have been the same, *more likely than not*. [Deposition Testimony of Dr. Thompson, 69:2-14]. When the hypothetical then changed to 25 minutes earlier (10:02 p.m.), Dr. Thompson referenced his report and replied that, at that, the outcome would have been better. [Deposition Testimony of Dr. Thompson, 69:15-23].

At 25-30 minutes, Dr. Thompson observed that the "medical certainty" required by law to offer an opinion concerning causation was present.The New Motion Judge erred in holding that Dr. Thompson's testimony was supposition and not proper to establish proximate causation. Dr. Thompson testified that Mackenzie was at risk for thirty-nine minutes, when being at risk for more than 25-30 minutes rendered it certain that she would suffer the injuries she did. There is no doubt that Dr. Thompson's testimony establishes a material issue of proximate causation.

CONCLUSION

For the foregoing reasons, this Court should reverse the July 17, 2023 and the September 29, 2023 decisions.

Respectfully submitted,

THE LYNCH LAW FIRM
Attorneys for Plaintiff

By: /s/ Joseph M. Cerra

Dated: January 18, 2024

THE ESTATE OF MACKENZIE JENNINGS by its Administratrix MICHELLE JENNINGS,	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO.: A-000307-23T4
Plaintiffs-Appellants	: Civil Action
v.	: On Appeal from Superior Court of New Jersey, Law Division - Passaic County
DIANA VITALE, M.D., PETER BALAZS, M.D., ASHLEY PAPAPETROU, D.O., VITALE WOMEN'S HEALTH OBSTETRICS AND GYNECOLOGY, L.L.C., ST. JOSEPH'S REGIONAL MEDICAL CENTER, "JOHN/JANE DOES 1-10" (fictitious names) and/or "ABC CORPORATIONS 1-10" (fictitious names),	: Docket No.: PAS-L-812-18 : Sat Below: : Hon. Vicki A. Citrino, J.S.C.
Defendants- Respondents	:

BRIEF AND APPENDIX ON BEHALF OF DEFENDANTS-RESPONDENTS ST. JOSEPH'S REGIONAL MEDICAL CENTER AND DR. PAPAPETROU

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PRELIMINARY STATEMENT

Plaintiffs appeal from orders granting Defendants' motions for summary judgment and denying reconsideration in this obstetrical medical malpractice and wrongful death case involving the birth of the infant Plaintiff, Mackenzie Jennings, who was delivered by the on call attending, non-party Dr. Balasz, via emergency C-Section on at 10:27pm on August 18, 2014. Plaintiffs alleged the second year obstetrical resident, Dr. Papapetrou, and their personal attending obstetrician, Dr. Vitale, who was not present in the hospital, failed to call for the emergency section and/or request the assistance of Dr. Balazs sooner, which Plaintiffs claimed would have resulted in an earlier delivery and avoided the infant's injuries and death.

Yet, the undisputed evidence confirmed Dr. Balasz was in the operating room performing a C-Section on his own patient and could not have delivered this baby any earlier than he did. As a result, Plaintiffs' dismissed any claim against him. But even assuming he was called earlier and decided to deliver Mrs. Jennings first, an impossible hypothetical scenario unsupported by the facts, the delivery still would not have occurred within the time Plaintiffs' experts testified was necessary to offer a chance for a better outcome. Indeed, Plaintiffs' liability expert testified that even if everything moved perfectly within the standard of care, at best, the delivery would have occurred 17-22 minutes earlier, which was outside the window Plaintiffs' causation expert testified might change the outcome.

When Defendants first moved for summary judgment in 2020, the initial judge denied the motion based on a cursory review of the briefs and allowed for additional discovery. After the completion of discovery, in 2023, Defendants moved for reconsideration and renewed the motion, which was assigned to a second judge since the first judge had retired. The second judge engaged in a detailed analysis of the record and correctly concluded Plaintiffs had failed to present sufficient evidence upon which a jury could find proximate cause, which she detailed in two written opinions. Essentially, the trial court found Plaintiffs' entire case was based upon speculation and theories not supported by the factual evidence, including the testimony of Plaintiffs' own experts.

As Plaintiffs failed to present a *prima facie* case of medical malpractice, the orders entered on July 17, 2023 and September 29, 2023 were properly entered and should be affirmed.

PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on March 18, 2018, naming as Defendants, Diana Vitale, MD, Peter Balazs, MD, Ashley Papapetrou, DO and their respective employers, Vitale Women's Health Obstetrics and Gynecology, LLC and St. Joseph's Regional Medical Center. (Pa60). Defendants filed their respective Answers on March 28, 2018 and April 10, 2018. (Pa82; Pa89). Following the infant Plaintiff's death in November 2018, Plaintiffs filed an Amended Complaint on June 27, 2019, asserting claims on behalf of her estate pursuant to the wrongful death and survivor statutes. (Pa138). Defendants filed their respective Answers to the Amended Complaint on July 3, 2019 and July 11, 2019. (Pa150, Pa158).

On December 11, 2019, Dr. Balasz moved for summary judgment when Plaintiffs' expert reports failed to offer any opinion he deviated from the standard of care, which Plaintiffs initially opposed pending the completion of further discovery. (Pa177; Pa185). Accordingly, the Honorable Joseph S. Conte, J.S.C. denied Dr. Balazs' motion, but the parties subsequently stipulated to the dismissal of all claims against Dr. Balazs on March 16, 2020. (Pa25; Pa197).

After the depositions of Plaintiffs' experts were completed, Dr. Papapetrou and St. Joseph's Medical Center moved for summary judgment on August 17, 2020, and Dr. Vitale cross moved for summary judgment, based on Plaintiffs'

failure to establish proximate cause. (Pa199, Pa258; 1T45-1T47).[1] Judge LaConte heard oral argument on November 5, 2020 and denied the motions. (1T57-1T59; Pa21, Pa23). Judge LaConte also extended discovery to allow Plaintiffs time to respond to Defendants' placental pathology expert report. (1T30; 1T44).

Following the completion of expert discovery, on May 18, 2023, Defendants moved to reconsider the prior interlocutory orders denying their motions for summary judgment. (Pa395; Pa430). As Judge LaConte had since retired, the motions were argued before the Honorable Vickie Citrino, J.S.C. on July 14, 2023. (2T). On July 17, 2023, Judge Citrino granted Defendants' motions and filed her orders with her written statement of reasons. (Pa13-Pa20; Da1-Da7).[2]

On August 7, 2023, Plaintiffs moved for reconsideration. (Pa506). Following oral argument on September 29, 2023, Judge Citrino denied Plaintiffs' motion for reconsideration. (Pa1-Pa12). This appeal follows. (Pa26).

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[1] 1T = November 5, 2020 motion transcript
2T = July 14, 2023 motion transcript
3T = September 29, 2023 motion transcript

[2] The order granting Dr. Papapetrou and St. Joseph's motion for summary judgment was omitted from Plaintiff's Appendix and is included in Defendant's appendix at Da1-Da7. The statement of reasons for both motions is the same.

COUNTERSTATEMENT OF FACTS

Mrs. Jennings was 39 weeks pregnant when her private obstetrician, Dr. Vitale, sent her to St. Joseph's Regional Medical Center for an elective induction of labor due to mild elevated blood pressure. (Pa526). Dr. Papapetrou had just started her second year of residency training in obstetrics and was the junior resident assigned to Labor and Delivery when Mrs. Jennings was admitted. (Pa525-Pa526). As a resident in training, Dr. Papapetrou did not hold a medical license and was not permitted to issue independent orders or make decisions without consulting with the attending. (Pa525-Pa526; Pa528-Pa530). She was certainly not permitted to perform C-Sections or any delivery alone.

This was considered a routine admission and it was Dr. Papapetrou's responsibility to admit the patient and discuss the findings and plan of care with the attending physician, in this case, Dr. Vitale. (Pa525). When Mrs. Jennings arrived at the hospital at approximately 8:30pm, Dr. Papapetrou evaluated her and discussed her findings by telephone with Dr. Vitale, who was home at that time. (Pa527). The plan was to monitor the mother and fetal heart tracings and keep Dr. Vitale updated on the status. (Pa528). During the initial monitoring over the first hour, Dr. Papapetrou noted nothing of concern. (Pa526). The events at issue take place between 9:48pm and 10:27pm, when Dr. Balasz delivered the baby as Dr. Vitale was enroute to the hospital.

According to the report of Plaintiffs' obstetrical expert, Richard Luciani, MD, the fetal monitoring strips became concerning with a pattern of decreased variability and subtle late decelerations, which required Dr. Vitale and Dr. Papapetrou to call for an emergency C-Section at 9:48pm. (Pa621; Pa227). At his deposition, Dr. Luciani confirmed there was no reason for anyone to call for a C-Section before 9:48pm. (Pa230; Pa236). He also acknowledged that even after such a call is made, an emergency C-Section requires a certain amount of time to arrange for and gather the necessary medical providers in the operating room, including anesthesia, such that an emergency delivery within the standard of care should be able to be accomplished within 10 to 15 minutes. (Pa223).

Discovery confirmed Dr. Papapetrou was not in the patient's room precisely at 9:48pm, nor required to be, but saw the strips at approximately 9:53pm and appropriately discussed them with Dr. Vitale in a five minute call between 9:58pm-10:03pm, as documented by telephone records and Dr. Papapetrou's note in the hospital record at 10:05pm. (Pa232; Pa234; Pa530). Dr. Luciani agreed it was appropriate and within the standard of care for Dr. Papapetrou to call Dr. Vitale to discuss the strips and the patient during this telephone call between 9:58pm-10:03pm. (Pa232). Dr. Vitale, who also reviewed the strips from home during the call, did not tell Dr. Papapetrou to arrange for an emergency C-Section at that point, but left for the hospital. (Pa228; Pa232).

According to Dr. Luciani, Dr. Vitale should have told the resident to move the patient to the Operating Room (OR) and expedite the delivery with anybody that was around, while Dr. Vitale was on the way to the hospital. (Pa228). Obviously that process could not have started until after Dr. Vitale and Dr. Papapetrou concluded their telephone call at 10:03pm. A few moments after hanging up the phone with Dr. Vitale, Dr. Papapetrou noted another deceleration and told the nurse to find Dr. Balazs, the in house attending present in the hospital, for assistance.(Pa527; Pa232; Pa530). No one disputes the fact Dr. Balazs was in the operating room finishing a C-Section on one of his own patients when the nurse contacted him and that he left his patient as soon as he safely could, arriving at Mrs. Jennings bedside between 10:08pm and 10:12pm. (Pa228, Pa235; Pa527; Pa623).[3] Dr. Luciani conceded Dr. Balazs obviously had to have been called a few minutes before he was notified and that he arrived at Mrs. Jennings' room as soon as he could from the C-Section in which he was engaged. (Pa232).

For his part, Dr. Balazs testified he was the on call in-house attending physician responsible for service patients who did not have a private attending physician and typically did not become involved with private patients unless it was a last resource. (Pa285, Pa287). He confirmed he was in the operating room finishing a C-Section he had just performed on one of his own patients when a

[3] The nursing notes in the hospital record contain two references to Dr. Balazs being at the bedside at 10:08pm or 10:12pm. Dr. Luciani agrees to both times and that Dr. Balazs arrived as soon as he could. (Pa228, Pa235).

nurse came in to ask if he could review the fetal heart tracing on one of Dr. Vitale's patients because he might be needed in the room while she was on the way to the hospital. (Pa285-Pa287; Pa291). While still in the operating room, Dr. Balazs reviewed the fetal monitor strips on a screen in real time, then took a minute or two to make sure his patient was not bleeding or exhibiting any complication so that he could feel comfortable allowing his resident to finish suturing his patient's uterus before leaving to see Mrs. Jennings. (Pa286).

As noted above, Dr. Balazs was at Mrs. Jennings bedside by 10:08pm or 10:12pm and, after a brief evaluation, decided to perform a C-Section rather than wait for Dr. Vitale. He assisted with the set up and, after the team, which included the NICU and anesthesia, was ready, he delivered the baby at 10:27pm, a few minutes before Dr. Vitale arrived. (Pa287-Pa288, Pa293-Pa294). Dr. Vitale took over and Dr. Balazs returned to his patient he had left in the operating room with another resident. (Pa294, Pa286, Pa298).

Despite acknowledging Dr. Balazs arrived as soon as he could and delivered the baby at 10:27pm, Dr. Luciani nevertheless testified that if the C-Section would have been called at 9:48pm, it would have been started shortly after 10:00pm with delivery occurring within 5 to 10 minutes, or by 10:05pm or 10:10pm (17 to 22 minutes earlier than what took place). (Pa233). Dr. Luciani's opinion assumed that everything ran perfectly after 9:48pm. (Pa233).

Missing from Dr. Luciani's assumption; however, was any factual evidence that Dr. Balazs (or any other attending physician) was available to perform the C-Section 17 to 22 minutes earlier. Dr. Luciani admitted he did not know if any attending physician besides Dr. Balazs was available, whether the other C-Section Dr. Balazs was performing was an emergency or what portion of that C-Section Dr. Balazs was involved in at approximately 10:00pm. (Pa223; Pa225-Pa226).

Dr. Balazs testified that, although he did not recall the specifics of his other case, and fortunately the patient was fine afterward, any time he calls for a C-Section, whether for a fetal tracing or maternal fever, he considers it one that should be done as quickly as possible. (Pa291-Pa292). He also testified there are less resources at night and that most C-Sections done at night have someone from the Neonatal Intensive Care Unit (NICU) available "to try to ensure that we are as safe as possible." (Pa290).

Dr. Luciani confirmed his opinions were limited to the standard of care and he was not going to offer any opinions about the causation and damages aspect of the case because such opinions were beyond the scope of his expertise. (Pa220; Pa229; Pa236). Stephen Thompson, MD, a pediatric neurologist, was Plaintiffs' expert on proximate cause. In his report, he opined the infant Plaintiff "suffered neurological injury, chronic respiratory issues and multiple other medical problems, all as a result of a delayed delivery of at least 25-30 minutes." (Pa627).

Notably, Dr. Thompson admitted the infant Plaintiff suffered a severe and massive fetal maternal hemorrhage 6 to 12 hours prior to delivery, as evidenced by the approximately 70% loss of blood and a hemoglobin of 4.1 at birth and the fact the infant had no detectable blood pressure for the first four hours of birth. (Pa334-Pa335).[4] He admitted this blood loss and severe anemia did not develop in a 25 to 30 minute period, but rather occurred over a period of many hours and even a day prior to delivery. (Pa335; Pa340). He further acknowledged this level of severe anemia can cause a decrease in cardiac output and oxygen to the brain, lead to brain injury and could cause all of the findings that this baby exhibited at birth as a consequence of the massive fetal maternal hemorrhage that occurred. (Pa335; Pa339). Dr. Thompson conceded this massive fetal hemorrhage could not have been predicted or prevented. (Pa339).[5] Despite these concessions, Dr. Thompson nevertheless testified the massive and severe fetal hemorrhage and blood loss, which occurred at least six to twelve hours and up to a day before delivery, did not cause any injury to this baby and that all of her injuries and eventual death were attributable to hypoxic ischemic encephalopathy (HIE) and not being delivered approximately 25-30 minutes earlier. (Pa333; Pa340).

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[4] Plaintiffs' Appendix Pa247-Pa257 cites a deposition Dr. Thompson gave in a different case, which was inadvertently attached to the original motion. The correct transcript appears at Pa323-Pa343.

[5] Dr. Luciani also agreed a fetal maternal hemorrhage is most often not predictable and was not predictable in this case. (Pa229).

In an effort to pin down how much earlier the baby had to be delivered to obtain the chance of a better outcome, the following exchange took place:

> Q. So, what I'm asking you is if this baby were **born** five minutes earlier, would the outcome be the same?
>
> A. Yes.
>
> Q. If the baby was born ten minutes earlier, would the outcome be the same?
>
> A. Most likely, yes, but it's impossible to know. We can have this – go ahead.
>
> Q. All right. So, if the baby were born 15 minutes earlier, more likely than not would the outcome be the same?
>
> A. Yes.
>
> Q. If the baby were born 20 minutes earlier, more likely than not, would the outcome be the same?
>
> A. Yes.
>
> Q. If the baby were born 25 minutes earlier, more likely than not, would the outcome be the same?
>
> A. Hang on one second. I wrote 25 to 30 minutes earlier. So at 25 minutes or longer, 25 minutes or more, we might have had a better outcome. We don't know. I wrote 25 to 30 minutes. I can't give you a better answer than what's in my report.

(Pa340-Pa341). Dr. Thompson then testified that if the baby was born 30 minutes earlier, she would have been normal. (Pa341).

According to Dr. Thompson, for this baby to have had any chance of a better outcome, she had to have been delivered (i.e. born) by 10:02am (25 minutes earlier than 10:27pm). Given Dr. Balazs' unavailability and Dr. Luciani's testimony, which assumed that even if everything went perfectly within the standard of care, the earliest the baby could have been delivered would have been between 10:05pm (22 minutes earlier) and 10:10pm (17 minutes earlier), which is outside Dr. Thompson's window of opportunity. (Pa233). Defendants therefore moved for summary judgment.

In response to the motions, Dr. Thompson issued a certification that attempted to change his deposition testimony to say that he actually testified the 25 to 30 minute period referenced in his report and deposition started from the abnormal strips at 9:48pm rather than the time of birth at 10:27pm. (Pa388-Pa390). He then offered a new opinion that the infant was going to suffer injury if not delivered by 10:18pm (30 minutes after 9:48pm).(Pa388). This "explanation" completely retracted his prior answers to the multiple clear questions that asked for his opinions assuming the baby was born between 5 and 30 minutes earlier than her actual 10:27pm delivery and his clear opinion the delivery needed to be 25 minutes earlier to have a chance at a better outcome. (Pa340-Pa341).[6]

[6] This certification should have been rejected as a sham affidavit pursuant to *Shelcusky v. Garjulio*, 172 N.J. 185, 202 (1985) and/or *Ritondo by Ritondo v. Pekala*, 275 N.J. Super. 109 (App. Div.), *certif. denied*, 139 N.J. 186 (1994).

Without addressing the change in Dr. Thompson's testimony, Judge LaConte denied the motions, citing Dr. Luciani's original report and arguments (not Dr. Luciani's deposition testimony which clarified the acceptable time frame) referenced in Plaintiffs' brief that the delivery should have occurred within five to ten minutes of 9:48pm, or before 10:00pm. (1T50; 1T57; Pa21). Judge LaConte also granted Plaintiffs additional time to respond to the defense placental pathology expert report of Janice Lage, MD, whose review of the placental pathology confirmed the infant plaintiff sustained a "massive" fetal hemorrhage that occurred at least 6 hours to a few days prior to delivery. (Pa631-Pa633; Pa402). Ultimately, Plaintiffs did not serve any report that disputed Dr. Lage's opinion regarding the timing of the hemorrhage.

After the completion of expert discovery, on May 18, 2023, Defendants moved for reconsideration of the interlocutory orders entered on November 5, 2020, in the interests of justice and to avoid what would no doubt be a month or more trial given the number of expert witnesses. As Judge LaConte had retired, this case had been reassigned to Judge Citrino. After extensive oral argument, and in a detailed written decision analyzing the record, Judge Citrino focused on the timeline and whether the C-Section could have been accomplished within the 25-30 minute time period Plaintiffs' experts testified would be necessary to prevent or lessen the infant's injuries. (Pa15-Pa20). She concluded that, affording Plaintiff all

legitimate favorable inferences, even assuming the C-Section was called at 9:48pm, there was no attending available to perform it before Dr. Balazs finished his C-Section and made sure not to compromise his other patient. (Pa19). According to Judge Citrino, the unavailability of Dr. Balazs was a "key" fact on which the case hinged, especially where no one disputed Dr. Balazs could not have arrived sooner, that Dr. Papapetrou could not perform the C-Section herself as a resident, and no one alleged Dr. Vitale was required to be in the hospital sooner to perform the surgery. (Pa19). Judge Citrino granted Defendants' motions for summary judgment. (Pa20; Da1).

In denying Plaintiffs' motion for reconsideration, Judge Citrino found her decision was not arbitrary, capricious or unreasonable and detailed the multiple reasons why she previously found Plaintiffs' entire case was based upon suppositions and "beliefs about situations which did not exist." (Pa8). The key undisputed facts Judge Citrino relied upon included:

1) Dr. Luciani admitted residents need permission from their attending to call for a C-Section and cannot do so on their own.
2) Dr. Luciani admitted that even if protocol was followed and everything went perfectly within the standard of care, the earliest the C-Section would have been completed was between 10:05pm and 10:10pm, 17 minutes to 22 minutes earlier.

3) Even if Dr. Vitale called for a C-Section at 9:48pm, she was not in the hospital to perform the surgery and there was zero evidence Dr. Balazs could have or would have started Mrs. Jenning's C-Section prior to the one he was engaged in or before 10:12pm.

4) Given Dr. Luciani's testimony regarding the standard of care, there was not enough time for Dr. Papapetrou (resident) to call Dr. Vitale (her attending) about the patient, (as permitted if not required by the standard of care), speak with her until 10:03pm (confirmed by the telephone records) call Dr. Balasz, prepare the patient for surgery and deliver the baby 25-30 minutes before the actual 10:27pm delivery in order to be within the window Dr. Thomspon opined was needed in order for there to have been any difference in the outcome.

5) Dr. Thompson testified that even if the baby was born at 10:12pm, i.e. 15 minutes earlier, the outcome more likely than not would have been the same. (Pa8-Pa11).

Plaintiffs appeal from both orders.

LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE PROPERLY EXERCISED HER DISCRETION TO RECONSIDER THE INTERLOCUTORY ORDERS PURSUANT TO *R.* 4:42-2 IN THE INTERESTS OF JUSTICE.

Nowhere in Plaintiffs' brief is there any discussion of the standard of review applicable to this appeal. Appeals from an order granting or denying a motion for reconsideration are reviewed for an abuse of discretion. *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582 (2021); *Kornbleuth v. Westover*, 241 N.J. 289 (2020). An abuse of discretion occurs where the decision is made without a rational explanation, inexplicably departs from established policies or rests on an impermissible basis. *Flagg v. Essex Cnty. Prosecutor,* 171 N.J. 561, 571 (2002). Plaintiffs contend the court improperly agreed to reconsider an interlocutory order and misinterpreted the testimony. In reality, Judge Citrino properly engaged in a detailed analysis of the undisputed testimony, which revealed the sheer unfounded speculation upon which Plaintiffs' entire case was based. Judge Citrino did not abuse her discretion when she exercised her discretion to review the issues.

R. 4:42-2 governs motions for reconsideration of interlocutory orders and provides, in pertinent part, that "any order ... which adjudicates fewer than all claims as to all parties … shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." *See*

also Lombardi v. Masso, 207 N.J. 517, 536 (2011); *Lawson v. Dewar,* 468 N.J. Super. 128, 134 (App. Div. 2021)(citations omitted). As the Supreme Court noted in *Lombardi*, *R.* 4:42-2 "sets forth no restrictions on the exercise of the power to revise an interlocutory order." 207 N.J. at 534.

Indeed, the Court recognized that cases continue to develop after orders have been entered and judges continue to think about them. *Id.* at 536. Cases are not static and, where appropriate, the trial court is empowered to revisit the prior ruling in the interests of justice to "right the proverbial ship." *Id.* at 537 (noting a judge "is not required to sit idly by and permit injustice to prevail" where, for whatever reason, he sees or hears something that convinces him that a prior ruling is not consonant with the interests of justice). The Court further held, "[t]his entitlement to change a prior ruling in the interests of justice is what distinguishes an interlocutory order from a final judgment." *Ibid. See also Lawson*, 468 N.J. Super. at 135 (if a prior judge has erred or entered an order that ceases to promote a fair and efficient processing of a particular case, the new judge owes respect, but not deference and should correct the error).

So too, in *Lawson*, the court observed reconsideration motions that argue in good faith a prior mistake, a change in circumstances or the court's misappreciation of what was previously argued, present the court with an opportunity to either reinforce or better explain why the prior order was

appropriate or correct a prior erroneous order. *Id.* at 136. Accordingly, the court encouraged trial judges to view well-reasoned motions based on *R.* 4:42-2 as "an invitation to apply Cromwell's rule: 'I beseech you … think it possible you may be mistaken.'" *Ibid.* The fact that Judge LaConte had retired did not preclude a subsequent motion to reconsider his earlier denial of the motion. *See, e.g. Nusbaum v. Newark Morning Ledger Co*., 86 N.J. Super. 132, 137 (App. Div.), *certif. denied,* 44 N.J. 398 (1965)(citations omitted).

Applying these principles confirms Judge Citrino did not abuse her discretion in reconsidering the November 5, 2020 order denying Defendants' motions for summary judgment. The interests of justice warranted reconsideration before compelling the parties to participate in a trial anticipated to last a month or longer given the number of expert witnesses, not to mention the exorbitant litigation costs and devotion of limited judicial time and resources to one case where a shortage of judges was delaying all civil trials. Moreover, in all fairness and with due respect to Judge LaConte, he did not attempt to analyze the testimony in the record necessary to decide this case properly.

Plaintiffs also claim they were denied due process because Judge Citrino found Dr. Balazs's unavailability to be a key factor in her decision, a point not emphasized in Defendants' briefs. This claim lacks merit. There is no law that precluded her from highlighting an undisputed fact, which had always been in the

record, as an additional reason for why Plaintiffs' proofs were deficient. *Lombardi*, *supra,* 207 N.J at 536 (noting there is no requirement for a trial judge considering a motion for reconsideration to confine himself to the original record). What is "critical" when a trial judge is inclined to revisit a prior interlocutory order, is that the court provide the parties with a fair opportunity to be heard on the subject, apply the proper legal standard to the facts and explain her reasons. *Id.* at 537. Judge Citrino did just that.

The motions were fully briefed with a record including the undisputed testimony of the three people necessary to prove Plaintiffs' claims – their standard of care and causation experts and Dr. Balazs, who Plaintiffs insisted would have delivered the infant plaintiff earlier, if only he had been summoned earlier. In fact, Dr. Balasz's availability was key to Plaintiffs' claim he would have performed the delivery sooner if he had been called. Yet, as Judge Citrino correctly analyzed the record, the testimony of these three witnesses simply did not support Plaintiffs' theory. It would have been an injustice to all parties, not just Defendants, to force them to endure a long and expensive trial that would impermissibly permit a jury to impose liability on Defendants based on sheer speculation.

Moreover, Plaintiffs were afforded ample opportunity to address the proximate cause issues, including Dr. Balazs's unavailability, and did address that point. Plaintiffs have always taken the untenable position that Dr. Balazs'

availability or unavailability was not material to the proximate cause issues. (Pa374-Pa375). They even argued before Judge Citrino that if Dr. Balazs was unavailable, that was somehow an admission of liability or negligence on the part of St. Joseph's Hospital, a theory of liability never pleaded or supported with appropriate expert testimony. (Pa471; 2T14). *See, e.g. Labega v. Joshi,* 470 N.J. Super. 472, 495 n.12 (App. Div. 2022)(declining to allow Plaintiffs to proceed on theories a negligence per se or breach of an alleged contract to staff a hospital department without an expert). Judge Citrino's decision to reconsider the motion, including all undisputed facts, did not deny Plaintiffs due process. Judge Citrino simply disagreed with the materiality of Dr. Balazs' unavailability, which she correctly found was a key issue to establish proximate cause.

As discussed more fully in Points II and III, Judge Citrino's analysis of the evidence was correct. Plaintiffs and their expert conceded Dr. Balazs arrived as soon as he could and there was no expert testimony Dr. Vitale should have been present at the hospital or driven to the hospital any earlier than she did. Absent Dr. Balazs' availability, which the facts did not support, there was zero evidence that an attending physician was available to perform the C-Section earlier than it occurred, even assuming Defendants called for it at 9:48pm. Reading the testimony of Plaintiffs' medical experts together, if everything worked perfectly, the delivery still would not have taken place in time to affect the ultimate outcome.

POINT II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT WHERE PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE UPON WHICH A JURY COULD FIND PROXIMATE CAUSE.

An Appellate court reviews de novo the trial court's grant of summary judgment. *Townsend v. Pierre*, 221 N.J. 36, 59 (2015). The court therefore applies the same standard applicable to the trial court and must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law. *Brill v. The Guardian Life Insurance Company of America*, 142 *N.J.* 520, 536 (1995). While the court must grant all legitimate favorable inferences to the non-moving party, it may pick and choose inferences from the evidence to the extent "a miscarriage of justice under the law" is not created. *Ibid.* A legitimate inference must be a reasonable inference, as distinguished from mere speculation. *Kulas v. Public Service Elec. and Gas Co.*, 41 N.J. 311, 317 (1964). That is, the claimed conclusion from the offered fact must be a probable or more probable hypothesis and well founded in reason as opposed to a mere guess or conjecture. *Dwyer v. Ford Motor Co*., 36 N.J. 487, 518 (1962) (internal quotation omitted).

It is well settled that to establish a *prima facie* case of medical malpractice, a plaintiff must present expert testimony establishing: (1) the applicable standard

of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury." *Lanzet v. Greenberg*, 126 *N.J.* 168, 195 (1991); *Rosenberg v. Cahill*, 99 *N.J.* 318, 325 (1985); *Germann v. Matriss*, 55 *N.J.* 193, 205 (1970). "Absent competent expert proof of these three elements, the case is not sufficient for determination by the jury." *Lanzet*, 126 *N.J.* at 195. Moreover, it is the Plaintiffs burden to prove each element by "some competent proof." *Townsend,* 221 N.J. at 51 (citations omitted).

When it comes to proximate cause and expert testimony, the Court has cautioned that given the weight a jury may accord an expert's opinion, it is the duty of the trial court to ensure an expert is not permitted to express speculative opinions or personal views that are unfounded in the record. *Id.* at 55. Thus, our Court has held "a party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record **or by an expert's speculation that contradicts the record**." *Ibid.* (emphasis added). Judge Citrino rightly found Plaintiffs entire case (and theory of proximate cause) relied upon suppositions and expert testimony about situations that did not exist. (Pa8).

To begin with, Plaintiffs took the position, via their causation expert Dr. Thompson, that the pre-existing massive fetal hemorrhage that occurred a minimum of six hours prior to delivery played no role whatsoever in the ultimate outcome and that the infant's injuries and subsequent death were caused by

hypoxic ischemic encephalopathy (HIE) and the failure to deliver her 25 to 30 minutes earlier than took place. (Pa333; Pa341). Defendants argued that where a Plaintiff alleges a delayed diagnosis of a pre-existing condition caused harm, the two-pronged modified increased risk standard set forth in *Scafidi v. Seiler*, 119 *N.J.* 93 (1990) applies. (Pa409). That is, a plaintiff must first "verify, as a matter of reasonable medical probability" the alleged negligent treatment increased the risk posed by the pre-existing condition before a jury question is raised as to whether that increased risk was a substantial factor in producing the ultimate result. *Scafidi*, 119 N.J. at 108-09 (citing *Evers v. Dollinger,* 95 *N.J.* 399, 417 (1984)). *See also* *Reynolds v. Gonzales*, 172 *N.J.* 266, 282-283 (2002). Although Judge Citrino did not specifically reference *Scafidi* or *Evers*, she cited *Vuocolo v. Diamond Shamrock Chem*, 240 N.J. Super. 289, 295 (App. Div. 1990), where Judge Michels, P.J.A.D. explained the increased risk/substantial factor standard of proximate cause set forth in *Evers*. She also cited *Davis v. Brooks*, 280 N.J. Super. 406, 410 (App. Div. 1993), which cites *Scafidi.*

More to the point, the *Evers*/*Scafidi* standard does not relieve the plaintiff of having to present proof to a reasonable degree of probability the defendant's negligence increased the risk of harm. Proof of an increased risk requires more than a mere "possibility." *Reynolds*, 172 N.J. at 284 (citing *Germann v. Matriss*, 55 *N.J.* 193, 205 (1970)). As the Court wrote in *Reynolds*, speculation is not

enough:

> [T]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. **A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.**

Ibid. (quoting W. Page Keeton et. al., *Prosser & Keeton on the Law of Torts*, §41, at 269 (5th ed. 1984)(emphasis added)). Consistent with this principle, the Court explained the purpose of the first prong of the increased risk test requires the jury "**to verify, as a matter of reasonable medical probability**, that the deviation ... increased the risk of harm from the pre-existing condition." *Id.* at 285 (quoting *Scafidi, supra*, 119 N.J. at 108-109) (emphasis added). Only after Plaintiff satisfies this burden can the case go to the jury to determine whether the increased risk was a substantial factor in causing the ultimate harm. *Id.* at 282-283. *See also Flood v. Aluri-Vallabhaneni,* 431 N.J. Super. 365, 375 (App. Div. 2013).

This is where Plaintiffs' case fails as a matter of law. Affording Plaintiffs all legitimate favorable inferences, they produced no evidence beyond pure speculation to establish the alleged deviation increased the risk of any pre-existing condition sufficient to create a jury question as to whether that increased risk was a substantial factor in causing the ultimate outcome. Under the facts of this case, an increased risk could only exist if Plaintiffs could present some evidence to a

reasonable degree of medical probability that Dr. Papapetrou's failure to call for a C-Section or contact Dr. Balasz at 9:48pm would more likely than not have resulted in an earlier delivery during the narrow window of time where Dr. Thompson claims there was time to achieve a better result. Absent such evidence, there can be no factual basis for a jury to find the alleged negligence was a substantial factor in causing the ultimate outcome.

For Plaintiffs to argue they had no requirement to prove a physician capable of performing the C-Section would have been available to do so ignores the initial proximate cause element our Courts have held in *Evers, Scafidi and Reynolds et. al.* is the Plaintiffs' burden of proof. To hold otherwise would eliminate entirely Plaintiffs' burden from having to provide some evidence of proximate cause and allow the jury to speculate about facts that did not exist.

The undisputed facts simply do not support proximate cause. Aside from the fact Dr. Luciani admitted Dr. Papapetrou was a second year resident who did not have legal authority to call for a C-Section or perform one on her own, even if she requested Dr. Vitale call for a C-Section and/or called Dr. Balazs for assistance at 9:48pm, there is no competent evidence Dr. Balazs or any other attending was available to perform the C-Section before Dr. Balazs ultimately did. Plaintiffs' suggestion Dr. Balazs would have immediately left his own patient, for whom he had determined a C-Section was required to be done as quickly as possible at night

when there are less resources available, and performed the section on Mrs. Jennings first, is not supported by Dr. Balazs' testimony. (Pa290-Pa291). Nor is it a legitimate inference that can be drawn, as a jury could not rationally find that more likely than not Dr. Balazs would have placed his own patient in jeopardy to evaluate Mrs. Jennings. The fact Dr. Balazs recalled his other patient was "fine" after the C-Section he performed does not change the indication for the emergent procedure or contradict his testimony that whenever he decides one of his patients needs a C-Section, particularly at night, he considers it one that needs to be done as quickly as possible. (Pa285; Pa290-Pa291). *See Acken v. Campbell,* 134 N.J. Super. 481, 490 (App. Div. 1974), *aff'd,* 67 N.J. 585 (1975) ("W]hen the proof of a particular fact is so meager or so fraught with doubt that a reasonably intelligent mind could come to no conclusion but that the fact did not exist there is no question for the jury to decide.") (internal quotation omitted).

Plaintiffs' suggestion Dr. Balazs was performing a purely elective C-Section at 10:00pm at night and therefore would have prioritized Mrs. Jennings belies the record and common sense. Aside from his own testimony he considers any C-Section he calls on one of his patients to be one that needs to be accomplished as quickly as possible, no one does an elective C-Section at night when there are less resources available. Without any evidence, Plaintiffs assert Dr. Balasz must have been in the operating room at 9:57pm and presumably would not have started that

C-Section and would have instead come to deliver Mrs. Jennings if only he had been called at 9:48pm. (Pa8; Pa589). No one knows when Dr. Balazs' other C-Section began, but the evidence is clear he had just finished delivering the baby when the nurse came to ask if he could assist with Dr. Vitale's patient, suggesting more likely than not that he had been in the operating room well before 9:48pm. The record simply does not support a legitimate inference that Dr. Balazs would have been presented with a choice between two patients and delayed his own patient's emergency C-Section in favor of Mrs. Jennings.

Having found no evidence to support Plaintiffs' speculation Dr. Balazs would have been able to deliver Mrs. Jennings even if called at 9:48pm, it was unnecessary for Judge Citrino to repeat the concessions that Plaintiffs' experts made regarding the timing of the delivery and the inescapable conclusion that there simply was not enough time to deliver the baby in time to offer a chance to avoid injury. In other words, even assuming everything worked perfectly within the standard of care, at best the delivery would have occurred by 10:05-10:10pm, as Dr. Luciani testified. That delivery would have been only 17 to 22 minutes earlier. Yet, Dr. Thompson testified the baby had to be born at least 25-30 minutes earlier than 10:27pm to have any chance of a better outcome, or by 9:57-10:02pm, a time when even Plaintiffs assume Dr. Balasz was in the operating room with his other patient.

To recap, the undisputed facts confirmed the following timeline:

9:48pm Deceleration appears on the fetal monitor. Dr. Luciani testifies Defendants should have called for a C-Section even though Dr. Papapetrou was not in the room at that precise moment and the standard of care did not require her to be. (Pa232, Pa234).

9:53pm Dr. Papapetrou is in patient's room evaluating patient. (Pa234).

9:58pm Dr. Papapetrou appropriately calls Dr. Vitale to discuss the strips and patient, as Dr. Luciani concedes. (Pa232). The telephone call lasts five minutes. (Pa235).

10:03pm Dr. Papapetrou and Dr. Vitale finish their five minute telephone discussion and Dr. Vitale leaves for the hospital. (Pa229; Pa235).

10:03pm is the earliest Dr. Luciani testified the delivery would have occurred even if everything moved perfectly within the standard of care starting from 9:48pm. (Pa233).

As the timeline continues, within minutes of ending the telephone call at 10:03pm, Dr. Papapetrou asked the nurse to find Dr. Balasz, who was in the operating room finishing a C-Section on his own patient. (Pa232). After making sure it was safe to leave his patient with another resident, Dr. Balasz arrived at Mrs. Jennings bedside between 10:08pm and 10:12pm, within five to nine minutes after Dr. Papapetrou and Dr. Vitale finished their telephone call at 10:03pm. (Pa232; Pa228, Pa235). Dr. Balasz decided to perform the C-Section, which he accomplished at 10:27pm. No one has criticized Dr. Balasz for delaying the delivery.

As Dr. Luciani admitted it was appropriate and within the standard of care for Dr. Papapetrou to call her attending, Dr. Vitale, at 9:58pm, the entire process of calling for Dr. Balasz could not have taken place before Dr. Papapetrou and Dr. Vitale finished discussing the patient at 10:03pm. Dr. Luciani never testified the standard of care required Dr. Papapetrou to contact Dr. Balasz before she spoke to her own attending.

Judge Citrino was correct when she found there was not enough time to perform the delivery in accordance with Dr. Luciani's opinion and no attending available to accomplish that task by 10:03pm or 10:10pm.

Recognizing the hole in their proofs, Plaintiffs attempted to assert some type of common knowledge claim that the hospital was not properly staffed because a doctor was not on standby and available to perform the emergency C-Section immediately when they claim it should have been performed. Without any citation in the record, Plaintiffs argued that Dr. Luciani testified the St. Josephs Hospital defendants were liable because they did not have a doctor ready to perform an emergency C-Section when that procedure needed to be performed. (Pa461; Pa471). Plaintiffs did not provide a supporting citation to Dr. Luciani's testimony because he never offered such an opinion. Similarly, at oral argument, Plaintiffs claimed Defendants attempted to excuse their alleged failure to expedite the delivery by admitting they were not properly staffed for a patient with a maternal

hemorrhage, a claim they repeat in their merits brief. (2T14; Pb33-Pb34). Any such claim is disingenuous, at best, because it presumes Defendants could predict the unfortunate hemorrhage that their own experts admitted was only knowable in retrospect and was not predictable or preventable. (Pa229, Pa339). That aside, Plaintiffs never pleaded or provided an Affidavit of Merit to support a direct claim against St. Joseph's Medical Center, as such a claim would clearly require an affidavit of merit and supporting expert testimony from a qualified expert. *See Havilland v. Lourdes Med. Ctr. Of Burlington Cnty, Inc.,* 250 N.J. 368, 383-384 (2022); *Labega v. Joshi,* 470 N.J. Super. 472, 495 n.12 (App. Div. 2022). Any claim St. Joseph's Medical Center should have had additional attending obstetricians on stand-by present in the hospital during the relevant time is not a question of common knowledge, as Judge Citrino rightly noted.(Pa20). There was no expert testimony the hospital was not appropriately staffed.

This entire point raised by Plaintiffs is curious because in its motion for reconsideration, Plaintiff claimed they never argued Defendants' liability was based upon negligent staffing and insisted Judge Citrino retract her comments. (Pa590-Pa591). Judge Citrino's comments rejecting any theory based upon alleged negligent staffing were made in direct response to Plaintiffs' statements in their brief and at oral argument. When Plaintiffs objected to this entire theory being addressed by the court in the motion for reconsideration, Judge Citrino retracted

her comments, but appropriately noted that retraction did not affect the rest of her decision to grant summary judgment. (Pa11-Pa12). For reasons unknown, Plaintiffs continue to discuss this non-issue in their merits brief. (Pb33-Pb34). As discussed in Point III, *infra*, Judge Citrino's decision and supporting statement of reasons was correct.

POINT III

THE TRIAL COURT DID NOT ABUSE HER DISCRETION IN DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION.

It is well settled an Appellate Court will review a trial court's denial of a motion for reconsideration for abuse of discretion. *Kornbleuth, supra,* 241 N.J. at 301. In contrast to the standard applicable to the review of an interlocutory order, when a trial court considers a motion to reconsider a final order granting summary judgment, the movant must satisfy the more stringent standards set forth in *R.* 4:49-2, which require a showing that the challenged order was the result of a "palpably incorrect or irrational analysis" or the court's failure to consider or appreciate competent and probative evidence. *Lawson*, *supra,* 468 N.J. Super. at 134 (quoting *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996)). Judge Citrino correctly found her decision to reconsider and grant summary judgment to Defendants was not an abuse of discretion, palpably incorrect or irrational. She was right.

First, Plaintiffs incorrectly argued Judge Citrino granted summary judgment based on the medical opinions of the Defendants' expert Dr. Stavis, who opined the infant's injuries were caused by the massive hemorrhage. Judge Citrino did not consider Dr. Stavis' report and any reference to it was simply part of a narration of the competing causation theories. (Pa6-Pa7; Pa18). She specifically stated that

regardless of whether the infant's injuries were ultimately caused by the hemorrhage or (HIE), she accepted Dr. Thompson's testimony that the C-Section needed to be performed 25 to 30 minutes earlier than it was to establish proximate cause. (Pa18-Pa19).

Plaintiffs next contend the trial court acted in an arbitrary, capricious and unreasonable manner when she found there was no evidence that even if Defendants called for a C-Section at 9:48pm, it could be accomplished within that 25 to 30 minute period. Judge Citrino correctly noted Dr. Luciani admitted that to make the calls and prepare the patient, the earliest the delivery would have occurred would have been between 10:05 and 10:10pm, or approximately 17 to 22 minutes earlier than occurred. (Pa233). But as previously discussed, Judge Citrino correctly found there was zero evidence to support Plaintiffs' repeated claims that Dr. Balazs would have started the Jennings' C-Section prior to the one he was engaged in, if only he had been contacted sooner. (Pa7-Pa8). Indeed, there was no evidence he would have had the opportunity to do so, let alone that he would have made that decision. Judge Citrino was not wrong to focus on this point in addition to the testimony of the medical experts.

Nor did Judge Citrino misstate the expert testimony or misapply the law. Rather, Judge Citrino's analysis exposed the wildly speculative theories and house of cards upon which Plaintiffs' entire case was based. It was agreed Dr.

Papapetrou could not have performed the C-Section herself as a resident, only that she should have called for the surgery earlier. (Da6). If she did call for a section, she would have to get Dr. Vitale or Dr. Balasz to agree and perform the surgery. Dr. Vitale was not in the hospital and there was no expert testimony that she was required to be or that she was required to drive to the hospital any sooner than she did. Within minutes of speaking with Dr. Vitale, Dr. Papapetrou asked the nurse to get Dr. Balasz for assistance, but he was already in the operating room attending to his own patient. Citing Plaintiffs' brief, Judge Citrino noted Plaintiffs' assertion that Dr. Balasz must have been in the operating room with his other patient at 9:57pm, but presumes he would not have started that C-Section and would have instead come to deliver Mrs. Jennings if only he had been called at 9:48pm. (Pa8; Pa589). Judge Citrino correctly found, "There is zero evidence that Dr. Balazs would have started Jennings' c-section prior to the one he was engaged in or before 10:12pm." (Pa8). Indeed, it would be improper to allow a jury to speculate that Dr. Balazs could have and would have held up his own patient's C-Section to perform one on Mrs. Jennings, especially when he has testified that any time he calls for a C-Section on one of his patients, it needs to be done as quickly as possible. (Pa291-Pa292). Judge Citrino correctly found Plaintiffs' entire case relied on suppositions and the opinions of Plaintiffs' experts were "beliefs about situations which did not exist." (Pa8).

In sum, Judge Citrino correctly concluded Plaintiffs failed to produce sufficient evidence for a jury to find to a reasonable degree of probability Defendants' alleged delay in calling for a C-Section at 9:48pm more likely than not would have resulted in a delivery during the time Plaintiffs' experts testified would have allowed for a chance for a better outcome. Accordingly, there was no evidence for a jury to find the alleged deviation was a substantial factor in causing the ultimate outcome. To send this case to the jury, based solely on speculation, would violate settled law and potentially allow for a manifest injustice to Defendants.

CONCLUSION

For the foregoing reasons, Dr. Papapetrou and St. Joseph's Medical Center respectfully submit the orders granting summary judgment to Defendants and denying Plaintiffs' motion for reconsideration be affirmed.

Respectfully submitted,
FARKAS & DONOHUE, LLC
Attorneys for Defendants-Respondents
Ashley Papapetrou, D.O. and
St. Joseph's Regional Medical Center

Beth A. Hardy/s/
By: _____
Beth A. Hardy, Esq.

Dated: February 20, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-000307-23T4

THE ESTATE OF MACKENZIE JENNINGS by its Administratrix MICHELLE JENNINGS, *Plaintiff-Appellant,* vs. DIANA VITALE, M.D., PETER BALAZS, M.D., ASHLEY PAPAPETROU, D.O., VITALE WOMEN'S HEALTH OBSTETRICS AND GYNECOLOGY, L.L.C., ST. JOSEPH'S REGIONAL MEDICAL CENTER, "JOHN/JANE DOES 1-10" (Fictitious Names) and/or "ABC CORPORATIONS 1-10" (Fictitious Names), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO. PAS-L-812-18 Sat Below: HON. VICKI A. CITRINO, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff The Estate of Mackenzie Jennings, by its administratrix Michelle Jennings ("Plaintiff" or "Appellant"), submits this Reply Brief in support of the appeal from orders of July 17 and September 29, 2023 (the "Orders on Appeal").

PROCEDURAL HISTORY

Appellant incorporates the Procedural History of the initial merits brief.

REPLY TO COUNTERSTATEMENT OF FACTS

Respondents Ashley Papapetrou, D.O. ("Dr. Papapetrou") and St. Joseph's Regional Medical Center (collectively the "St. Joseph's Defendants"); and Donna Vitale, M.D. ("Dr. Vitale") and Vitale Women's Health Obstetrics and Gynecology, L.L.C. (collectively the "Vitale Defendants")[1] have taken liberties with the record. They have mischaracterized the deposition testimonies of Plaintiff's experts, Dr. Richard Luciani, M.D. ("Dr. Luciani") and Dr. Stephen Thompson, M.D. ("Dr. Thompson"). This is consistent with the proceedings below. The New Motion Judge, who had never handled any aspect of this case before, accepted these mischaracterizations, many of which found their way into the decisions of July 21, 2023 and September 29, 2023.

[1] St. Joseph's Regional Medical Center is vicariously liable for the negligence of Dr. Papapetrou. Vitale Women's Health Obstetrics and Gynecology, L.L.C. is vicariously liable for the negligence of Dr. Vitale.

Moreover, on this appeal, Respondents regretfully contend that Dr. Thompson filed a "sham" affidavit when he advised the Case Management Judge about just how badly his words were misused in Respondents' briefing. As a review of that Affirmation [Pa386-390] proves, Dr. Thompson identified sections of the briefs mischaracterizing his testimony, and then cited to pages of his deposition transcription showing that he had not said the things attributed to him. Appellant accurately set forth the substance of Dr. Thompson's testimony at pages 44 through 50 of her initial merits brief and respectfully refers the Court to that discussion.[2]

The New Motion Judge, accepted the argument that Dr. Thompson stated that an earlier delivery would not have made a difference. [Pa9-10]. In fact, Dr. Thompson explicitly testified that an earlier delivery would have changed the outcome: "You asked me, do I agree that an earlier delivery would not have changed the outcome, and I don't agree that an earlier delivery would not have changed the outcome. My report opines that an earlier delivery would, in fact, have changed the outcome." [Pa336, Thompson Dep., 50:10-15]. When the questioning continued as if he had just said, rather, that an earlier delivery would not have changed the outcome, Dr. Thompson repeated: "I want to make sure

[2] The deposition of Dr. Thompson is located at Pa322-355. Appellant apologizes for the oversight on pages 44 through 50 of not including the specific appendix page reference when citing to deposition page number and lines.

that, an earlier delivery would have made the outcome better for this child. That's my opinion in my report. That's what I'm trying to articulate here." [Pa336, 50:20-23]. And again: "I don't agree with your statement an earlier delivery wouldn't have changed the outcome. I believe an earlier delivery would." [Pa336, 50:25 to 51:2]. Respondents' arguments that Dr. Thompson's testimony establishes a lack of proximate causation is flatly without merit.

Similarly, Respondents mischaracterize the deposition testimony of Dr. Luciani. Respondents claimed it was hospital policy that a resident can never call a C-section, even in an emergency, and that Dr. Luciani agreed that Dr. Papapetrou could not call the C-section. The New Motion Judge even "found" that Dr. Luciani "testified that residents need permission from their attending to call for a C-section" and that, as a matter of undisputed fact, "[t]he facts are that Papapetrou could not have called the C-section." [Pa7-8]. These observations are not true. In fact, Respondents have never come forward with any proof of this hospital policy. No written procedures were ever produced; and no medical authority was ever proffered to the effect that a resident cannot call a C-section. Nonetheless, Dr. Luciani was asked at his deposition to assume this policy existed and questions were posed based on this (unproven) assumption. Even so, Dr. Luciani indicated that hospitals can have normal operating rules and procedures, but he further stated what is obvious in law and medicine: "But the

standard of care is not dictated by the policies and the procedures of any given hospital." [Pa221, Luciani Dep., 19:16-18]. Dr. Luciani explicitly faulted Dr. Papapetrou for not calling the C-section, given the emergency, contrary to the Court's findings and Respondents' briefing.[3]

In truth, Dr. Papapetrou herself actually testified that a second-year resident can "give orders" [Pa529, Papapetrou Dep., 85:13-15], so long as she consulted the attending physician. [Pa529, Papapetrou Dep., 85:23-86-1]. Even under the unproven hospital policy, all she needed to do was consult with Dr. Balazs before giving the order, according to Dr. Papapetrou. [Pa529, Papapetrou Dep., 85:13-15; 85:23-86-1]. So accepting her testimony as true, Dr. Papapetrou deviated from the applicable standard of care by not consulting with Dr. Balazs in a timely fashion, by her own admission. It was not until about 10:10 p.m. when the charge nurse -- not even Dr. Papapetrou or Dr. Vitale -- consulted with Dr. Balazs. [Pa285-286].

[3] When seeking summary judgment, Respondents submitted mini-script deposition transcripts, rather than copies of the certified original full-page transcripts. In their briefs, when citing to a purported fact at deposition, Respondents refer merely to a single page of the appendix, which includes four pages of actual transcript. In many cases, this Court will search high and low for many of Respondents' assertions and, frequently, what the Court ultimately will discover is that the briefing is a generous mischaracterization of what was actually said

Assuming that the hospital did have such a policy, Dr. Luciani further testified that a hospital's protocol of having another doctor consult with a resident must be relaxed for an emergency in the interest of the health of the mother and the child. He testified that "realistically, when you're in a residence program and you have a baby that has any sort of fetal distress," the resident must have "*carte blanche* to call for a section and expedite it before we even get phone calls or walk through the door because the only thing we're concerned about, and you would agree with this, is that we want a healthy mother and a healthy baby. So really there are two different things." [Pa231, Luciani Dep., 55:16-25].

REPLY ARGUMENT

A. Respondents Do Not Dispute The Fact That The New Motion Judge Raised And Decided Issues That They Did Not Raise (Pa13-20)

As demonstrated in Appellant's Procedural History and initial merits brief, the New Motion Judge raised and then decided matters not raised by any of the motions. Respondents essentially ignore this argument in their opposition and, to the extent it is addressed in the Vitale Defendants' brief, the point is implicitly acknowledged – the Vitale Defendants simply argue that what the New Motion Judge did was fine. [Vitale Defendants' Brief, pp.25-31]. Respondents implicitly have acknowledged that the sole legal argument pursued

by them, in support of their 2020 and 2023 motions, was that Plaintiff could not, as a matter of law, establish proximate causation. This was asserted because Dr. Thompson supposedly had testified to the effect that even if the delivery had occurred within the time period fixed by the applicable standard of care, the outcome would have been the same [See Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442].

The following matters, raised and decided by the New Motion Judge, were not raised in the moving briefs of the Respondents:

(i) That Dr. Papapetrou and Dr. Vitale did not deviate from the applicable standard of care, as a matter of law. [Pa7-8]. In fact, neither Respondent so contended on their motions. They instead argued that, accepting that they did not meet the standard of care, their deviation did not proximately cause any injury because Dr. Thompson supposedly conceded that an earlier delivery would not have made any difference. [See Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442]. Even though the issue should not have been decided below, as it was not raised, Appellant nonetheless has demonstrated that there is far more than enough evidence to establish that Dr. Papapetrou and Dr. Vitale deviated from the standard of care – because neither one of them ever called the C-section.

(ii) That Appellant's proofs that Mackenzie's injuries were proximately caused by the delayed delivery, and not the maternal hemorrhage on the day previous, were inadequate [Pa10-11]. In truth, Respondents' moving papers conceded that Dr. Thompson's opinion created a jury for the issue to determine over whether Mackenzie's injuries were the result of the hemorrhage or the thirty-nine minutes of oxygen deprivation. [See, e.g., Pa208].[4] The New Motion Judge faulted Plaintiff for not addressing the

[4] Moreover, the New Motion Judge's explanation on this point was one-sided and ignored Dr. Thompson's detailed testimony as to why, even though a maternal hemorrhage could cause in some cases some of the injuries suffered by

causation proofs concerning the effect of the maternal hemorrhage [Pa10: "There has been no specific testimony about the cause of the infant's multiple medical problems"] when the movants had actually conceded that this issue was not being raised by their motion for summary judgment.[5]

(iii) That Dr. Luciani's opinions did not contest that Dr. Papapetrou met the standard of care [Pa7-8], when in fact, the defense did not actually argue that as part of their motion. The New Motion Judge wrote: "What the Plaintiff neglects to acknowledge is that there is no expert testimony that the Defendant Papapetrou, deviated from the accepted standard of care of a resident obstetrician" and "[t]he facts are that Papapetrou could not have called the c-section." [Pa7-8]. Both of these observations are just wrong; and no party ever raised, as a legal argument, that Dr. Papapetrou or Dr. Vitale met their standard of care, as a matter of law. [See Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442].

To the extent Respondents address the due process arguments, this Court should note that they do not actually dispute that the New Motion Judge raised these issues *sua sponte*; or that the New Motion Judge actually ruled against Appellant on issues that they had conceded for purposes of the motions. The St.

Mackenzie, the injuries in this case were attributable solely to the delayed delivery. [Pa333-334, Deposition of Dr. Thompson, 39:23-42:17].

[5] There is a good reason why the movants did not move for summary judgment based on the report of Dr. Robert Stavis. Not only are Dr. Thompson's opinions thorough and supported with detailed explanations, but Dr. Stavis' report is conclusory and will be, before trial, subject to an *in limine* motion based on net opinion. For the moment, however, it merely bears noting that the New Motion Judge ruled against Appellant on an issue that the Respondents ***had conceded***, for purposes of the summary judgment motions. [Pa208: "for purposes of this motion only, Defendants will accept Dr. Thompson's opinion"].

Joseph's Defendants do not address the issue at all.[6] On the other hand, the Vitale Group argues that Appellant had an "opportunity to be heard" on these issues through Appellant's motion for reconsideration. [Vitale Defendants' Brief, pp.25-31]. This argument ignores that the New Motion Judge, realizing that its first order could not withstand appellate review, withdrew the most critical aspect of the July 17, 2023 Order. Instead of simply admitting that the court got it wrong, however, the New Motion Judge instead created even more new purported reasons to rule against Plaintiff in the September 29, 2023 Order. Appellant likewise had no notice or opportunity of the new issues raised and decided by way of the September 29, 2023 Order.

Essentially, because of the New Motion Judge's willingness go beyond the issues actually framed -- to the point of even ignoring explicit concessions that had been for purposes of the motion -- the opinions below devolved into a "fact-finding" free-for-all during which the New Motion Judge and Respondents were no longer bound by those concessions. The New Motion Judge identified "facts" that were not set forth in either movants' Rule 4:46-2 statement of material undisputed facts, and determined that these so-called facts were

[6] For the first time ever in this case, the St. Joseph's Defendants now contend that causation in this case is governed by the principles of *Scafidi v. Seiler*, 119 *N.J.* 93 (1990) (St. Joseph's Group Brief, pp21-26]. They never argued that this was a *Scafidi* case; and the New Motion Judge did not analyze it as a *Scafidi* case.

"material" and undisputed. The New Motion Judge took issues that had been explicitly conceded for purposes of the motion and resolved them against Plaintiff. Neither Dr. Papapetrou nor Dr. Vitale argued below in their merits brief that they met the standard applicable to them. [See Pa210-211; Pa212-213; Pa266-267; Pa403-410; Pa438-442]. But at oral argument on July 14, 2023, they began to suggest to the Second Motion Judge that Dr. Luciani's opinion -- that the applicable standard of care required one of them, or both of them, to act more promptly -- was not realistic because of bald excuses they were offering. Dr. Papapetrou's counsel asserted that she was not bedside at 9:48 p.m.; first learned of the deceleration at 9:53 p.m.; and then placed a call to Dr. Vitale – ***at 9:58 p.m. and they spoke for five minutes!*** None of these "facts" were recited in the Rule 4:46-2 statement submitted on her behalf.

There are good reasons why the St. Joseph's Defendants did not argue that Dr. Papapetrou met the standard of care, at least for purposes of this motion. Why it allegedly took Dr. Papapetrou five minutes to learn of the deceleration creates numerous issues of fact. Why it then took another five minutes for Dr. Papapetrou to place a call to Dr. Vitale raises similar issues of fact. Why they allegedly spoke for another five minutes, while Mackenzie's life hung in the balance, creates yet again another whole set of troubling fact questions. Why Dr. Papapetrou did not immediately notify the attending physician, Dr. Balazs,

creates issues of fact. Significantly, the St. Joseph Defendants did not proffer an expert report that any of these alleged circumstances mattered to whether Dr. Papapetrou met her applicable standard of care. And then there is the most troublesome undisputed fact of all: that Dr. Papapetrou ***never*** called for the C-section: neither at 9:48 p.m.; nor at 9:53; nor at 10:03 p.m. The C-section was not called until the charge nurse asked Dr. Balazs to take a look at the alarming Jennings readings at about 10:10 p.m.

Dr. Papapetrou now claims on appeal that it is "undisputed" that she was not bedside at 9:48 p.m. and first learned of the deceleration at 9:53 p.m. If these "facts" had been specified in the St. Joseph Group's Rule 4:46-2 Statement filed for purposes of the motions [Pa205-209; 398-402], Plaintiff would have certainly seriously disputed them. But Dr. Papapetrou's deviation had been assumed, at least for purposes of the motion.

The Vitale Defendants likewise did not frame any argument in their submissions that Dr. Vitale met the standard of care applicable to her. They submitted no expert report for purposes of the motions; they included no factual claim in their Rule 4:46-2 statement to this effect. The excuse they argued at oral argument, on Dr. Vitale's behalf, is that she was not at the hospital at the time and learned of the alarming deceleration at 9:58 p.m.

Frankly, if Dr. Vitale had immediately called for the C-section upon learning of these disturbing circumstances, Plaintiff would have dismissed the Vitale Defendants from the case -- as she did after learning that Dr. Balazs, who had been a defendant, acted immediately when learning of the deceleration. But Dr. Vitale never called for the C-section; neither at 9:58 p.m.; nor at 10:03 p.m.; nor ever. Yet this Court now has a "finding" from the court below that there is no material proof that a doctor who never called for a C-section deviated from the applicable standard of care.

B. Neither Defendant Doctor Actually Met The Standard Of Care (Pa13-20)

Neither Ashely Papapetrou, D.O. ("Dr. Papapetrou") nor Donna Vitale, M.D. ("Dr. Vitale") ***ever*** met the standard of care applicable to them in this case. This undeniable conclusion is based on their failure to call for an emergency C-section to deliver Michelle Jennings' intrauterine daughter after a deceleration event. Rather than decide the case on these actual facts, however, the New Motion Judge decided the case based on speculative assumptions of what might have happened "[i]n a hypothetical world where Vitale did call for the C-section at 9:48." [Pa8]. The obvious error, of course, is that cases are decided on actual facts, not based on hypotheticals and speculation. Because the C-section was not called by Dr. Papapetrou or Dr. Vitale, it was not possible to complete the C-section within fifteen minutes after the deceleration even or any time reasonably

thereafter. As Dr. Luciani indulged at his deposition, even if the time were extended to 10:10 p.m., the delivery still occurred 17 minutes later than that. [Pa233, 63:19-22].

Appellant's three-fold response to the New Motion Judge's hypothetical remains. First, cases cannot be decided on hypotheticals, as it is not even possible to "prove" what "would have happened" in what the judge acknowledged was "a hypothetical world where Vitale did call for the c-section at 9:48 …." [Pa8]. Second, it is no defense that a doctor was allegedly not available. Patients entrust their care to doctors based on the implicit representation that they are competent, capable, and possess the requisite skill and resources to render medical services in accordance with the standard of care. *See, e.g., Carbone v. Warburton*, 22 *N.J.Super*. 5, 9 (App.Div.1952) (*quoted in Carbone v. Warburton*, 11 N.J. 418, 426 (1953)).[7] Third, as set forth in Appellant's merits brief and not convincingly addressed in any opposition, the evidence suggests that a doctor was available to perform the C-section, even in the hypothetical world created below.

[7] ***If*** emergency circumstances existed within the hospital at a relevant time, and these circumstances diverted medical resources, those facts might establish a defense against a plaintiff who did not receive immediate medical attention. There is no hint of an emergency here; defendants never pleaded such as an affirmative defense; and served no expert reports addressing this.

C. The Court Framed A Heads Defendants Win, Tails Plaintiff Loses Hypothetical (Pa13-20)

Perhaps the most troublesome aspect of the New Motion Judge's hypothetical is that it turned this case into a "heads, defendants win; tails, plaintiff loses" scenario. Although Dr. Papapetrou could have called the C-section, Plaintiff has never contended that Dr. Papapetrou could have performed the C-section herself. Likewise, although Dr. Vitale should have likewise called the C-section immediately upon learning of the deceleration, she was not at the hospital and could not have performed the C-section in a timely fashion. Plaintiff's expert did not fault either of these doctors for failing to perform the C-section. Rather he faulted them for not calling for the C-section.

In the court's hypothetical, though, the doctors timely called for the C-section and thus met the standard of care. *Of course* Plaintiff loses her case against these doctors if they met the standard of care. The court's several observation that a plaintiff has no case against any doctor if that doctor meets the standard of care. In a roundabout way, all the court actually said was that if these doctors had called for the C-section in time, Plaintiff had no case against these defendants -- regardless of whether the C-section was subsequently performed in a timely fashion, or not. Heads, defendants wins.

However, in the hypothetical created below in which the defendant doctors called the C-section, the only person who could have been potentially

liable was Dr. Balazs for not delivering Mackenzie in a timely fashion. But everyone already knew Dr. Balazs had acted appropriately, in the real world. So the court created a speculative version of this case under which Plaintiff could not possibly prevail against anyone. Plaintiff could not assert a claim against Dr. Balazs based on the court's hypothetical framed; his defense based on the actual facts had already resulted in his dismissal. Tails, plaintiff loses.

Respondents now try to defend the court by placing the errant hypothetical in "proximate cause" language. In advancing this position, Respondents ignore the portions of Appellant's brief showing that Dr. Balazs could have performed the procedure, if it had called it in a timely fashion. More importantly, though, issues of proximate cause are not decided based on the assumption of facts that did not happen. In this case Plaintiff can prove proximate causation because, in actual fact, due to the defendant doctors' deviation from the standard of care, the C-section was not called until 10:12 p.m., -- far too late.

The New Motion Judge's hypothetical raises the question of to prepare a case for motion practice. Arguing actual facts may not suffice; the judge might devise a hypothetical, and who is to say what those hypothetical facts might be?

If this Court entertains a hypothetical, Appellant suggests a hypothetical in which – accepting the unproven claims that Dr. Balazs was in a procedure at 9:48 p.m. and Dr. Papapetrou was barred from calling a C-section – Dr.

Papapetrou enters the room, like the charge nurse actually did at 10:10. Dr. Papapetrou then notifies Dr. Balazs of the Jennings' deceleration. Consistent with his actual conduct at 10:10, Dr. Balazs then says: "Okay, get a team to scrub, get Michelle Jennings into the procedure room and prepare her for an emergency C-section. I will be there promptly after I deliver here." And since the record conclusively establishes that such procedures take 15 minutes, but that the delivering doctor needs to be there only to make the incision, deliver the baby, and start the suturing,[8] Dr. Balazs arrives shortly thereafter -- so in this hypothetical, everyone wins and Mackenzie is alive today.

CONCLUSION

There is simply no doubt this case presents a matter that must be tried.

Respectfully submitted,
THE LYNCH LAW FIRM
Attorneys for Plaintiff

Dated: March 15, 2024

By: /s/ Joseph M. Cerra
Joseph M. Cerra

[8] As this Court already knows, all of that happened in two to three minutes during the Jennings' delivery, which was started at 10:25 p.m. with a delivery at 10:27 p.m. This Court should also note that Respondents use the terms "non-elective" and "emergency" interchangeably. They contend the other procedure was "obviously" non-elective because of the time of night. True enough, but not all non-elective C-sections are emergencies. Dr. Balazs testified the other procedure was "fine" and "uneventful." [Pa284, 37:17 to 39:8]. For example, a non-scheduled C-section might have been started because the patient had been in a prolonged labor. But that doesn't make that procedure an "emergency."