ALLSTATE NEW JERSEY INSURANCE COMPANY, ALLSTATE NEW JERSEY PROPERTY and CASUALTY INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, ALLSTATE FIRE & CASUALTY INSURANCE COMPANY, ALLSTATE NORTHBROOK INDEMNITY COMPANY, and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

CARTERET COMPREHENSIVE MEDICAL CARE, P.C., d/b/a MONROE COMPREHENSIVE MEDICAL CARE, d/b/a COMPREHENSIVE MEDICAL CARE, d/b/a FASSST SPORT, d/b/a COMPREHENSIVE VEIN CARE, INIMEG MANAGEMENT COMPANY, INC., 311 SPOTSWOOD-ENGLISHTOWN ROAD REALTY, L.L.C., 72 ROUTE 27 REALTY, L.L.C., SAME DAYPROCEDURES, L.L.C., MID-STATE ANESTHESIA CONSULTANTS, L.L.C., NORTH JERSEY PERIOPERATIVE CONSULTANTS, P.A., INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY, L.L.C., d/b/a PAIN MANAGEMENT PHYSICIANS OF NEW JERSEY, d/b/a METRO PAIN CENTERS, d/b/a METRO PAIN and VEIN, SOOD MEDICAL PRACTICE, L.L.C., ONE OAK MEDICAL GROUP, L.L.C., d/b/a NEW JERSEY VEIN TREATMENT CLINIC, ONE OAK ORTHOPAEDIC & SPINE GROUP, L.L.C., ONE OAK HOLDING, L.L.C.,

SUPERIOR COURT OF THE STATE OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-001575-23

On Appeal From:
Superior Court of New Jersey
Law Division, Middlesex County

Sat Below:
Hon. Christopher D. Rafano J.S.C.

Trial Court Docket No.:
Docket No. MID-L-1469-23

JOSEPH BUFANO, JR., D.C., CHRISTOPHER BUFANO, MICAH LIEBERMAN, D.C., RICHARD J. MILLS, M.D., JENNIFER M. O'BRIEN, ESQ., GERALD M. VERNON, D.O., D.C., ALVIN F. MICABALO, D.O., JOSE CAMPOS, M.D., JOHN S. CHO, M.D., MICHAEL C. DOBROW, D.O., RAHUL SOOD, D.O., SACHIN SHAH, M.D., FAISAL MAHMOOD, M.D., RAVI K. VENKATARAMAN, M.D., MANGLAM NARAYANAN, M.D., SHANTI EPPANAPALLY, M.D.,

Defendants-Respondents.

BRIEF IN SUPPORT OF PLAINTIFFS' APPEAL OF THE TRIAL COURT'S DENIAL OF DISQUALIFICATION OF COUNSEL

Submitted March 11, 2024

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PRELIMINARY STATEMENT

Plaintiffs seek to undo the manifest error by the trial court in refusing to disqualify counsel representing multiple defendants despite the presence of an inherent, per se, conflict of interest and more broadly, to clarify novel issues of law regarding the propriety of counsel's joint representation of multiple defendants who face joint tort liability, where legal fees are being funded by one of those defendants on behalf of all parties.

Plaintiffs have uncovered a fraudulent pattern of legal violations and unethical practices by defendants Carteret Comprehensive Medical Care (CCMC) and its associates. The complaint sets forth a tableau of insurance fraud by defendants and highlights the aggressive tactics used by the principal defendants to force subordinates' compliance with their fraudulent scheme. The primary defendants, implicated at the core of the fraud, made a strategic decision to not only retain counsel to jointly represent them and their subordinate employees but also to undertake the financial responsibility of all legal fees.

That tactical move raises significant questions about the impartiality and independence of the legal representation, particularly where, as here, defendants' liability, and share of damages, under the Insurance Fraud Prevention Act (IFPA) must be apportioned pursuant to the Comparative Negligence Act (CNA). That framework places each defendant in a position of

inescapable conflict, as each seeks to minimize his or her own liability, invariably leading to the maximization of co-defendants' culpability.

The joint representation of defendants under those circumstances constitutes a per se conflict, exponentially aggravated by the decision to have defense counsels' fees for all parties funded by the principal defendants, who face the greatest liability. Under the circumstances, that per se conflict is unwaivable in light of the Supreme Court's decision in In re Grand Jury Investigation, 200 N.J. 481 (2009) (Grand Jury), which squarely holds that a third-party payor who is funding a client's litigation expenses cannot have an attorney-client relationship with the lawyer.

The trial court acknowledged that "the CNA may create a conflict of interest if this matter proceeds to trial but for purposes of th[e disqualification] motion," did not "find this to be a conflict of interest." Thus, acknowledging the likelihood of conflicts arising at a later date, the court nonetheless refused to resolve the issue at the pleading stage. That decision constitutes reversible error. To idly wait for the already ripe conflicts to manifest even further, leading to the disqualification or withdrawal of joint counsel months or years into the litigation, perhaps on the eve of trial, would be a disservice to all parties and the court. Moreover, the conflicts that could arise may not necessarily be perceivable to the court, such as when an employee fears providing evidence

exculpatory to himself, but which is inculpatory to the payer-employer, or if the employee has been prevented from pursuing advantageous settlement opportunities.

The concern for conflicts here has broad policy implications. The IFPA was enacted to combat the pervasive issue of insurance fraud, which has significant financial implications, leading to higher premiums and costs. Ensuring that IFPA violations are addressed properly, with each party receiving conflict-free representation is essential to the proper adjudication of fraudulent activities. By way of this appeal, we ask this court not only to undo the damage caused by the trial court's decision in this case, but to clarify novel issues of law and to hold that: (i) joint representation in a CNA joint liability case triggers an automatic per se conflict in cases of intentional torts, and/or concerted acts, and (ii) that conflict is nonwaivable if legal fees are funded by one of the joint defendants who is represented by the same lawyer.

PROCEDURAL HISTORY

On March 15, 2023, Plaintiffs filed a nine-count complaint against Defendants in the Middlesex County Law Division, alleging that defendants conspired to violate the corporate practice of medicine (CPOM), codified in N.J.A.C. 13:35-6.16, and the prohibition against practicing medicine without a license under N.J.S.A. 2C:21-20, as well as New Jersey's anti-kickback and anti-

self-referral laws and regulations in violation of the IFPA, N.J.S.A. 17:33A-1 to -30, and New Jersey racketeering statute (RICO), N.J.S.A. 2C:41-1 to -6.2. Pa002-003.

On August 3, 2023, Plaintiffs filed a motion to disqualify counsel for two sets of defendants: (i) Mid-State Anesthesia Consultants, Interventional Pain Consultants of North Jersey, Sood Medical Practice, Rahul Sood, D.O. and Sachin Shah, M.D. (collectively, the Sood defendants) and (ii) CCMC, Inimeg Management, Joseph Bufano, D.C., Jennifer O'Brien, Esq., 311 Spotswood-Englishtown Realty, 72 Route 27 Realty, Christopher Bufano, Gerald Vernon, M.D., Micah Lieberman, D.C., Richard Mills, M.D., Michael Dobrow, D.O. and Alvin Micabalo, D.O. (collectively, the CCMC defendants). Pa305-316.

Following briefing on the disqualification issue, on October 27, 2023, the trial court issued two orders denying Plaintiffs' motion to disqualify counsel for the CCMC and Sood defendants.[1] Pa305-306; Pa311-312.

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[1] On that same date, the trial court also issued three orders granting the CCMC and Sood Defendants, and defendant John S. Cho, M.D.'s motions to remand the case to arbitration under the Automobile Insurance Cost Recovery Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. Plaintiffs filed an appeal as of right from those orders, challenging the trial court's erroneous conclusion that the complex affirmative fraud claims under the IFPA, RICO and common law alleged in the complaint are subject to personal injury protection (PIP) arbitration. That appeal is pending before this Court under Docket No. A-000778-23 and will be heard back-to-back with this interlocutory appeal. Pa355.

On December 1, 2023, Plaintiffs filed a motion for leave to appeal the trial court's denial of its motion to disqualify, which this court granted on December 29, 2023. Pa354. Plaintiffs filed a notice of appeal on January 29, 2024 and an amended notice of appeal on February 1, 2024. Pa357-389.

STATEMENT OF FACTS

A. Defendants' Alleged Fraudulent Insurance Scheme

Plaintiffs' complaint centers around CCMC, a medical practice that is alleged to have been structured in violation of the CPOM, a regulatory framework designed to prevent the commercial exploitation of medical practices and protect public health and safety by ensuring that such practices are owned and controlled by licensed physicians. Pa015-017; Pa020-021; Allstate Ins. Co. v. Northfield, 228 N.J. 596 (2017); N.J.A.C. 13:35-6.16(f). The complaint alleges that CCMC's formation and operation contravened the CPOM by allowing non-plenary physicians to exert control over the practice. Pa020-021.

Further, according to Plaintiffs, defendants built upon the ongoing CPOM violations to violate the statutes and regulations prohibiting medical providers from paying or receiving kickbacks and engaging in self-referrals. The complaint alleges that CCMC and its professionals referred patients insured by Plaintiffs to certain of the other defendants for pain-management and surgical procedures. Pa065 (Compl. ¶ 385). Those defendants, who simultaneously

owned, or were associated with, sizable independent medical practices, consulted with the patients at CCMC's offices and acted contrary to their own economic interests by allowing CCMC to bill for and profit from the consultations and services instead of billing for them directly. See Pa065-066; Pa069; Pa072 (Compl. ¶¶ 385, 388-390, 393, 409, 423). To account for that lost revenue, those defendants also recommended that the patients undergo procedures at an outpatient facility that they owned, and during the procedures, anesthesia was provided by professionals who worked for entities owned or controlled by those defendants. Pa065 (Compl. ¶¶ 386-387). Defendants' participation in and receipt of the unlawful kickbacks and self-referrals rendered them ineligible for PIP-benefit payments. Pa065-077 (Compl. ¶¶ 384-450).

The complaint alleges that that from 2008 to 2022, Plaintiffs paid CCMC, and other service providers, over $1.7 million in benefits to which CCMC was not entitled, which amount Plaintiffs seek as consequential damages in addition to other statutory and equitable remedies. Pa013-015. Among other relief, the complaint seeks to claw back those payments that Defendants fraudulently obtained.

Two sets of defendants retained two law firms to represent them in this case. The Law Office of Jeffrey Randolph, L.L.C. (the Randolph firm) was retained to represent twelve defendants, including CCMC and affiliated entities;

the ringleader brothers of the fraudulent enterprise, Joseph and Christopher Bufano; general counsel, Jennifer O'Brien, Esq., Dr. Richard J. Mills, M.D., CCMC's sham or "paper owner," as well as the subordinate worker-doctors (the CCMC defendants). Pa008-009; Pa018-019; Pa050-052; Pa305.

Mandelbaum Barrett P.C. (the Mandelbaum firm) (together with the Randolph firm, the Firms) was retained to represent six other defendants, including Dr. Rahul Sood (Sood), the owner of multiple medical practices alleged to have both aided the CPOM violations and to have received unlawful referrals from CCMC, and an employee of some of those entities, Sachin Shah, M.D. (Shah) (the Sood defendants). Pa010-011; Pa305.

Defendants have not denied that the superiors are paying the subordinates' legal fees for their shared representation.

1. The CCMC Defendants

Defendant Joseph Bufano Jr., D.C. (J. Bufano), a New Jersey licensed chiropractor, allegedly orchestrated the insurance fraud scheme. He is CCMC's de facto owner and played the principal role in CCMC's formation and operations. Pa008; Pa039; Pa050 (Compl. ¶¶ 54, 277-280, 330). Although CCMC and its alter egos purport to be owned by a medical doctor, Dr. Adrian Didita, they are in fact illegally owned and controlled by J. Bufano. Pa003-004; Pa021-023 (Compl. ¶¶ 8-12, 137-158). Dr. Didita confirmed in a sworn

statement that he never had any ownership interest in CCMC, was hired as a part-time employee after CCMC began operations, and only worked for CCMC for a few months after which J. Bufano fired him. Pa021-022 (Compl. ¶¶ 146-155). J. Bufano spearheaded CCMC's daily operations and strategic decisions and directed defendants to unlawfully bill for and profit from medical services provided to CCMC patients. He also played a leading role in the fraudulent activities at CCMC, which included compelling plenary physicians to perform or prescribe clinically unnecessary services, pay and receive kickbacks, and make illegal referrals. Pa050 (Compl. ¶ 330).

Defendant Christopher Bufano (C. Bufano) was CCMC's "Director of Operations" and acted as the entity's "enforcer," even though he holds no license to provide healthcare services. Pa008-009; Pa050 (Compl. ¶¶ 56-57, 331). Like his brother, C. Bufano's role included compelling practitioners to perform treatments that were not medically necessary and to make unlawful referrals under threats and intimidation. Pa050 (Compl. ¶ 331). Defendant Micah Lieberman, CCMC's "Clinical Director," who is only a chiropractor, had oversight of operations and medical practices, and like the Bufanos, was involved in influencing and directing medical decisions and controlled which patients the plenary physicians at CCMC should treat. Pa009; Pa051 (Compl. ¶¶ 58-59, 334). Defendant Richard Mills is CCMC's "Medical Director" according

to its website, a misleading title intended to create the false perception that CCMC is controlled by a plenary physician. Pa051 (Compl. ¶ 335). Defendant Jennifer O'Brien, Esq., CCMC and Inimeg Management Company's general counsel and chief compliance officer, assisted the Bufanos' insurance scheme by interfering with clinical decision-making. Pa050-051 (Compl. ¶¶ 332-333).

The "worker-doctor" defendants, including Gerald Vernon, Michael Dobrow, Alvin Micabalo, and Mills, acted as CCMC's "primary engine" for generating income through unnecessary medical services, unlawfully referring CCMC patients for additional services, and perpetrating the façade that CCMC is operated by plenary physicians. Pa052; Pa101-Pa127 (Compl. ¶¶ 337, Exhibit A). The complaint contains six independent witness accounts demonstrating how CCMC management routinely interfered with and attempted to direct the plenary physicians' clinical judgment using threats and intimidation. Pa021-039.

2. The Sood Defendants

Sood owns or controls several medical entities. He was Same Day Procedures' largest shareholder, the sole owner of Mid-State Anesthesia, and holds primary roles in North Jersey Perioperative Consultants and Interventional Perioperative Consultants of North Jersey, d/b/a Metro Pain Centers, all named defendants here. Pa005-007, Pa010 (Compl. ¶¶ 23-28, 30-43, 76-81). Shah's role within those same entities is more circumscribed, and his financial interest

limited, thus functioning in a capacity that is subordinate to Sood's direction and control. Pa010-011 (Compl. ¶¶ 82-87). Through those entities, Sood and Shah provided medical services on behalf of CCMC as part of the corporate practice and kickback schemes. Pa046-047; Pa076-077 (Compl. ¶¶ 310-315). Shah is currently employed by entities solely owned by Sood. Pa010-011; Pa336-338 (Compl. ¶¶ 83-87).

B. The Trial Court's Denial of Allstate's Disqualification Motion

On August 23, 2023, Plaintiffs filed a motion to disqualify the Mandelbaum firm from simultaneously representing each of the Sood defendants, and to disqualify the Randolph firm from simultaneously representing each of the CCMC defendants. On October 27, 2023, the trial court denied those motions. Pa306; Pa312. Despite conceding that "[t]he CNA may create a conflict of interest if this matter proceeds to trial," the court held that each client's position is not currently aligned directly against one another as contemplated by RPC 1.7. Pa310; Pa316. The court further stated that all clients signed informed consent waivers after being informed of potential risks of joint representation and waiving conflicts – a determination that the court made without having seen the waivers and based on certifications of only three out of ten individual (twenty total) defendants, purporting to describe them. Pa317-324. The court failed to analyze Plaintiffs' argument that the third-party payor

arrangement of the Firms whose fees were paid by superiors on behalf of their subordinate employees, all of whom were jointly represented, was prohibited by the Supreme Court's decision in Grand Jury.

LEGAL ARGUMENT

This court reviews the determination of whether counsel should be disqualified de novo. Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 451 (App. Div. 2016) (quoting City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010)). Importantly, "there is no right to demand to be represented by an attorney disqualified because of an ethical requirement." Ibid. (internal quotation marks omitted). Any doubt as to the propriety of an attorney's representation is resolved "in favor of disqualification." Ibid. (internal quotation marks omitted). For the reasons set forth below, this court should reverse.

A. THE TRIAL COURT FAILED TO RECOGNIZE THE DEFENDANTS' INHERENT CONFLICT OF INTEREST IN A CASE SUBJECT TO THE CNA. (RAISED BELOW, PA307-08; PA310; PA313-14; PA316).

RPC 1.7(a) expressly prohibits two types of concurrent representations: (1) direct adversarial representations, and (2) representations that pose a significant risk of material limitation in the lawyer's responsibilities to a client. RPC 1.7 reflects "the fundamental understanding that an attorney will give 'complete and undivided loyalty to the client and should be able to advise the client in such a way as to protect the client's interests.'" State ex rel. S.G., 175

N.J. 132, 139 (2003). Here, each defense firm's arrangement with its clients violates both subsections of RPC 1.7(a).

RPC 1.7(a)(1) is clear and unequivocal in its prohibition: "a lawyer shall not represent a client if the representation . . . of one client will be directly adverse to another client." Comando v. Nugiel, 436 N.J. Super. 203, 214 (App. Div. 2014) (internal quotation marks omitted) (quoting RPC 1.7). Direct adversity does not necessarily mean that parties are on opposite sides of a lawsuit; concurrent representation of multiple parties whose goals, objectives, or positions are fundamentally in conflict with each other suffices. See Am. Bar Ass'n Standing Committee on Ethics and Prof'l Responsibility, Formal Op. 05–434 (Dec. 8, 2004) ("Direct adversity requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests."); Model Rule of Professional Conduct 1.7, cmts. 6, 7.

An example of such adversity is the longstanding prohibition on an attorney's dual representation of a driver and passenger in an automobile accident if there is any unresolved issue concerning liability. In 1968, the Supreme Court issued a Notice to the Bar, stating:

> The Supreme Court is of the view, because of the conflict of interest inherent in the situation, that an attorney should not represent both the driver of a car and his passenger in an action against the driver of another car, unless there is a legal bar to the passenger suing his own driver.

> [McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 497 (App. Div. 2011) (quoting 91 N.J.L.J 81 (Feb. 8, 1968)).]

Two years later, the New Jersey Advisory Committee on Professional Ethics addressed the propriety of representing both the driver and passenger, who agreed not to sue each other and to sign waivers for any third-party claim. The Committee found that the proposal was improper, reasoning:

> Where a passenger is injured . . . the passenger has a possible claim against the driver. The facts at trial may bring this out even though the parties believe to the contrary . . . the rule cannot be based upon an attorney's judgment of the facts. Public policy precludes an exception by waiver and consent. Should a conflict develop, the attorney . . . must retire from all representation with consequent delay, interruption of proceedings, and expense.
>
> [Ethics Comm. Op. No.188, 93 N.J.L.J. 789, at *1 (Nov. 12, 1970).]

Thus, dual representation of a driver and passenger is prohibited unless there is no question as to liability or claims between them. See, e.g., In re Shaw, 88 N.J. 433, 440-41 (1982) ("[W]here liability is in dispute, a lawyer cannot represent the interests of both the driver of a vehicle and his passenger in claims against the driver of the adverse vehicle."); McDaniel, 419 N.J. Super. at 497 (distinguishing case from one where attorney represents both a passenger and driver injured in the same accident "because here the co-employee is immune

from suit"); Straubinger v. Schmitt, 348 N.J. Super. 494, 502 (App. Div. 2002) (permitting joint representation where driver and passenger sustained injuries from another drunk driver because it was "clear that the other driver was completely responsible for the accident"); Ethics Comm. Op. No. 248, 96 N.J.L.J. 93, at *2 (Jan. 25, 1973) (permitting attorney to represent husband and wife, or parent and child against another driver only where liability is undisputed).

The adversity of interests that courts previously recognized in cases between a driver and passenger are even more glaring in this case, where joint tortfeasors are accused of perpetrating insurance fraud and the jury must apportion fault among them under the CNA, N.J.S.A. 2A:15-5.1 to -5.8. See Liberty Ins. v. Techdan, LLC, 253 N.J. 87, 118-119 (2023) (holding that IFPA claims are subject to the CNA, where liability and damages are apportioned according to each party's degree of fault, with the fault of all defendants adding up to one hundred percent). The principle underlying the CNA is that "[i]t is only fair that each person only pay for injuries he or she proximately caused." Fernandes v. DAR Dev. Corp., 222 N.J. 390, 407 (2015). To that end, where liability is in dispute, the jury is required to determine "the extent, in the form of a percentage, of each party's negligence or fault." N.J.S.A. 2A:15-5.2(a)(2). Significantly, the plaintiff may recover the full amount of the damages

from any party determined to be 60% or more responsible for the total damages, N.J.S.A. 2A:15-5.3(a), but if a party is adjudged less than 60% responsible, he or she is only liable for the percentage directly attributable to that party's fault, N.J.S.A. 2A:15-5.3(c).

Notably, the adversity of defendants' interests persists throughout the entirety of the lawsuit because apportionment of fault is required even if a joint tortfeasor settles and is not a remaining defendant at trial. Jones v. Morey's Pier, Inc., 230 N.J. 142, 164 (2017) (requiring apportionment under CNA even if claims against defendant are dismissed); Young v. Latta, 123 N.J. 584, 595-96 (1991) (permitting jury to allocate fault among physicians in medical malpractice action where plaintiff settled with one physician defendant and proceeded to trial against another). The concept is a corollary to the "empty chair" defense in which a defendant shifts blame to a joint tortfeasor who is not in the courtroom. Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 114 (2004) (citing cases) (holding jury was required to apportion fault in negligence action to a non-party that was dismissed due to a discharge in bankruptcy). Not only does the non-settling defendant have a right to a credit for the percentage of fault allocated to the settling defendant, Kranz v. Schuss, 447 N.J. Super. 168, 182

(App. Div. 2016), but such allocation may entitle the remaining defendants to a contribution claim from the settling defendant.[2]

Practically, what that means is that each joint tortfeasor in a CNA case, has an unyielding interest in minimizing their own liability and maximizing that of their co-defendants because the exposure for damages is directly correlated to that defendant's percentage of fault and, even more significantly, the prospect that such defendant may be liable to pay the entire judgment if he or she is found to be 60% or more liable. Even if a defendant settles claims with Plaintiffs, a jury's finding that that he or she is 60% or more liable could subject that defendant to a contribution claim by the remaining defendants. That rule compels the most culpable defendants to point to their co-defendants if only to avoid liability for the full judgment amount. Those considerations are exacerbated by the fact that IFPA damages are trebled if the defendant is found to have engaged in a pattern of violating the statute, N.J.S.A. 17:33A-7(b). So, the stakes are extraordinarily high. Those dynamics render the interests of all codefendants "directly adverse" to one another in the same manner as the conflict inherent in the representation of a driver and passenger in a motor vehicle accident and constitutes a conflict per se.

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[2] A defendant compelled to pay more than his or her percentage of damages may seek contribution from the other joint tortfeasors under the Joint Tortfeasors Contribution Law (JTCL). N.J.S.A. 2A:15–5.3(e).

That position is amply supported by jurisprudence requiring liability insurers who defend multiple insureds to appoint independent counsel to represent each insured where conflicts are foreseeable. See Wolpaw v. Gen. Accident Ins. Co. v. Parker, McCay & Criscuolo, 272 N.J. Super. 41, 45 (1994) (holding that a liability insurer violates its contractual duty and must retain separate counsel for insured's co-defendant where interests conflict in "maximizing the percentage of the other insured's fault and minimizing their own"); Yeomans v. Allstate Ins. Co., 130 N.J. Super. 48, 54 (App. Div. 1974) ("[W]here the same company covers codefendants whose interests are antagonistic, retention of separate and independent counsel for each will ordinarily suffice to fulfill the carrier's duty."); see also, e.g., Univ. of Miami v. Great Am. Ins. Co., 112 So. 3d 504, 508 (Fla. Dist. Ct. App. 2013) ("[I]n defense of both co-defendants, Great American's counsel would have had to argue conflicting legal positions, that each of its clients was not at fault, and the other was, even to the extent of claiming indemnification and contribution for the other's fault . . . [T]his legal dilemma clearly created a conflict of interest . . . sufficient to qualify for indemnification for attorney's fees and costs for independent counsel."); Williams v. Am. Country Ins. Co., 833 N.E.2d 971, 980 (Ill. App. 2005) (holding that a policy exclusion for intentional acts of an agent under the doctrine of respondeat superior creates a conflict of interest with co-

defendants requiring separate counsel where "it would be in [one co-defendant's] best interest to present a defense that he was an agent of [the other co-defendant], while it would be in [the other co-defendant's] best interest to establish the exact opposite"); Bituminous Ins. Cos. v. Pa. Mfrs.' Ass'n Ins. Co., 427 F. Supp. 539, 555 (E.D.Pa.1976) (holding that an insured is entitled to reimbursement from its insurer based on its duty to defend because of the insured's conflict with its co-defendant, reasoning that each defendant may attempt to absolve itself from liability by alleging the damage was caused solely by the negligence of the other).

This court's decision in Wolpaw is particularly instructive. There, an insurance company assigned one attorney to represent the homeowner, her sister, and the sister's eleven-year-old son, who had accidentally injured a playmate with an air rifle. 272 N.J. Super at 45. Defendants' familial relationship was of no consequence; the court held that the parties were all entitled to separate counsel, reasoning that although "[t]he three insureds had the common interests of minimizing the amount of [an injured neighbor's] judgment and maximizing the percentage of fault attributable to the other defendants . . . their interests in maximizing the percentage of the other insureds' fault and minimizing their own were clearly in conflict." Ibid.

The same rationale applies here. While defendants all have a generalized common interest in disputing Plaintiffs' allegations, at the same time they have an undeniable interest in seeking to minimize their own liability and maximize their co-defendants' liability. Although the trial court conceded that "[t]he CNA may create a conflict of interest if this matter proceeds to trial," it refused to find a conflict at the early stage of litigation. Pa310; Pa316. That decision was erroneous. Indeed, the trial court conceded that disqualification need not necessarily be premised upon an actual conflict; "a potentially serious" conflict will suffice. Pa309; Pa315 (citing United States v. Jones, 381 F.3d 114 (2d Cir. 2004)). In Jones, cited by the trial court, the Second Circuit upheld disqualification of counsel in a criminal proceeding where defendant's attorney was "likely" to be called as a witness. The Second Circuit held that a "potential conflict of interest" arises "if the interests of the defendant could place the attorney under inconsistent duties in the future." Id. at 119 (emphasis added) (citing United States v. Kliti, 156 F.3d 150, 153 n. 3 (2d Cir. 1998)); see Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 181 (1981) (a conflict need not be obvious or actual as the "mere possibility of conflict at the beginning of a relationship is enough to establish an ethical breach"); Clark v. Corliss, 98 N.J. Super. 323, 327 (App. Div. 1967) (a lawyer should avoid circumstances where "a conflict is likely to develop" (internal quotation marks and citation

omitted)). Although rightfully recognizing that the CNA could create a conflict amongst defendants at trial, the trial court wrongly determined that no conflict existed at the pleading stage. The conflict here is actual and real – representation of joint defendants in joint liability cases under the CNA creates a per se conflict.

For the same reasons that defendants' interests in this CNA case are adverse under RPC 1.7(a)(1), a conflict also arises under RPC 1.7(a)(2), which prohibits joint representation if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." The comments to Rule 1.7 explain that "[a] conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." The question is whether there is a "significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests," In re Op. No. 17-2012 of Advisory Comm. on Prof'l Ethics, 220 N.J. 468, 478-79 (2014) (internal quotation marks and citation omitted), and whether the lawyer would be impeded from "considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.'" Ibid.; see also

Hill v. New Jersey Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 309 (App. Div. 2001).

To identify such a risk, "[t]he critical questions are the likelihood that a difference in interests" will arise, and "if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.'" Op. No. 17-2012, 220 N.J. at 478-79. And where, as here, the lawsuit is brought against an employer and employee, "[t]he elements of mutuality must preponderate over the elements of incompatibility." Hill, 342 N.J. Super. at 309 (internal quotation marks omitted) (quoting Petition for Review of Op. 552, 102 N.J. 194, 204 (1986)).[3]

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[3] Defendants may try to rely on Opinion 552 as rejecting a per se prohibition under RPC 1.7 on a single attorney representing multiple defendants. That argument, if made, is unavailing. In Opinion 522, one attorney represented both a municipality and individual officials and employees of that municipality as co-defendants in a lawsuit brought under 42 U.S.C. § 1983. Despite finding a potential for conflict, the Supreme Court held that "an absolute rule requiring separate counsel at the pleading stage is not required to adhere to traditional ethics precepts" and that joint representation "is best addressed by an evaluation by the individual attorney of the circumstances of each case." Id. at 206. The Court's rationale, however, was limited to the unique facts of that case and cannot be extrapolated to this situation.

First, the case arose in the context of § 1983 civil rights action, and the Court specifically noted that an absolute bar against joint representation may be overbroad in that context, as the potential for a conflict would depend on whether the action was brought against a government employee in their "personal capacity" versus their "official capacity." Id. at 199-200. If the latter,

Here, defendants' positions are inherently incompatible, and the Firms will be hindered in advancing appropriate defenses for each individual client by virtue of those attorneys' responsibilities to their other clients. The complaint details the participation of various defendants in falsely portraying Mills as CCMC's medical director to create the misimpression that CCMC is controlled by a plenary physician as required by the CPOM. Pa051; Northfield, 228 N.J. at 601. It describes the roles of various defendants in the self-referral and kickback scheme. Pa047-054.

Moreover, Plaintiffs obtained sworn statements from witnesses who attest to the misconduct of the superiors toward their subordinate worker doctors. Pa021-039. The complaint describes the Bufanos' threats and intimidation upon

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no conflict would exist. Ibid. Second, the Court was "moved by the severe financial strains the per se rule imposes on local governments and those individual employees who are forced to obtain independent counsel," which played a part in the decision to bar a per se rule in the municipal context. Id. at 206. Neither of those concerns are present here.

Last but not least, the Court explicitly stated that joint representation is permissible only "if it does not appear clearly from the pleadings or from early discovery that the claims against the governmental entity and its individual employees will result in different and inconsistent defenses, or will, if successful, probably lead to independent or several, rather than overlapping or joint, compensatory relief against each class of defendants." Id. at 205 (emphasis added). Therein lies the distinction. Here, the CNA would confer joint and overlapping relief against defendants and not independent or several as contemplated by the Court. Thus, the basis for Court's hesitation to craft a per se rule in Opinion 522 simply does not apply here.

the worker doctors to perform unnecessary diagnostic tests on patients or to bill for services irrespective of clinical need to exhaust patients' insurance benefits. There are allegations about how the Bufano brothers "whip[ped]" Vernon "into shape" to comply with their scheme; how Lieberman decided what patients the worker-doctors treat and how; and how O'Brien convinced patients to have procedures that maximize insurance revenue and ignored worker-doctors' complaints about unethical practices. Pa033-034; Pa039. Accordingly, it would be in some defendants' interests to assert that they were coerced, or believed that they would lose their jobs if they did not participate in their superiors' wrongful acts.

Legally and practically, it is impossible for one attorney to adequately represent all defendants, particularly the subordinates whose defenses differ materially from their superiors and who almost certainly have indemnification and cross-claims against each other, third-party claims for fraud, misrepresentation and malpractice against professionals hired by their codefendants, or may wish to settle with Plaintiffs – courses of action they will likely be forced to forego because their superiors (positioned to control or influence their decision making) are financing their legal fees for their shared counsel. See Am. Bar Ass'n, Model Rules of Prof'l Conduct, Rule 1.7, cmt. 23

(2023) ("A conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement[.]").

All of those concerns are compounded by the fact that all defendants stand to be jointly liable to Plaintiffs for $1,737,113.94 in damages (before trebling, counsel fees and other statutorily mandated awards pursuant to the IFPA and RICO). The court's finding that Plaintiffs' claims are "based on speculation" (Pa310; Pa316) is unsupported, as the cases cited by the trial judge all make clear that the standard for establishing conflict is "more than a fanciful possibility" and "must have a reasonable basis." Dewey v. R.J. Reynolds, 109 N.J. 201, 216 (1988); see also State v. Loyal, 164 N.J. 418, 429 (2000). Plaintiffs clearly have satisfied that burden.

B. DEFENDANTS' PER SE CONFLICT IS UNWAIVABLE IN LIGHT OF GRAND JURY'S PROHIBITION OF THIRD-PARTY PAYOR ARRANGEMENTS. (RAISED BELOW, PA307-08; PA310; PA313-14; PA316).

Whereas conflicts typically can be waived by clients after receiving informed consent, see RPC 1.7(b), in this situation – where concurrently represented defendants face joint liability, and their fees are being funded by codefendants represented by the same attorney, a prohibited third-party payor arrangement under Supreme Court jurisprudence - a waiver cannot be valid.[4]

[4] A waiver also is ineffective if the representation involves "the assertion of a claim by one client against another client represented by the lawyer in the same

In Grand Jury, the Supreme Court adopted an ethical framework governing third-party payer arrangements, in a case involving an investigation into whether a corporate contractor submitted fraudulent invoices for services rendered to a county government. Because the investigation sought testimony from three of the company's employees, the company arranged to pay for counsel for those employees and entered into retainer agreements with four separate lawyers (one for itself and separate counsel for each employee). Id. at 486. The State moved to disqualify counsel claiming a per se conflict of interest. Id. at 488.

The Court analyzed RPC 1.7(a) among others and held that a lawyer's arrangement with a client whose fees are being paid by a third party is appropriate "provided each of the[se] six conditions is satisfied:" (1) informed consent of the client is obtained; (2) the third-party payer does not interfere with the representation; (3) the lawyer cannot have an attorney-client relationship with the third-party payer; (4) the client's confidential information is protected; (5) the third-party payer must timely pay client's invoices; and (6) the third-party payer must continue its funding obligation unless relieved by court order.

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litigation." RPC 1.7(b)(4). Although no claims have yet been asserted by defendants against one another, given the inherent conflict, "[p]ublic policy precludes an exception by waiver and consent" the same way it precludes waiver of driver/passenger joint representation with liability at issue. Ethics Op. 188, 93 N.J.L.J. at *1.

Id. at 495–97 (emphasis added); Pashman Stein v. Nostrum Labs., Inc., A-1759-13T1, 2014 WL 5312535, at *5 (App. Div. Oct. 20, 2014) (Pa393). The Court in Grand Jury deemed the arrangement proper because each of the employees had independent counsel to protect their interests. 200 N.J. at 498 (emphasizing that "the record is clear that none of the lawyers selected to represent the individual defendants had any current relationship with the company").

Here, however, neither of the Firms comply with the conditions set forth in Grand Jury to establish a proper third-party payer arrangement. Grand Jury makes clear that "[t]here cannot be any current attorney client relationship between the lawyer and the third-party payer," based on the principle that legal representation should be free from external influences that could compromise the attorney's loyalty and the quality of counsel. Id. at 496. That condition was explicitly intended to avoid RPC 1.7 conflicts. Id. at 496-98. Defendants' arrangement, in which the superior defendants (Sood and J. Bufano) with ostensibly greater resources finance the legal representation of subordinate codefendants, in the context of claims subject to the CNA, is precisely the kind of arrangement prohibited by the Court in Grand Jury. The defendants financing the representation have the power to exert undue influence over the legal strategies employed for codefendants, which compromises counsel's independence and prejudices the codefendants. After all, if the subordinate

worker-doctors witnessed the same unlawful practices by the superiors reported by Plaintiffs' eyewitnesses, is it conceivable that the defendants financing the litigation would permit them to reveal that damaging information, or to claim that they were similarly intimidated? When the client and third-party payer are represented by the same attorney and have adverse interests, like here, the payers have the power to manipulate strategy, as Grand Jury warned against.

Under these circumstances, once the Firms undertook joint representation of the superiors, together with their subordinates whose fees they are paying, they violated Grand Jury's third requirement prohibiting an attorney-client relationship with a third-party payer, as well as the second and fourth requirements that prohibit dictating litigation strategy and disclosure of client confidences. Indeed, J. Bufano in his certification purports to speak on behalf of his codefendants that their interests are "aligned" based on "discussions" with his subordinates and undoubtedly involving the disclosure of client confidences. Pa318. In the context of claims subject to the CNA, maintaining client confidences is vital and yet, even putting aside the third-party payers' ability to use their purse strings to influence strategy, lawyers representing multiple parties are ethically obligated to share all information with their clients.

The conflict here – where the parties are co-defendants subject to joint liability, and also share an employer/employee relationship with a litigation

financing arrangement – is inherent. Once the Firms undertook respective joint representation of both the superiors and their subordinates whose fees they are paying (thus, violating Grand Jury's third requirement prohibiting an attorney-client relationship), the representation, by definition also violated the second and fourth requirement regarding dictating litigation strategy and non-disclosure of client confidential information.

Even accepting as true defendants' belief that they share a common defense and no crossclaims are anticipated (Pa318; Pa320; Pa323), discovery could reveal that one client is more culpable than the others, at which point, the attorney is put in an untenable position of trying to represent the culpable client and the non-culpable clients. That dynamic is the reason the Supreme Court held that a third-party payer financing a litigation cannot have an attorney-client relationship with the lawyer. The arrangement here directly contradicts the safeguards implemented by Grand Jury and constitutes an unethical third-party payer arrangement.

The trial court failed to conduct a Grand Jury analysis, even though the issue was raised and briefed. The per se conflict here – where codefendants are subject to joint liability and comparative negligence, and also share an employer/employee relationship with a litigation financing arrangement – cannot be waived given Grand Jury's conditions on a proper third-party payer

arrangement. Defendants' failure to adhere to Grand Jury – under circumstances where the divergent interests could not be clearer and a per se conflict arises – creates, we submit, an unwaivable conflict requiring disqualification of counsel.

C. SHOULD THIS COURT FIND THAT DEFENDANTS' PER SE CONFLICT IS WAIVABLE, THE RECORD WAS INSUFFICIENT FOR THE TRIAL COURT TO ASSESS THE SUFFICIENCY OF THE WAIVER. (RAISED BELOW, PA307-08; PA310; PA313-14; PA316).

A conflict may be waived provided a lawyer gives "each affected client [] informed consent, confirmed in writing, after full disclosure and consultation," which includes "an explanation of the common representation and the advantages and risks involved." RPC 1.7(b)(1) The trial court found that "all the defendants assert that they have signed [an] informed consent waiver to any potential conflicts of interest" and that they "have been properly informed by their attorneys of the potential risks involved with multi-defendant representation." Pa310; Pa316. That holding lacks record support and misapplies the law of informed consent.

Initially, the informed consent waivers purportedly signed by defendants are not part of the record; defendants refused to produce them claiming, without legal support, attorney-client privilege. Pa317-318. Although defendants offered the trial court an opportunity to review the written waivers in camera, it declined that invitation, and decided the waivers were sufficient without ever having seen

them. See Brazza v. Kagen, A-1991-21, 2023 WL 4418263, at *3 (App. Div. July 10, 2023) (noting that judge was not satisfied the estate received full disclosure and since plaintiff failed to provide the waiver, appointed independent counsel to explain implications to the client) (Pa397-398).

Absent the waivers, the trial court relied on certifications submitted by three of the ten individual defendants (Sood, Shah, and J. Bufano) that illustrate the inadequacy of the informed consent. The certifications speak in generalities, without any indication as to what risks and dangers of the dual representation were discussed, the extent to which counsel's activities may be compromised by a conflict, the benefits of having independent counsel, waiver of confidentiality, or the effect of a potential disagreement between the parties relating to the joint representation. See, e.g., State v. Sheika, 337 N.J. Super. 228, 248 (App. Div. 2001) (stating that attorney should apprise the client of "the potential problems and pitfalls pertaining to the potential conflict"); Advisory Comm. Op. 679 (1995) (observing that consultation should "include an explanation of the implications of the proposed representation, including both its risks and advantages"); Advisory Comm. Op. 509 (1983) (stating that the lawyer disclose to both clients the possible effect of the conflict on the exercise of his independent professional judgment on behalf of each); Michels & Hockenjoss, New Jersey Attorney Ethics, § 26.5 (2024) (listing examples of written

disclosures). Most importantly, none of the certifications mention a disclosure that the pending IFPA claims are subject to the CNA and the implications of a jury's finding of joint liability.

J. Bufano is the only defendant (out of eight individual and twelve total defendants represented by the Randoph firm) who submitted a certification and it is particularly troubling. He certifies in conclusory fashion that "[b]ased on . . . [his] discussions with other [CCMC] defendants, all of the parties are aligned in interest." Pa318. J. Bufano is financing his codefendants' defense, and the complaint is replete with evidence of his pattern of intimidating and coercing subordinates to follow his directives or risk termination, including certifications obtained from former CCMC employees about J. Bufano's misconduct in that regard and even describing a lawsuit filed by a former CCMC physical therapist alleging constructive discharge for resisting the Bufanos' demands to perform unnecessary medical tests on patients. Pa035-036; Pa039. Yet, the court accepted as true J. Bufano's self-serving hearsay statement that all defendants' interests are aligned, without any corroborating certification from his co-defendants.

Nor was the certification of J. Bufano's defense counsel, Jeffrey Randoph, Esq., illuminating. Pa325-326. Mr. Randolph merely stated that "[a]ll defendants were advised of the potential conflict of interest of joint representation, were provided full informed consent, and signed off on same,"

without ever explaining what information was communicated to his clients, precluding the trial court from evaluating whether the consent was actually "informed." And to the extent Mr. Randoph certified that he "can provide competent and diligent representation to each client," the trial court was wrong to accept solely his subjective beliefs without assessing it under an objective standard. See Whitman v. Estate of Whitman, 259 N.J. Super. 256, 263 (Law Div. 1992) (explaining that the test is a combined subjective and objective standard).

The effectiveness of a prospective waiver necessarily depends upon the adequacy of the disclosures and the court's function is to assess those disclosures and ensure that defendants understand the consequences of joint representation. See State v. Belluci, 81 N.J. 531, 545 (1980) (joint representation "must be explored on the record both to ensure that defendant is aware of the potential hazards and to secure a proper waiver"); see also State v. Land, 73 N.J. 24, 33 (1977). Notably, a court is allowed "substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." State v. Loyal, 164 N.J. 418, 434 (2000) (internal quotation marks

and citation omitted). Given the insufficiency of information from which to analyze the waiver, the trial court should have rejected it.

Finally, we question how, under these circumstances, the lawyers could, consistent with their ethical obligations to each client, recommend that their clients waive the obvious conflicts that exist. How could a lawyer explain to a client that he or she will do everything possible to minimize that client's liability when liability, if found to exist, will be apportioned among each of that lawyer's clients? The answer to that question is as clear as the existing conflicts.

CONCLUSION

The joint representation of defendants in a CNA case by the same counsel, when funded by the primary defendants embroiled in the insurance fraud conspiracy, raises conflicts that compromise the integrity of the proceedings. Plaintiffs, therefore, respectfully urge the court to reverse the trial court's decision denying the motion to disqualify defense counsel.

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Dated: March 11, 2024

ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY AND CASUALTY INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE NORTHBROOK INDEMNITY COMPANY; AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Plaintiffs, v. CARTERET COMPREHENSIVE MEDICAL CARE P.C. D/B/A MONROES COMPREHENSIVE MEDICAL CARE, D/B/A COMPREHENSIVE MEDICAL CARE, D/B/A FASSST SPORT, COMPREHENSIVE VEIN CARE; INIMEG MANAGEMENT COMPANY, INC.; 311 SPOTSWOOD-ENGLISHTOWN ROAD REALTY, L.L.C.; 72 ROUTE 27 REALTY, L.L.C.; MID-STATE ANESTHESIA CONSULTANTS, L.L.C.; NORTH JERSEY PERIOPERATIVE CONSULTANTS, P.A.; INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY L.L.C., D/B/A PAIN MANAGEMENT PHYSICIANS OF NEW JERSEY D/B/A METRO PAIN AND VEIN; SOOD MEDICAL PRACTICE L.L.C., ONE	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-1575-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MIDDLESEX COUNTY DOCKET NO.: MID-L-1469-23 Sat Below: Hon. Christopher D. Rafano, J.S.C

OAK MEDICAL GROUP, L.L.C. D/B/A NEW JERSEY VEIN TREATMENT CLINIC; ONE OAK TREATMENT CLINIC; ONE OAK ORTHOPAEDIC & SPINE GROUP L.L.C.; ONE OAK HOLDING L.L.C.; JOSEPH BUFANO JR., D.C.; CHRISTOPHER BUFANO; MICAH LIEBERMAN D.C.; RICHARD MILLS, M.D.; JENNIFER M. O'BRIEN ESQ.; GERALD M. VERNON, D.O.; ALVIN F. MICABALO, D.O.; JOSE CAMPOS, M.D.; JOHN S. CHO, M.D.; MICHAEL C. DOBROW, D.O.; RAHULSOOD, D.O.; SACHIN SHAH, M.D., FAISAL MAHMOOD, M.D.; RAVI K. VENKATRAMAN M.D.; MANGLAM NARAYANA M.D.; SHANTI EPPANAPALLY, M.D.; JOHN AND JANE DOES 1 THROUGH 10; XYZ CORPORATIONS 1 THROUGH 10,

Defendants.

DEFENDANT/RESPONDENT CARTERET COMPREHENSIVE MEDICAL CARE, PC, ET. ALS.'S APPELLATE BRIEF

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PRELIMINARY STATEMENT

This appeal addresses a bold attempt by Allstate to disqualify legal counsel of Defendants' choice from representing multiple defendants in the action. Allstate's purported altruistic attempt to ensure the defendants in this case have independent defense counsel to obtain a fair trial is a thinly veiled attempt to run up defense costs by using the Court to force each defendant to obtain separate legal counsel and foot the bill individually as opposed to pooling resources and engaging in a joint defense. Joint Defense Agreements are commonplace in such litigation. It is also an attempt by Allstate to divide and conquer the defendants by driving a wedge between those who have a unity of interest and joint defense at this stage of the litigation.

Allstate has sued these defendants alleging that they engaged in a conspiracy to commit insurance fraud as well as a racketeering enterprise in violation of the New Jersey Insurance Fraud Prevention Act as well as New Jersey RICO Act. (C.C.Da.1-100):

Allstate Complaint

> 378. Pursuant to IFPA §4(b), defendants . . .and other unknown persons are jointly liable to the plaintiffs because they *knowingly conspired with, aided, abetted, or urged each other,* and other unknown persons, to violate IFPA §§4(a)(1) through (3) and (c) in connection with CCMC's violations of the CPOM.

> 379. Further, pursuant to IFPA §4(c), defendants . . .and other unknown persons are jointly liable to the plaintiffs because, as a result of their assistance to, *conspiracy with,* or urging of each other, and other unknown persons, to engage in the CPOM violations, each defendant knowingly benefitted, directly or indirectly, from the proceeds derived from the multiple claims for payment for No-Fault medical, chiropractic and other health care benefits that were submitted to the plaintiffs in connection with CCMC's CPOM violations and in violation of IFPA §§4(a)(1) through (3)
>
> 384. Defendants . . .and others *conspired or aided and abetted each other* to submit, or cause to be submitted, claims for payment for medical services to the plaintiffs that violated the New Jersey anti-kickback and anti-self-referral laws, as follows.
>
> 498. The defendants *associated and conspired with each other* and other unknown persons to form an Enterprise within the definition of N.J.S.A. §2C:41-1(d), as described by ¶¶316 through 349, *above*.
>
> 506. Thus, proof of a pattern of IFPA violations with respect to the CPOM, as alleged herein, also proves a pattern of violating N.J.S.A. §2C:21-20(d) because the *Bufano defendants, with the knowing aid, assistance and encouragement of their co-conspirators,* engaged in the hiring, employment and direction of plenary physicians; the provision of medical services to the general public; billing insurance companies for reimbursement for such medical services; and influencing, or directing others to influence, medical decision making; all activities for which a
> plenary license to practice medicine is a necessary prerequisite.

(C.C.Da.1-100)(emphasis added).

However, in the Motion to Disqualify subject to this appeal Allstate must pivot one hundred eighty degrees and argue, contrary to their initial pleading, that there is *no* unity of interest or commonality and each defendant must obtain

separate counsel as a result. See, Pb.21-44. Allstate cannot have it both ways: argue a joint conspiracy and racketeering enterprise in its complaint and argue the exact opposite in their motion to disqualify based upon a purported disunity of interest and actual conflict. These contrary positions and arguments ring hollow warranting affirmation of the trial court's denial of Allstate's Motion to Disqualify counsel.

STATEMENT OF FACTS

Defendants are medical professionals, administrative laypersons and entities treating, among others, patients suffering from injuries sustained in automobile accidents. (C.C.Da.1-10).[1] At its core, the theory of Allstate's complaint is that Defendants fraudulently billed Allstate for medical services that were not necessary or appropriate, not provided, or were forced to be provided by doctors of lower licensure or no licensure or the product of illegal referrals. (C.C.Da.1-100). Specifically, plaintiff's complaint sounds in the following causes of action:

[1] C.C.Da. refers to the Carteret Comprehensive Defendants' Appendix per R. 2:6-8 for multiple defendants.

Count One: Declaratory Judgment that CCMC is Structured, Organized and Operated in Violation of the Corporate Practice of Medicine Doctrine and N.J.A.C. §13:35-6.16 and Practices Medicine Without a License in Violation of N.J.S.A. §2C:21-20.

Count Two: Declaratory Judgment that CCMC was Not Entitled to No-Fault Insurance Benefits Pursuant to Allstate v. Northfield and Allstate v. Orthopedic Evaluations and Ordering Disgorgement of Insurance Benefits Received as a Result of CCMC's Corporate Structure Violations

Count Three: Violations of the Insurance Fraud Prevention Act as a Result of the Defendants' CPOM Violations

Count Four: Declaratory Judgment that Defendant Joseph Bufano, D.C., Violated Board of Chiropractic Examiners' Regulation N.J.A.C. §13:44E-2.6, Prohibiting Payment or Receipt of Referral Fees or Other Compensation, in Connection with Referrals for Pain Management, Anesthesia and Other Surgical Procedures

Count Five: Declaratory Judgment that Defendants Mills, Sood, Shah, Mahmood, Venkataraman, Narayanan and Eppanapally Violated Board of Medical Examiners' Regulation, N.J.A.C. §13:35-6.17 Prohibiting Payment or Receipt of Compensation in Exchange for Patient Referrals.

Count Six: Declaratory Judgment that the Defendants Violated the Anti Self-Referral Law N.J.S.A. §§45:9-22.4, et. seq. (The Codey Act)

Count Seven: Declaratory Judgment that CCMC, Same Day, Mid-State, Naraynan, the Sood Practices and the Mahmood Practices were Not Entitled to No-Fault Insurance Benefits Pursuant to Allstate v. Orthopedic Evaluations and Ordering Disgorgement of Insurance Benefits Received as a Result of the Bufano-Sood-Mahmood Kickback and Self-Referral Violations

> Count Eight: Violations of the Insurance Fraud Prevention Act as a Result of the Bufano-Sood-Mahmood Self-Referral and Kickback/Self-Referral Violations.
>
> Count Nine: Violations of the New Jersey Anti-Racketeering Statute, N.J.S.A. §2C:41-2, et. seq. in Connection with CCMC's CPOM Violations and the Bufano-Sood-Mahmood Kickback and Self-Referral Violations.

(C.C.Da.1-100). Through many hundreds of paragraphs, Allstate tried to impute liability to all the named defendants, through one service or another, even though many of the defendants had no involvement with processing, submitting, reviewing, or collecting on the claims. They even include real estate holding companies in the complaint as somehow conspiring to commit insurance fraud. Further, Allstate makes these fraud allegations based on its lay opinion, with no medical background, regulatory background on the corporate practice of medicine, and no supporting information provided in the Complaint. (C.C.Da.1-100).

Allstate, as a tactical matter, with the intended purpose of driving up costs of defense and fabricating a conflict of interest amongst the defendants, filed a motion to disqualify counsel based upon a speculative conflict of interest.[2] In

[2] The Law Office of Jeffrey Randolph, LLC, ("Randolph firm") represents the following defendants: CCMC, Inimeg Management, Joseph Bufano, D.C., Jennifer O'Brien, Esq., 311 Spotswood Englishtown Realty, 72 Route 27 Realty, Christopher Bufano, Gerald Vernon, M.D., Micah Lieberman, D.C., Richard Mills, M.D., Michael Dobrow, D.O. and Alvin Micabalo, D.O. (collectively, the "CCMC defendants").

opposition to this specious motion, Dr. Bufano, authorized representative of the defendants, produced a sworn affidavit rebutting all of the RPC factors that Allstate claimed could be violated:

> 1) I as well as the other Carteret Comprehensive defendants were advised of the potential conflict of interest of joint representation, were provided full informed consent, and signed off on same as part of the initial retainer agreement in this matter. We all maintain that the retainer agreement is attorney-client privileged but will provide a complete copy of same for the Court's review *in camera* if requested.
>
> 2) Based upon my personal knowledge and discussions with the other Carteret Comprehensive Defendants, all of the parties are aligned in interest.
>
> 3) All of the Carteret Comprehensive Defendants have a past or current employment relationship and are in concert in defense of the allegations in the Allstate Complaint. These defendants represent an owner of the professional corporation and corporate representative (myself), its medical personnel, in-house counsel, and management employees. There is no direct adversity between these parties.
>
> 4) I believe the only basis for the present motion is for Allstate to attempt to create a non-existent conflict between these aligned parties, drive up our costs of defense as separate attorneys will each charge for the work that can be accomplished by one firm who is our first choice in representation, and to bankrupt us all with costs of defense in this complex case which will take years and hundreds of thousands of dollars in legal fees to defend.

(C.C.Da.101-02).

The speculative and conclusory nature of Allstate's claim is evidenced in the hearing transcript wherein Allstate counsel attempted to contrive a conflict but failed to do so under the questioning of Judge Rafano:

> THE COURT: Well, but aren't your allegations conclusory?
>
> MR. HALL: No, Judge, because all you have to -- I'm saying, look, how can they represent two defendants or six defendants under the Comparative Negligence Act, all right? Everyone's got an incentive under the CNA to point the fingers at the other guy.
>
> THE COURT: But that has not occurred at this point.
>
> MR. HALL: Well, it will occur in the future.
>
> THE COURT: How do we know that?
>
> MR. HALL: Well, if this case were to go to trial then we're going to have everybody pointing fingers at each other.
>
> THE COURT: So, you're saying that it may happen, we don't know it's going to happen. It may happen, therefore every single defendant has to retain their own attorney? . . .

(TR.43-44.). When challenged by Judge Rafano as to why the conflicts could not be waived, Allstate again could not provide any concrete reason as to why it could not, providing a rambling answer about "ticking time bombs" and the Comparative Negligence Act (which Allstate claims applies to the intentional fraud and RICO claims in their complaint):

> THE COURT: Well, let me ask you this, can't their client waive that potential conflict?

> MR. HALL: Yes, and then -- and set off a ticking time bomb under this litigation. At some point they're going to realize --
>
> THE COURT: But what ticking time bomb?
>
> MR. HALL: Excuse me, Judge?
>
> THE COURT: What? What ticking time bomb?
>
> MR. HALL: Because I -- you know what, can't get a fair trial here because of the Comparative Negligence Act. I have no ability to point my – the finger at the other defendant represented by my same lawyer. What happens if one defendant makes an admission that's damaging to the other defendant? Is that same lawyer going to cross examine him? What about --
>
> THE COURT: If at some point in the future it becomes apparent that there is a conflict, maybe at that point then he can retain his own counsel.
>
> MR. HALL: Well --
>
> THE COURT: But you're asking me at this point to declare the firm to say you can't represent this defendant -- all these multiple defendants who have all agreed to have their firm represent them, all said, look, we don't believe there's a conflict. In the event there is a conflict, we waive that, we've been advised of it. We want to forge ahead with one attorney. You're saying I have to step in and say no, you can't do that . . .

(T.45-46).

Judge Rafano, following oral argument and *in camera* review of the Retainer and Conflict Waivers of the CCMC Defendants, denied Allstate's motion, holding:

> The Court notes that there must be a "reasonable basis" for disqualification as it cannot be based on imagined scenarios of conflict. Plaintiff's assert that because of potential crossclaims, third-party claims and settlement offers the Mandelbaum and Randolph firms' representation of multiple clients is materially limited by the lawyers' responsibilities to each set of co-defendants. Plaintiff infers that under the CNA each defendant has an incentive to minimize their own liability at the expense of their co-defendants. The CNA may create a conflict of interest if this matter proceeds to trial but for purposes of this motion, the Court does not find this to be a conflict of interest. All the Defendants assert that they have signed informed consent waivers to any potential conflicts of interests, there are no pending cross or third-party claims being pursued by any defendant against another, and each attorney is confident in their ability to represent their clients. This Court finds that the representation of the Mandelbaum and Randolph firms in this matter is not prohibited by law as each clients position are not aligned directly against one another "in the same litigation or other proceeding before a tribunal". M.R.P.C. 1.7 cmt. 17. The Court finds that the Plaintiff's contentions are based on speculation which is not grounds to disqualify counsel under Dewey and Loyal. See Dewey, supra, 109 N.J. at 221-22; See Also Loyal, 164 N.J. at 434 (2000). The Court notes that the numerous Defendants have signed informed consent waivers and have been properly informed by their attorneys of the potential risks involved with multi-defendant representation. Plaintiff may refile this application to relieve counsel.

(C.C.Da.110).

PROCEDURAL HISTORY

On March 15, 2023, Allstate filed the complaint in this matter against all defendants. (C.C.Da.1-100). These defendants (as well as all other defendants) filed a Motion to Dismiss In Lieu of Answer on or about April 13, 2023. Allstate

filed a concomitant motion to disqualify the Randolph firm as well as the Mandelbaum firm from representing multiple defendants claiming that a conflict of interest existed.

Oral argument was heard before Judge Rafano on or about October 24, 2023. (T.1-57). Thereafter, Judge Rafano issued his written decision and order on October 27, 2023, denying the disqualification motion and granting the motion to dismiss in favor or arbitration. (C.C.Da.105-10). Allstate appealed both determinations on October 27, 2023. (Pa.0354).

STANDARD OF REVIEW

In determining whether a ruling, action or inaction by the lower court or agency constituted error, the appellate court applies a standard of review that gives the appropriate deference to the lower court's decision. That standard may allow for no deference (review of purely legal decisions), some degree of deference, or a substantial degree of deference (review of findings of fact). See, Mandel, *N.J. Appellate Practice* § 34:2-1 (2022).

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. See, In re Ridgefield Park Bd. of Educ., 244 *N.J.* 1, 17 (2020) (agency's interpretation of a statute); State v. Courtney, 243 *N.J.* 77,

85 (2020) (interpretation of sentencing provisions in the Criminal Code).

With regards to findings of fact, "[t]he general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 *N.J.* 414, 428 (2015) (*quoting* Cesare v. Cesare, 154 *N.J.* 394, 411-12 (1998)). See, State v. Camey, 239 *N.J.* 282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 *N.J.* 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 *N.J.* 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 *N.J.* 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record").

In the present matter, the underlying determination by the trial judge as to whether a conflict of interest existed that could not be waived constituted a factual determination. Thus, an abuse of discretion standard must be applied.

LEGAL ARGUMENT

Point I: The Trial Judge Was Correct In Denying The Disqualification Motion as No Conflict of Interest Existed and/or Was Subject to Waiver.

A. Conflict of Interest Rules and Law.

Conflicts of interests are governed by RPC §1.7, *Conflict of Interest: General Rule.* RPC §1.7 provides, in pertinent:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
>
> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (3) the representation is not prohibited by law; and
>
> (4) the representation does not involve the assertion of a

> claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

An attorney cannot engage in concurrent representation where there is "a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." In re Opinion No. 17-2012 of Advisory Comm. on Pro. Ethics, 220 N.J. 468, 478–79 (2014). To identify such a risk, "[t]he critical questions are the likelihood that a difference in interests will arise, and if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Id. However, "joint representation of multiple parties whose interests are potentially diverse is permissible only if 'there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants.'" Hill v. New Jersey Dep't of Corr. Com'r Fauver, 342 *N.J. Super.* 273, 309 (App. Div. 2001) (*citing Matter of Petition for Rev. of Opinion 552 of Advisory Comm. on Pro. Ethics*, 102 N.J. 194, 204 (1986)).

"Disqualification of counsel is a harsh discretionary remedy which must be used sparingly." Cavallaro v. Jamco Prop. Mgmt., 334 *N.J. Super.* 557, 572

(App. Div. 2000). Thus, "[m]otions to disqualify are typically disfavored because they 'can have such drastic consequences.'" H & H Mfg. Co., Inc. v. Tomei, No. A-4209-19, 2021 WL 6132769, at *4 (N.J. Super. Ct. App. Div. Dec. 29, 2021) (*citing* Rohm & Haas Co. v. Am. Cyanamid Co., 187 F. Supp. 2d 221, 226 (D.N.J. 2001)).

When deciding a motion to disqualify counsel the movant bears the burden of proof that disqualification is appropriate. City of Atlantic City v. Trupos, 201 N.J. 447, 462-63 (2010); Maldonado v. New Jersey, ex rel. Admin. Office of Courts-Prob. Div., 225 F.R.D. 120, 136-37 (D.N.J. 2004). The movant's burden is a heavy one since "[m]otions to disqualify are viewed with 'disfavor' and disqualification is *5 considered a 'drastic measure which courts should hesitate to impose except when absolutely necessary.'" Alexander v. Primerica Holdings, Inc., 822 *F.Supp*. 1099, 1114 (D.N.J. 1993).

B. The Trial Judge Correctly Determined That No Conflict of Interest Existed And/or Could Be Waived.

Addressing the RPC 1.7 factors in the matter at bar, Judge Rafano was correct in determining that there was no legal or factual basis to disqualify this firm from representing the "Carteret Comprehensive Defendants" based upon the alleged concurrent conflict of interest.

In Dantinne v. Brown, Civil No. 17-0486 (6/23/2017), the U.S. District Court for New Jersey faced a similar factual scenario. (C.C.Da.111-17). The Plaintiff moved to disqualify counsel for defendant under RPC1.7 and 1.9 claiming that a conflict of interest existed as defense counsel "may" become a witness at trial. Id.at 1-2. The trial court denied the motion without prejudice, stating, "[t]he reason is because no present conflict exists, and no future conflict is certain, that warrants Gillespie's disqualification. Further, it is not yet known if Gillespie will be a necessary trial witness." Id.at 7. … "The Court can and will decide plaintiff's disqualification motion when and if it is based on an existing or unavoidable conflict. This situation does not presently exist." Id.at 8-9.

The matter at bar is strikingly similar in the speculative and conclusory nature of the conflict alleged. The speculative and conclusory nature of Allstate's claim is evidenced in the hearing transcript wherein Allstate counsel desperately attempted to contrive a conflict but failed to do so:

> THE COURT: Well, but aren't your allegations conclusory?
>
> MR. HALL: No, Judge, because all you have to -- I'm saying, look, how can they represent two defendants or six defendants under the Comparative Negligence Act, all right? Everyone's got an incentive under the CNA to point the fingers at the other guy.
>
> THE COURT: But that has not occurred at this point.

> MR. HALL: Well, it will occur in the future.
>
> THE COURT: How do we know that?
>
> MR. HALL: Well, if this case were to go to trial then we're going to have everybody pointing fingers at each other.
>
> THE COURT: So, you're saying that it may happen, we don't know it's going to happen. It may happen, therefore every single defendant has to retain their own attorney? . . .

(T.43-44.). When challenged by Judge Rafano as to why the conflicts could not be waived, Allstate again could not provide any concrete reason, providing only a nonsensical response about ticking time bombs and the Comparative Negligence Act (which does not apply to intentional fraud and RICO claims – there are no negligence counts in Allstate's Complaint):

> THE COURT: Well, let me ask you this, can't their client waive that potential conflict?
>
> MR. HALL: Yes, and then -- and set off a ticking time bomb under this litigation. At some point they're going to realize --
>
> THE COURT: But what ticking time bomb?
>
> MR. HALL: Excuse me, Judge?
>
> THE COURT: What? What ticking time bomb?
>
> MR. HALL: Because I -- you know what, can't get a fair trial here because of the Comparative Negligence Act. I have no ability to point my – the finger at the other defendant represented by my same lawyer. What happens if one defendant makes an admission that's damaging to the other

> defendant? Is that same lawyer going to cross examine him? What about --
>
> THE COURT: If at some point in the future it becomes apparent that there is a conflict, maybe at that point then he can retain his own counsel.
>
> MR. HALL: Well --
>
> THE COURT: But you're asking me at this point to declare the firm to say you can't represent this defendant -- all these multiple defendants who have all agreed to have their firm represent them, all said, look, we don't believe there's a conflict. In the event there is a conflict, we waive that, we've been advised of it. We want to forge ahead with one attorney. You're saying I have to step in and say no, you can't do that . . .

(T.45-46).

Addressing the merits of the claims, the representation of one client would not be directly adverse to another client or materially limit the firm's representation of the parties. Dr. Bufano, an owner and the corporate representative of Carteret Comprehensive, provided a sworn affidavit on behalf of himself and the corporation that the parties are aligned in interest. (CC.Da.101-02). They all have a past or current employment relationship and are in concert in defense of the allegations in the Allstate Complaint. Id. These defendants represent an owner of the corporation, its medical personnel, in-house counsel, and management employees. There is no direct adversity between these parties. In the affidavit, Dr. Bufano further provides that: "I believe the only basis for the present motion is for Allstate to attempt to create

a non-existent conflict between these aligned parties, drive up our costs of defense as separate attorneys will each charge for the work that can be accomplished by one firm who is our first choice in representation, and to bankrupt us all with costs of defense in this complex case which will take years and hundreds of thousands of dollars in legal fees to defend." Id.

Even if the Appellate Court disagrees with the underlying determination that no conflict existed, the Carteret Comprehensive Defendants all signed potential conflict of interest waivers in their initial retainers after receiving full informed consent per *RPC* 1.7. (C.C.Da.101-02). Defendants maintain that the retainer agreement is attorney-client privileged and it was not attached to the publicly filed motion opposition. However, contrary to the assertions of Allstate in their brief, Judge Rafano performed an *in camera* review of the retainer with conflict waiver in rendering his determination. (T.57). The "Unidentified Speaker" in the transcript is Judge Rafano's law clerk confirming he received the waivers for review from the CCMC defendants signed by Dr. Bufano.

Designated trial counsel from the Randolph Firm also provided a certification that he reasonably believes that he can provide competent and diligent representation to each client, that to the best of his knowledge the joint representation is not prohibited by law, and there are no known or anticipated

cross-claims amongst the defendants, per *RPC* 1.7. (C.C.Da.103-04).

Accordingly, there was ample evidence of record before the trial court to support Judge Rafano's determination that there was no concurrent conflict of interest, or even if there was, it could be properly waived per *RPC*1.7. Thus, the underlying decision denying the motion to disqualify must be affirmed on appeal.

CONCLUSION

Based on the foregoing, this Court should affirm the underlying trial court determination denying Allstate's Motion to Disqualify based upon a speculative conflict of interest must be affirmed.

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/s/ *Jeffrey Randolph*
Jeffrey B. Randolph, Esq.

Dated: April 26, 2024

ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY and CASUALTY INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE NORTHBROOK INDEMNITY COMPANY; and ALLSTATE PROPERTY AND CASULATY INSURANCE COMPANY,

Plaintiffs,

v.

CARTERET COMPREHENSIVE MEDICAL CARE, P.C., d/b/a MONROES COMPREHENSIVE MEDICAL CARE, d/b/a COMPREHENSIVE MEDICAL CARE, d/b/a FASSST SPORT, d/b/a COMPREHENSIVE VEIN CARE; INIMEG MANAGEMENT COMPANY, INC.; 311 SPOTSWOOD-ENGLISHTOWN ROAD REALTY, L.L.C.; 72 ROUTE 27 REALTY, L.L.C.; MID-STATE ANESTHESIA CONSULTANTS, L.L.C.; NORTH JERSEY PERIOPERATIVE CONSULTANTS, P.A.; INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY, L.L.C., d/b/a PAIN MANAGEMENT PHYSICIANS OF NEW JERSEY, d/b/a/ METRO PAIN and VEIN; SOOD MEDICAL

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Docket No. A-001575-23

Civil Action

On Appeal From:
Superior Court of New Jersey, Law Division, Dkt. No. MID-L-1469-23

Sat Below:
Honorable Christopher D. Rafano, J.S.C.

PRACTICE, L.L.C.; ONE OAK MEDICAL GROUP, L.L.C., d/b/a NEW JERSEY VEIN TREATMENT CLINIC; ONE OAK TREATMENT CLINIC; ONE OAK ORTHOPAEDIC & SPINE GROUP, L.L.C.; ONE OAK HOLDING, L.L.C.; JOSEPH BUFANO, JR., D.C.; CHRISTOPHER BUFANO; MICAH LIEBERMAN, D.C.; RICHARD MILLS, M.D.; JENNIFER M. O'BRIEN, ESQ.; GERALD M. VERNON, D.O., D.C.; ALVIN F. MICABALO, D.O.; JOSE CAMPOS, M.D.; JOHN S. CHO, M.D.; MICHAEL C. DOBROW, D.O.; RAHUL SOOD, D.O.; SACHIN SHAH, M.D.; FAISAL MAHMOOD, M.D.; RAVI K. VENKATRAMAN, M.D.; MANGLAM NARAYANAN, M.D.; SHANTI EPPANAPALLY, M.D.; JOHN AND JANE DOES 1 through 10; and XYZ CORPORATIONS 1 through 10,

Defendants.

BRIEF OF DEFENDANTS MID-STATE ANESTHESIA CONSULTANTS, L.L.C., INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY, L.L.C., SOOD MEDICAL PRACTICE, L.L.C., RAHUL SOOD, D.O., AND SACHIN SHAH, M.D.

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PRELIMINARY STATEMENT

Plaintiff Allstate's gambit to disqualify the defendants' counsel is the insurance industry's newest strategy to crack joint defenses and to leverage defendants into settling regardless of the merits of insurers' claims against them. The trial court's decision was correct. Mandelbaum Barrett P.C. (the "Mandelbaum Firm") does not have a conflict of interest under RPC 1.7(a) and is not disqualified from representing defendants Dr. Rahul Sood, Dr. Sood's practices, and Dr. Sachin Shah merely because Allstate's cause of action under the New Jersey Insurance Fraud Prevention Act ("IFPA") is governed by the Comparative Negligence Act ("CNA").

Allstate has no standing to assert this purported conflict. But even if it did, the Court should reject Allstate's extreme position here that any case with a claim governed by the CNA, including one in which an insurer asserts a violation of the IFPA as Allstate does, creates an automatic *per se* conflict prohibiting a single law firm from representing multiple defendants. Allstate's extraordinary position has no basis in existing legal authority and is divorced from the realities of joint defense practice that occurs every day in this State.

Dr. Sood and Dr. Shah have knowingly and intelligently chosen to retain the Mandelbaum Firm, assert consistent defenses, and deny any liability to Allstate. They also executed appropriate conflict waivers. And they reaffirmed

this in response to Allstate's motion. Nevertheless, Allstate insists that each of them and, in fact, every defendant in this case must have separate counsel. That is not the law. Allstate cannot drive a wedge between defendants, and certainly not at the very outset of the case merely by filing a complaint.

This Court should affirm the trial court's denial of Allstate's motion to disqualify the Mandelbaum Firm. The playing field should not be further tilted in favor of insurers like Allstate and against medical practitioners like Dr. Sood and Dr. Shah.

PROCEDURAL BACKGROUND

Allstate filed this lawsuit on March 15, 2023. Pa305. In April 2023, Dr. Sood and Dr. Shah (and the other co-defendants) moved to dismiss and compel arbitration of Allstate's claims (which were subsequently re-filed with a new, later return date). While those arbitration motions were pending, on August 3, 2023, Allstate moved to disqualify counsel for the Sood Defendants and counsel for the CCMC Defendants. Ibid. On October 24, 2023, the trial court held oral argument. See T.[1] On October 27, 2023, the trial court denied Allstate's motion to disqualify both counsel. Pa306, 310, 312, 316. This Court then granted Allstate leave to appeal, and Allstate appealed. Pa354, 357.

[1] "T" refers to the transcript of oral argument dated October 24, 2023.

FACTUAL BACKGROUND

Allstate filed a 127-page Complaint against nearly thirty medical practices, medical practitioners, and administrative personnel, asserting nine counts that allege various types of misconduct, kickbacks, and insurance fraud. Pa1-98. As Allstate concedes, the Complaint "centers around CMCC" and its affiliates. Pb5. Allstate asserted claims for declaratory judgments (Counts 1-2, 4-7), violation of the IFPA, N.J.S.A. 17:33A-4 (Counts 3, 8), and violation of the New Jersey RICO statute (Count 9). Pa54-98.

The Law Office of Jeffrey Randolph, LLC (the "Randolph Firm") represents the twelve CCMC Defendants: Carteret Comprehensive Medical Care, PC, Inimeg Management Company, Inc., 311 Spotswood-Englishtown Road Realty LLC, 72 Route 27 Realty LLC, Joseph Bufano, Jr., D.C, Christopher Bufano, Micah Lieberman, D.C., Richard Mills, M.D., Jennifer O'Brien, Gerald Vernon, M.D., and Alvin Micabalo, D.O. (the "CMCC Defendants").

Separately, Mandelbaum Barrett PC (the "Mandelbaum Firm") was retained to represent Mid-State Anesthesia Consultants, LLC ("Mid-State"), Interventional Pain Consultants of North Jersey, LLC ("IPCNJ"), Sood Medical Practice, LLC ("Sood Medical"), Rahul Sood, D.O. ("Dr. Sood"), and Sachin Shah, M.D. ("Dr. Shah") (the "Sood Defendants"). Dr. Sood retained the

Mandelbaum Firm to represent him and his medical practice entities. Pa319; SDa36-40.[2] Dr. Shah also retained the Mandelbaum Firm to represent him personally. Pa322; SDa41-45. Dr. Shah works for Dr. Sood's medical practices, IPCNJ/Sood Medical and Mid-State. Pa7, 10-11. Pursuant to Dr. Shah's retainer, Dr. Sood and his practices agreed to pay for legal fees incurred by Dr. Shah in this litigation. SDa41-42; Pa319-20. This agreement to do so and the attendant RPC conditions were set forth in the retainer. SDa42, 44.

In conjunction with Allstate's motion to disqualify, at the trial court's direction, on October 16, 2023, the Mandelbaum Firm sent both retainer agreements and an additional conflict waiver to the Court via email to its law clerk for *in camera* review. SDa33-34; see also T49:11 to 51:6. That is why the trial court's decision expressly found that Dr. Sood and Dr. Shah signed informed consent waivers of any potential conflict and were informed by counsel of the potential risks involved. Pa316. Thus, Allstate's statement that the trial court made its determination "without having seen the waivers" and based only on certifications of three out of ten individual defendants is inaccurate. Pb10, 29-30. The trial court received and reviewed both the waiver and the retainer agreements. T49:11 to 51:6, 57:11-17; SDa34-35. And, both Dr.

[2] "SDa__" shall refer to the Sood Defendants' Appendix. If the Court grants the Sood Defendants' pending motion, they will submit Volume II of their Appendix to the Court in paper form only for *in camera* review.

Sood and Dr. Shah submitted certifications—*i.e.*, two out of the three certifications that Allstate refers to. Pa319-24.

Dr. Sood's retainer agreement contains an express acknowledgment that the Mandelbaum Firm represents a co-defendant, consents to that dual representation, and waives any potential conflict arising from the representation. SDa37. It also conveys that the Mandelbaum Firm is not presently aware of any conflict based on its determination that Dr. Sood's and his co-defendant's interests are aligned in the case. Ibid. But it also states that, if any conflict does arise, the Mandelbaum Firm may have to withdraw. SDa37-38. The same provisions are contained in Dr. Shah's retainer agreement. SDa43.

In opposition to Allstate's motion to disqualify the Mandelbaum Firm, both Dr. Sood and Dr. Shah reaffirmed in certifications what they had been advised and consented to in their retainer agreements. Pa319 ¶ 6; Pa322 ¶ 6. They again explained that they waived any potential conflicts of interest arising out of the dual representation because they believed then, and still believed when they signed their certifications, that doing so was in their best interests. Ibid. Both doctors explained that they were, prior to signing their certifications, advised by the Mandelbaum Firm about the nature of the dual representation and potential conflict, as well as about the arguments made by Allstate in its motion. Pa320 ¶ 14; Pa323 ¶ 14. Both doctors further attested that they believed their

interests in the case were aligned with one another and that they did not believe they had claims against one another but that, to the extent they exist, pursuing them would be contrary to their best interests. Pa320 ¶¶ 11-13; Pa323 ¶¶ 11-13.

On August 28, 2023, both Dr. Sood and Dr. Shah executed another conflict waiver in response to Allstate's motion. SDa47-52. The Sood Defendants submitted the conflict waiver to the trial court *in camera*, and they likewise submit it to this Court *in camera* because it contains the Mandelbaum Firm's legal advice to its clients. SDa34; N.J.R.E. 504. As this Court will discern upon its review of the conflict waiver, it contains all of the requisite information to again obtain Dr. Sood's and Dr. Shah's informed consent under RPC 1.7(b). See SDa47-52.

Payment of Dr. Shah's legal fees was addressed extensively in Dr. Shah's retainer agreement. SDa41-42. Dr. Sood and his practices agreed to pay Dr. Shah's legal fees. Ibid. The relevant RPC provisions concerning third-party payment of legal fees were set forth and acknowledged by both parties. SDa42.

In his certification, Dr. Sood explained that he was advised about the nature of his agreement to pay Dr. Shah's legal fees and that Dr. Shah had to consent to the arrangement. Pa319-20 ¶ 7. Dr. Sood was advised that, among other things, he could not control or interfere with the Mandelbaum Firm's representation of Dr. Shah and that he was obligated to pay Dr. Shah's legal fees

until a court relieved him of doing so after written notice. Ibid. Dr. Shah certified that he was advised of the same provisions related to Dr. Sood paying his legal fees. Pa323 ¶ 7.

Both Dr. Sood and Dr. Shah certified they wanted the Mandelbaum Firm to continue to represent them and that their interests and strategy would be tremendously harmed if the Mandelbaum Firm was disqualified from representing them. Pa320-21 ¶¶ 16-17; Pa324 ¶¶ 16-17.

The trial court correctly denied, without prejudice, Allstate's motion to disqualify the Mandelbaum Firm. Pa305-10. The court reasoned that there was no present conflict of interest and that the CNA "may" create a conflict if the matter had to be tried. Pa310. Further, there were no pending cross or third-party claims being pursued by the doctors against one another and the firms were confident in their ability to represent the defendants. Ibid. As well, the Mandelbaum Firm's representation was not prohibited by law because the clients were not directly adverse to one another. Ibid. The court further explained that Dr. Sood and Dr. Shah "have signed informed consent waivers and have been properly informed by their attorneys of the potential risks involved with multi-defendant representation." Ibid.

LEGAL ARGUMENT

This Court reviews "an order granting or denying a disqualification motion" under a "de novo plenary review" standard. Comando v. Nugiel, 436 N.J. Super. 203, 213 (App. Div. 2014) (citing Twenty–First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 274 (2012)). Under that standard, the Court should affirm the trial court's denial of Allstate's motion to disqualify.

I. Allstate does not have standing to seek to disqualify counsel based on alleged conflicts between Dr. Sood and Dr. Shah.

This case illustrates the reason why standing is a threshold issue when an opposing party who is neither a current client nor a former client seeks to disqualify counsel. It is a transparent tactical ploy to gain leverage in a lawsuit. The need to have standing in this context is a corollary to the rule that "[d]isqualification of counsel is a harsh discretionary remedy which must be used sparingly." Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 192 (App. Div. 2022). Although the trial court did not address it in its decision and Allstate's opening brief also does not address it, Allstate does not have standing to seek to disqualify the Mandelbaum Firm (or the Randolph Firm).

Generally, a "litigant has standing only if the litigant demonstrates [1] a sufficient stake and real adverseness with respect to the subject matter of the litigation and [2] a substantial likelihood of some harm in the event of an

unfavorable decision." Edison Bd. of Educ. v. Zoning Bd. of Adjustment of the Twp. of Edison, 464 N.J. Super. 298, 305 (App. Div. 2020) (cleaned up). "A litigant generally cannot assert the rights of a third party." Goldman v. Critter Control of N.J., 454 N.J. Super. 418, 424 (App. Div. 2018).

"The general rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest." ABA, Ann. Mod. Rules Prof. Cond. § 1.7 (10th ed. 2023); see also Eric C. Surette, Standing of Person, Other than Former Client, to Seek Disqualification of Attorney in Civil Action, 72 A.L.R.6th 563 §§ 8-9 (2012 & Supp.) (stating the "majority view" that "only current and former clients have standing to seek disqualification of counsel"); Douglas A. Richmond, The Rude Question of Standing in Attorney Disqualification Disputes, 25 Am. J. Trial Advoc. 17, 34 (2001) ("The majority view is that only a current or former client has standing to disqualify an attorney.").

In line with this general rule, our courts have held that a party without standing cannot disqualify opposing counsel. The most prominent example of this rule is In re Trust for the Benefit of Duke, 305 N.J. Super. 408 (Ch. Div. 1995), aff'd o.b., 305 N.J. Super. 407 (App. Div.), certif. denied, 151 N.J. 73 (1997). There, the trial court denied the movant's motion to disqualify the law firm that represented an endowment and that had earlier represented the trustees.

Id. at 442. The movant claimed the firm's representation violated RPC 1.7 because the firm was "running the show" in the case on behalf of both the endowment and trustees, which had potentially adverse interests. Id. at 443.

The trial court held that the movant did not have standing to bring the disqualification motion because she was not the endowment or the trustees, nor did they join the motion. Ibid. The court recognized that there may be a potential conflict but, crucially, concluded "neither of the parties who would suffer from the conflict . . . complained" about it, and the movant "was not in any way harmed by" the firm's representation. Id. at 445. This Court affirmed the decision for the reasons expressed by the trial court. 305 N.J. Super. at 408.

Courts outside of New Jersey, for example New York courts, have reached the same conclusion. See, e.g. Sentry at QB, LLC v. Wu, 194 N.Y.S.3d 305, 307 (App. Div. 2023) (holding that because the appellants "were neither a present nor a former client of the Silverman law firm, they lacked standing to seek disqualification based upon a conflict of interest"); Ellison v. Chartis Claims, Inc., 35 N.Y.S.3d 922, 923 (App. Div. 2016) ("Since the plaintiff is neither a present nor a former client of the subject law firm, he lacked standing to seek disqualification of Paul Hastings, LLP, as the attorneys for the individual defendants in the action.").

Here, Allstate is in the same position as the movant in Duke. Like the movant in Duke, Allstate does not claim that it was previously represented by or is currently represented by the Mandelbaum Firm (or the Randolph Firm). Instead, Allstate raises an alleged potential conflict only between Dr. Sood and Dr. Shah based on the Mandelbaum Firm's current representation of both (and between the other defendants based on the Randolph Firm's representation of them). This is again like the movant in Duke, who sought to raise a conflict as between the endowment and the trustees based on the firm's representation of both. 305 N.J. Super. at 443.

Also like in Duke, neither Dr. Sood nor Dr. Shah complains about the joint representation. Pa319-24; see SDa47-52. To the contrary, both Dr. Sood and Dr. Shah certified in opposition to Allstate's motion that they were, on several occasions, advised of potential issues generally surrounding joint representation, that they consented to and wanted the Mandelbaum Firm to continue the joint representation, and they opposed any effort to disqualify the Mandelbaum Firm because their interests are aligned and they want to put forward a unified, joint defense. Pa319-24. And, as in Duke, Allstate is "not in any way harmed by" the alleged conflict between Dr. Sood and Dr. Shah. Put another way, Allstate does not have any stake or adversity with respect to the alleged conflict and would not suffer any harm from the alleged conflict. See

Edison Bd. of Educ., 464 N.J. Super. at 305. Allstate is improperly trying to assert the alleged rights of third parties, the doctors Allstate is suing. Goldman, 454 N.J. Super. at 424.

Allstate's lack of standing underscores its true motive to disqualify the Mandelbaum Firm as its opening salvo before answers are filed and before any discovery is taken: to obtain a tactical advantage in the case. To this point, Allstate did not file the motion to disqualify until after the Sood Defendants first moved to dismiss and compel arbitration. Realizing that the doctors were aligned and prepared to defend themselves, Allstate developed a ploy to disqualify the lawyers defending them in an attempt disrupt their unified defense.

However, Allstate has no cognizable stake in the attorney-client relationship, and depriving an adversary of efficient, unified representation is not a legal basis for disqualification. The alleged conflict under RPC 1.7 stemming from the Mandelbaum Firm's joint representation of Dr. Sood and Dr. Shah does not prejudice, harm, or otherwise impact Allstate. Allstate admitted below—although it is obvious even absent Allstate's express admission—that its motive for seeking to disqualify counsel is its self-interest.

Allstate told the trial court that "the opportunities for settlement negotiations [are] completely curtailed" where there is a unified defense, T47:10-15; SDa19-21 (Allstate's trial court brief arguing defendants have a

significant interest in settlement and cooperating with Allstate), a theme that Allstate repeats here on appeal. Pb3, 23-24. In other words, Allstate's strategy is to seek disqualification as a strategy to break the defendants' unified defense, to leverage the defendants into settling, and to peel them off and try to turn them against one another. Allstate's desire to deprive Dr. Sood and Dr. Shah of their joint representation by the Mandelbaum Firm to gain an upper hand over them does not give them standing.

Allstate's overt admissions highlight why a litigant in Allstate's position does not generally have standing to seek disqualification under the RPCs of an adversary's counsel. The oft-cited decision on this issue, In re Yarn Processing Patent Validity Litigation, explained that, to allow "an unauthorized surrogate to champion the rights" of a non-complaining client "would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist." 530 F.2d 83, 90 (5th Cir. 1976); see also ABA, Ann. Mod. Rules Prof. Cond. § 1.7 (noting the prominence of In re Yarn Processing and collecting cases for the general rule); Ronald E. Mallen, 4 Legal Malpractice § 32:31 (2024 ed.) (explaining that "an adversary has a particularly strong tactical incentive" to allege a conflict between parties seemingly aligned in interest in effort "to disrupt the seemingly harmonious relationship of the parties"). So too here.

At the very most, there exists a narrow exception to the general rule where an ethical issue is "manifest and glaring" and the court is confronted with "a plain duty to act." In re Yarn Processing, 530 F.2d at 89; see also ABA, Ann. Mod. Rules Prof. Cond. § 1.7 ("In exceptional circumstances courts will forgive lack of standing."). Exceptional circumstances do not exist in this case. Attorneys regularly represent multiple parties in a case where the parties mount a joint defense. That is this case.

The Court should reject Allstate's appeal for lack of standing. This is not a case where an adverse party has a former relationship with an attorney that creates a conflict. This is an adversary with no stake in the relationship seeking to disrupt a joint defense. Nor is this a case where a party has been deprived of the counsel of its choice so that the litigation of the case and its outcome could be for naught due to reversal. To hold otherwise would be to breach the proverbial dam holding back a flood of strategic and meritless motions to disqualify, like the one Allstate brought below.

On this basis alone, the Court should affirm the trial court's order denying Allstate's disqualification motion. See Atl. Ambulance Corp. v. Cullum, 451 N.J. Super. 247, 254 (App. Div. 2017) ("We affirm or reverse judgments and orders, not reasons.").

II. The Mandelbaum Firm is not disqualified from jointly representing the Sood Defendants under RPC 1.7(a)(1) based on the CNA.

Even if the Court holds that Allstate had standing to bring its motion to disqualify the Mandelbaum Firm, the Court should still affirm the trial court's denial of that motion. RPC 1.7(a) allows the Mandelbaum Firm to represent Dr. Sood and his practices as well as Dr. Shah in this case. Contrary to Allstate's novel position, the CNA's apportionment of liability between defendants for IFPA claims does not create a "per se conflict" under RPC 1.7(a)(1) or (a)(2) where one firm represents multiple defendants. Pb2. In fact, Allstate is asking the Court to create a new "automatic per se conflict" in all intentional tort and concerted acts cases including IFPA cases. Pb3. Only the Supreme Court, however, has authority to create a groundbreaking *per se* conflicts rule. But even setting that aside, the Court should affirm the trial court order and reject Allstate's radical request to disqualify the Mandelbaum Firm under RPC 1.7(a)(1) because Allstate has not carried its heavy burden.

For good reason, "disqualification motions are . . . viewed skeptically in light of their potential abuse to secure a tactical advantage." Escobar v. Mazie, 460 N.J. Super. 520, 526 (App. Div. 2019). "Disqualification of counsel is a harsh discretionary remedy which must be used sparingly." Dental Health Assocs. S. Jersey, P.A., 471 N.J. Super. at 192.

"The party who seeks the disqualification bears the burden of persuasion." Dental Health Assocs. S. Jersey, P.A., 471 N.J. Super. at 193-94. It is a "heavy burden" with a "high standard of proof." Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1114 (D.N.J. 1993). Evaluation of an alleged conflict "does not take place in a vacuum, but is, instead, highly fact specific." In re Grand Jury Investigation, 200 N.J. 481, 491 (2009). And that evaluation requires a "painstaking analysis of the facts." Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 205 (1988). In evaluating an alleged conflict of interest, courts must "balance the need to maintain the highest standards of the profession against a client's right to freely choose his counsel." Ibid.

RPC 1.7(a) states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," except as permitted by paragraph (b) of the rule. Under subsection (a), there is a concurrent conflict of interest when one of the two following situations is true: (1) "the representation of one client will be directly adverse to another client," or (2) "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." RPC 1.7(a)(1)-(2).

As noted in the opening clause of the rule, subsection (b) permits clients to waive a concurrent conflict. RPC 1.7(b). Specifically, even if a concurrent

conflict exists under subsection (a), an attorney can still represent the client if (1) each affected client gives informed consent in writing after full disclosure, (2) the attorney believes that he or she can provide competent and diligent representation to each client, (3) the law does not prohibit the representation, and (4) representing the client does not involve asserting a claim by one of the attorney's clients against another in the same case. RPC 1.7(b)(1)-(4).

The Sood Defendants also note that, even where an RPC 1.7(a) conflict exists, disqualification is not mandatory, especially where disqualification would lead to an unjust result. Carlyle Towers Condo. Ass'n, Inc. v. Crossland Sav., FSB, 944 F. Supp. 341, 346-47, 349 (D.N.J. 1996).

Allstate argues that the Mandelbaum Firm's representation of both Dr. Sood/his practices and Dr. Shah is prohibited by "both subsections of RPC 1.7(a)." Pb12. Allstate's position is incorrect both on the merits and for two basic procedural reasons.

A. Allstate never sought to disqualify the Mandelbaum Firm under RPC 1.7(a)(1) in the trial court.

As a threshold matter, Allstate neglects to mention that it never raised in the trial court the argument that the Mandelbaum Firm (or Randolph Firm) should be disqualified pursuant to RPC 1.7(a)(1), which prohibits representation when one client is directly adverse to the other. The only basis for Allstate's motion was RPC 1.7(a)(2), concerning a significant risk of material limitation

as a result of the representation. See SDa1-33 (Allstate's trial court briefs); Pa307 (trial court decision reciting that Allstate argued the Mandelbaum Firm and Randolph Firm representation of multiple clients "is materially limited by the lawyers' responsibilities to each set of co-defendants"). Because Allstate never raised RPC 1.7(a)(1) in the trial court, it cannot do so now for the first time on appeal. See Pfannenstein v. Surrey, 475 N.J. Super. 83, 99 (App. Div.), certif. denied, 254 N.J. 512 (2023). Therefore, the Court should reject Allstate's argument related to RPC 1.7(a)(1). Pb12-20.

B. The Appellate Division does not have authority to create new *per se* conflict rules.

Even if the Court reaches Allstate's RPC 1.7(a)(1) argument, respectfully, the Appellate Division does not have the legal authority to create the new *per se* conflict rule under RPC 1.7(a) that Allstate asks for. Any new *per se* conflict rule and bar on joint representation in any case in which the CNA, N.J.S.A. 2A:15-5.1 et seq., governs the cause of action—IFPA violation, negligence, products liability, malpractice, strict liability, consumer fraud, fraud, and other intentional torts—can only come from the Supreme Court of New Jersey. This is because the Supreme Court and its advisory committees (*e.g.*, the Advisory Committee on Professional Ethics) have exclusive authority over such matters. N.J. Const. Art. 6, § 2, ¶ 3; R. 1:14; Balducci v. Cige, 240 N.J. 574, 591-92, 606

(2020); Arbus, Maybruch & Goode, LLC v. Cohen, 475 N.J. Super. 509, 516, 518 (App. Div. 2023).

So, even if this Court is inclined to believe that a *per se* conflict rule should exist (it should not) or deserves consideration, respectfully, it is not within this Court's jurisdiction to declare such a new rule of attorney ethics. See Arbus, Maybruch & Goode, LLC, 475 N.J. Super. at 518 (observing that no rigorous ethics rule existed like the one the party urged the Appellate Division to adopt and declining to adopt such a rule as a basis for reversing the trial court at the expense of usurping the Supreme Court's exclusive authority); see also In re Petition for Review of Opinion 552 of Advisory Comm. on Prof'l Ethics, 102 N.J. 194, 206 n.3 (1986) ("Only in the most sensitive circumstances have **we** imposed a *per se* rule of disqualification for potential conflicts of interest. In the past **we have by administrative directive** . . ." (emphasis added)); Notice to the Bar, 91 N.J.L.J. 81 (Feb. 8, 1968) (Supreme Court's notice to the bar announcing *per se* prohibition on joint representation of driver and passenger).

On this basis too, the Court should reject Allstate's request and affirm the trial court's denial of Allstate's motion to disqualify the Mandelbaum Firm.

C. The Mandelbaum Firm is not disqualified under RPC 1.7(a)(1) because the joint representation is permissible.

Even if the Court disagrees and considers Allstate's argument on the merits, the trial court's order should be affirmed. Allstate contends that, because

Dr. Sood and Dr. Shah could, in the abstract, assert cross-claims against one another for apportionment of fault under CNA, a concurrent conflict automatically exists under RPC 1.7(a) barring joint representation. Not so.

The Mandelbaum Firm's representation of Dr. Sood and his practices is not directly adverse to Dr. Shah. Primarily, Allstate argues that this case is analogous to direct adversity in a car accident case merely because IFPA claims are subject to the CNA and, as such, there is a *per se* bar to a single law firm representing multiple defendants in any case governed by the CNA. Pb12-14; see also Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 111 (2023) (holding IFPA claims are subject to CNA apportionment of fault). Allstate's analogy is misguided. That is not the law. Indeed, a holding to the contrary would be an earthquake in joint representation of multiple defendants, which occurs day-in and day-out in this State in different types of cases.

The legal authority that generally prohibits one lawyer from representing both the driver and passenger in an automobile accident case is inapposite. See Pb12-14 (citing McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 497 (App. Div. 2011); Notice to the Bar, 91 N.J.L.J. 81; ACPE Opinion 188, 93 N.J.L.J. 789 (Nov. 12, 1970)). First, car accident cases are about plaintiffs' lawyers pursuing claims on behalf of a driver and passenger where there has been an accident and injury. Here, there is no automobile accident that caused a personal injury. In an

IFPA case like this one, all that exists is Allstate's allegations of insurance fraud where the defendants jointly deny any fraud occurred and any liability at all to the insurer plaintiff.

Second, in car accident cases, the passenger suffered injury as a result of the negligence of either the driver of the car he or she was riding in, another driver, or both. Thus, joint representation of the driver and passenger by one attorney is prohibited because "[w]here a passenger is injured, the passenger . . . has a possible claim against the driver" for that injury. ACPE Opinion 188, 93 N.J.L.J. 789; see also DeBolt v. Parker, 234 N.J. Super. 471, 479-80 (Law. Div. 1988) (explaining passenger-driver adversity). Here, in contrast, joint defendants in an IFPA case do not have claims for injury against one another. Dr. Sood did not potentially injure Dr. Shah and vice versa by virtue of the insurer's allegations that both of them engaged in insurance fraud.

Rather, Allstate is claiming they both engaged in fraudulent conduct that injured the insurer. Both Dr. Sood and Dr. Shah deny liability, period, and should be free to mount a joint defense without an insurer being able to prevent them from retaining counsel of their choice to mount that joint defense. They have made that intelligent strategic decision and reiterated that decision to the trial court. Pa308, 310, 319-24; SDa47-52; cf. ACPE Opinion 373, 100 N.J.L.J. 646 (July 21, 1977) (allowing joint representation of husband-driver and wife-

passenger where wife stated she would not sue her husband). Dr. Sood and Dr. Shah are not directly adverse like a driver and passenger are in the typical case where liability is disputed. Suffice it to say, Allstate's attempt to shoehorn this case into the automobile accident paradigm mixes apples and oranges.

At its core, Allstate argues that the Supreme Court's decision in Techdan, which held that the CNA applies to IFPA claims, also simultaneously made joint representation by one law firm of multiple defendants in IFPA cases a *per se* concurrent conflict and violation of RPC 1.7(a)(1). Pb14. Not so.

Long before Techdan, it was settled that "the CNA governs a broad range of civil actions," such as negligence, products liability, malpractice, strict liability, consumer fraud, fraud, and other intentional torts. Techdan, 253 N.J. at 106-08; see also N.J.S.A. 2A:15-5.2(c) (defining "negligence actions" under the CNA to include a much broader list of cause of action and case types). But there has never been a *per se* prohibition under RPC 1.7(a)(1)—or (a)(2) for that matter—on joint representation of defendants in cases falling within the CNA's purview, except for joint representation of a driver and passenger in car accident cases unless liability is undisputed.

Allstate fails to point to any New Jersey case law, ethics opinions, or other authority that states or even suggests a *per se* prohibition under any subsection of RPC 1.7(a) on joint representation in any case where the pleaded causes of

action are subject to the CNA or to similar laws or principles. By failing to do so, Allstate tacitly acknowledges there is no such authority. And so, Allstate tries to re-frame its position as asking the Court to clarify a "novel" issue. Pb3. This is not a novel issue, and there is nothing to clarify. Rather, this is an unprecedented assault by the insurance industry in a new effort to crack joint defenses mounted by defendant medical practices and doctors.

Existing authority is against Allstate. This Court already explained that, "under the RPCs, representation of clients who are on the same side in the same civil litigation, unlike opposing clients with a direct conflict of interest, does not always present a potential for a conflict of interest, and is not automatically barred." New Jersey Div. of Child Prot. & Permanency v. G.S., 447 N.J. Super. 539, 569-70 (App. Div. 2016). "Only in the most sensitive circumstances" has the Supreme Court "imposed a *per se* rule of disqualification for potential conflicts of interest." Opinion 552, 102 N.J. at 206 n.3; see also Kahrar v. Borough of Wallington, 171 N.J. 3, 15 (2002) (noting fact sensitive analyses are not "conducive to *per se* rules").

There is a reason why Allstate does not provide legal authority announcing that a *per se* conflict exists in any CNA-governed case. The Supreme Court already addressed an analogous situation in Opinion 552, 102 N.J. at 196, and rejected Allstate's *per se* theory, which formed the basis for this

Court's explanation in G.S. that representation of multiple clients on the same side in civil litigation is "not automatically barred." 447 N.J. Super. at 570.

In Opinion 552, 102 N.J. at 196, the Supreme Court rejected a *per se* prohibition under RPC 1.7 on a single attorney representing both a municipality and individual officials and employees of that municipality as co-defendants in a lawsuit brought under 42 U.S.C. § 1983. The Court recognized that, when a governmental entity and individual officials are both sued, "the governmental entity, in an effort to shift liability, may claim that the assertedly wrongful conduct of the individuals was unauthorized and outside the scope of the employment." Id. at 198.

Conversely, the individual defendants "may claim that the alleged offending conduct was taken pursuant to an official governmental policy or directive and that the governmental entity is the party properly responsible and ultimately liable." Ibid. "Thus, under the defenses asserted or available, one party-defendant may seek to avoid or lessen its exposure at the expense of the other." Ibid. Notwithstanding that there "is undoubtedly a concern here for potential conflicts," the Court held that "an absolute rule requiring separate counsel at the initial pleading stages is not required to adhere to traditional ethics precepts." Ibid.

The Court explained that, given the myriad of and complexity of conflicts scenarios, the rule for assessing potential conflicts "must be grounded upon common sense, experience, and realism," concluding: "joint representation of clients with potentially differing interests is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants." Id. at 204.

The Court recognized that it may not "be easy to apply this rule in all cases," but that to find the substantial identity of interests outweighs potential conflicts, it is critical to determine "whether, under the facts involved, the defendants would present consistent defenses to the claims brought against them." Id. at 205. If so, joint representation is permitted "even if the positions may appear to be somewhat potentially conflicting." Ibid. The Court was further clear that "[j]oint representation will not automatically be prohibited due to an apparent divergence of interests on the face of the complaint." Ibid.

The Court noted its ruling reflected the disfavor of *per se* rules governing conflicts of interest and that "[o]nly in the most sensitive circumstances ha[s the Court] imposed a *per se* rule of disqualification for potential conflicts of interest." Id. at 206 n.3 (noting driver-passenger, husband-wife, and parent-child as only basis for *per se* conflict). Whether an attorney could undertake joint representation "is best addressed by an evaluation by the individual attorney of

the circumstances of each case." Id. at 206. The attorney must be satisfied that it is objectively reasonable that there is no direct adversity between the clients and that the joint representation would not materially limit the attorney's responsibilities to each client. Ibid.

The Court then observed that a blanket *per se* rule "would encourage plaintiffs to name numerous officials solely to improve their bargaining position with the government defendant by forcing defendants to engage separate independent counsel." Id. at 207. The "dispensation of justice" would be undermined by a *per se* rule that would bludgeon the defendants "into settling for reasons wholly unrelated to the merits of any liability claim." Ibid.

Ultimately, if a conflict does arise in the joint representation during the case, the Court explained the attorney must bring it to the court's attention, and it must be satisfactorily resolved on the record, which will encourage attorneys "to act reasonably and responsibly, the essential interests of clients will be protected, and the interests of justice will be secured." Id. at 208.

The holding of Opinion 552 is certainly not limited to § 1983 claims. It applies more broadly. See, e.g., Hill v. New Jersey Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 309 (App. Div. 2001) (applying decision to CEPA litigation), certif. denied, 171 N.J. 338 (2002); ACPE Opinion 605, 120 N.J.L.J. 317 (Aug. 13, 1987) (applying decision to multi-party environmental litigation

involving both private and public co-defendants); ACPE Opinion 588, 118 N.J.L.J. 94 (July 24, 1986) (applying decision to environmental litigation).

Contrary to Allstate's position, "it is well established that an evaluation of whether a conflict exists in multiple representation cases is initially best addressed by the attorney or attorneys in each case," G.S., 447 N.J. Super. at 579 (citing Opinion 552, 447 N.J. at 206; State v. Bell, 90 N.J. 163, 173-74 (1982)), not to the attorney's adversary like Allstate. There is no *per se* concurrent conflict under RPC 1.7(a)(1). An attorney "is not barred from representing two parties in the same case as long as the parties' . . . defenses are consistent," 47 N.J. Practice, Civil Trial Handbook § 3:1 (2024) (William S. Greenberg), just as Dr. Sood's and Dr. Shah's joint defense that they have opted to raise is consistent here.

Allstate goes to great lengths to downplay the significance of Opinion 552. It does so principally by relegating its discussion of the decision to one long footnote. Pb21-22 n.3. Contrary to Allstate assertion, the holding of Opinion 552 is not "limited to the unique facts of that case." Ibid.; see also Hill, 342 N.J. Super. at 309; APCE Opinion 605, 120 N.J.L.J. 317; ACPE Opinion 588, 118 N.J.L.J. 94 (all applying Opinion 552's holding outside the context of that case). Nothing in Opinion 552 limits its holding only to municipal defendants or prohibits the application of its reasoning outside the facts of the case.

For example, just as a municipality and its employees would suffer financial strains if they are each forced to engage separate counsel, Pb22 (citing Opinion 552, 102 N.J. at 206), so too would Dr. Sood and Dr. Shah if forced to retain separate counsel. Indeed, the strain on Dr. Sood would be enormous given that a separate attorney would have to represent each of Dr. Sood's medical practice entity defendants. See infra. This severe strain would exist in any case involving multiple entities and individuals who own them, as most insurance fraud cases do. See, e.g., Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 135 (2015) (Allstate IFPA lawsuit against dozens of practitioners and practices).

Allstate's biggest mistake concerning Opinion 552 is its backwards misunderstanding of the main sentence from the decision that it emphasizes. Allstate relies on the Court's statement that joint representation is permitted if the face of the pleadings or early discovery do not clearly show that the claims against the defendants "'will result in different or inconsistent defenses, or will, if successful, probably lead to independent or several, rather than overlapping or joint, compensatory relief against each class of defendants.'" Pb22 n.3 (quoting Opinion 552, 102 N.J. at 205).

Put a different way, if (1) the defendants have different or inconsistent defenses, or (2) the plaintiff succeeding on its claims against defendants will probably lead to independent or several liability, then joint representation is not

permissible. Conversely, if (1) the defendants have the same or consistent defenses, or (2) the plaintiff succeeding on its claims against defendants will probably lead to overlapping or joint liability, then joint representation is permissible. Opinion 552, 102 N.J. at 205; see also 47 N.J. Practice, Civil Trial Handbook § 3:1 (stating an attorney "is not barred from representing two parties in the same case as long as the parties' . . . defenses are consistent"). This makes sense because, in the latter scenarios, defendants have "a substantial identity of interests" that "outweigh their potential conflicts." Ibid.

Allstate thus has it exactly backwards when it emphasizes that Opinion 552 is distinguishable from this case and a *per se* conflict exists because "the CNA would confer joint and overlapping relief against defendants and not independent or several as contemplated by the Court." Pb22 n.3; see also Pb24 (stressing defendants would be "jointly" liable). Opinion 552 expressly says that if liability is likely joint or overlapping, then joint representation **is permissible**. It is because Dr. Sood and Dr. Shah are asserting consistent defenses and liability, if any, would be joint/overlapping, that the Mandelbaum Firm can represent all Sood Defendants. See 47 N.J. Practice, Civil Trial Handbook § 3:1.[3] In other words, Allstate inadvertently disproved its own position that a *per*

[3] Implicit, or perhaps explicit, in Allstate's argument is that merely because the CNA applies to the cause of action the plaintiff asserts against multiple defendants, the defendants are obliged to point the finger of fault at one

se conflict of interest exists among the defendants by virtue of the CNA's applicability to an IFPA claim.

Crucially, Allstate also avoids addressing the obvious absurdity that would result from its position. Allstate frames this as a Dr. Sood and Dr. Shah issue. To do so, Allstate lumps Dr. Sood together with his separate medical practice entity defendants, Mid-State, IPCNJ, and Sood Medical. But that does not work under Allstate's theory. Under the CNA, fault would be apportioned amongst each defendant, both individuals and entities. See Techdan, 253 N.J. at 111-13, 117-19 (holding jury should apportion fault among the four entity and individual defendants); Lyon v. Barrett, 89 N.J. 294, 300 (1982) (explaining a corporation is separate from its shareholders). Thus, under Allstate's *per se* conflict theory, each entity despite being owned by Dr. Sood would need to retain its own separate counsel, with Dr. Sood effectively having to direct and pay for four different attorneys. The absurdity is plain. Indeed, it would result

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another with a cross-claim to seek apportionment to minimize their fault, and to seek contribution. Pb16. But that is simply not the case. Allstate cannot force direct adversity on defendants like Dr. Sood and Dr. Shah who wish to assert consistent defenses. They are not obligated to claim against one another rather than to put up a united joint defense denying liability altogether. Indeed, Allstate confirmed during argument in response to questioning by the trial court that the defendants have not yet sought to point the finger at one another and that it may never occur. T43:19-45:9; see also See ACPE Opinion 605, 120 N.J.L.J. 317, at *2 (explaining co-defendants' liability to the plaintiff can be the subject of discovery and tried as a first stage and, if the plaintiff prevails, then cross-claims if any can be later pursued in a second stage).

in this case requiring nearly three dozen different defense attorneys and would allow a deep-pocket adversary, like Allstate, to drive up defense costs and make it impractical, if not impossible, for some defendants to afford a defense.

Allstate also never acknowledges that, in the very case that forms the premise of its position, Techdan, the same attorney represented four defendants—two entities and two individuals—without any comment from the Supreme Court of New Jersey (or the plaintiff-insurer's counsel) about a conflict of interest. John P. Morris, Esq. represented defendants Techdan, LLC, Exterior Erecting Services, Inc., Daniel Fisher, and Robert Dunlap. Techdan, 253 N.J. at 92 (identifying attorneys). If representing multiple defendants in a CNA-governed case creates a *per se* conflict of interest under RPC 1.7(a)(1) equivalent to representing both a driver and passenger in a car accident, then upon finding the CNA applied to the IFPA and remanding for trial on apportionment, the Supreme Court would surely have identified the conflict of interest and directed that each defendant needed new and separate counsel. But it did no such thing. See id. at 119. That it did not do so is a strong, if not dispositive, indication that no such *per se* conflict exists under Rule 1.7(a)(1).

Lastly, the Sood Defendants observe the curiosity and inconsistency in Allstate's position. Allstate was silent below and remains silent here on appeal about its New Jersey RICO claim that it asserted in this case. Pa91-97. But RICO

claims have long been subject to the CNA. See Techdan, 253 N.J. at 108 ("The CNA thus governs a broad range of civil causes of action, including statutory and common-law claims premised on intentional conduct as well as those based on negligence." (citing N.J.S.A. 2A:15-5.2(c), -5.3); Blazovic v. Andrich, 124 N.J. 90, 106-08 (1991) (applying the CNA to intentional torts even before the CNA was amended in 1995 to include them). Yet, Allstate does not raise any alleged RPC 1.7(a) conflict issue with regard to the Mandelbaum Firm's joint representation of the Sood Defendants vis-à-vis the RICO claim. Nor has any court held, to the Sood Defendants' knowledge, that one firm cannot represent multiple defendants in a civil RICO lawsuit. Allstate's silence and inconsistency in this regard gives away that its position here is a red herring. The IFPA was merely added to the list of CNA-governed causes of action. Nothing else changed.

For all of these reasons, the Court should reject Allstate's invitation to find that the Mandelbaum Firm is disqualified by a *per se* conflict under Rule 1.7(a)(1) simply because the CNA applies to IFPA claims.

III. The Mandelbaum Firm is not disqualified under RPC 1.7(a)(2), and the Sood Defendants waived any conflict under RPC 1.7(b) anyway.

Allstate's argument that the Mandelbaum Firm is disqualified from jointly representing the Sood Defendants under RPC 1.7(a)(2) is also without merit.[4] Subsection (a)(2) states there is a concurrent conflict disallowing representation if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]" RPC 1.7(a)(2). That is not the case here, substantially for the reasons in Section II.C. above. RPC 1.7(a)(2) is not a *per se* bar to joint representation in the panoply of cases with claims to which the CNA applies. And, in any event, even if a conflict existed, Dr. Sood and Dr. Shah waived it pursuant to RPC 1.7(b).

A. There is no significant risk that the Mandelbaum Firm is materially limited in its course of action for any of the Sood Defendants.

For a significant risk of a material limitation to exist, there "must be a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." In re Opinion No. 17-2012 of Advisory Comm. on Prof'l Ethics, 220 N.J. 468, 478 (2014). To determine this, an attorney must ask whether "the likelihood that a difference in interests will

[4] Despite acknowledging the different standards under Rule 1.7(a)(1) and (a)(2), Allstate is still advocating for a *per se* conflict under (a)(2). See Pb3, 20.

arise, and if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Id. at 478-79. Conflicts in this regard could exist "by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." G.S., 447 N.J. Super. at 570 (quoting ABA Mod. Rules of Prof'l Conduct R. 1.7 comment 23).

Joint representation of clients with potentially differing interests is permissible if "there is a substantial identity of interests between them in terms of defending the claims" such that "elements of mutuality must preponderate over the elements of incompatibility." Opinion 552, 102 N.J. at 204; G.S., 447 N.J. Super. at 569. And, as this Court explained, the "[c]ritical determination is whether co-defendants would present consistent defenses to the claims brought against them," and as such, representing multiple defendants "may be permitted even if the positions may appear to be somewhat potentially conflicting." G.S., 447 N.J. Super. at 569.

Here, Allstate's argument that "defendants' positions are inherently incompatible" because the law firms "will be hindered in advancing appropriate defenses for each individual client" is conclusory—certainly as to the

Mandelbaum Firm. Pb22. As both Dr. Sood and Dr. Shah attested when Allstate moved to disqualify, they wish to mount a joint defense against Allstate's specious allegations of insurance fraud under the IFPA. Pa319-24 ¶¶ 10-15. There is nothing inherently incompatible about clients who have been counseled and who have decided they wish to contest any and all accusations by an insurer of wrongdoing and do not wish to baselessly point fingers at one another. See G.S., 447 N.J. Super. at 569 (critical question is whether defendants would present consistent defenses to the claims); Opinion 552, 102 N.J. at 205 (representation permissible if defenses would be consistent).

The Mandelbaum Firm is not hindered in advancing defenses as to Dr. Sood and his practices or Dr. Shah. Certainly, Allstate has no basis to determine otherwise at the outset of a case as it did here—and coincidentally only after the Sood Defendants jointly moved to compel arbitration of Allstate's claims as part of their defense. To this end, the Supreme Court was clear that this evaluation is left to the Mandelbaum Firm (and Randolph Firm as to the other defendants); it is not left to Dr. Sood's and Dr. Shah's adversary, Allstate. Opinion 552, 102 N.J. at 206.

Allstate's arguments about incompatibility largely ignore the Sood Defendants and invoke allegations concerning only the CMCC Defendants. Pb22-23 (explaining the Complaint has allegations about CCMC's medical

director, that there are sworn statements from CCMC subordinates, that the Bufanos threatened workers to take improper diagnostic actions or intimidate subordinates, that other CCMC personnel undertook improper decisions). Allstate cannot disqualify the Mandelbaum Firm under RPC 1.7(a)(2) with arguments geared toward an entirely separate set of defendants. See Dental Health Assocs. S. Jersey, P.A., 471 N.J. Super. at 193-94 (explaining there is a heavy burden of persuasion on the movant seeking disqualification); In re Grand Jury, 200 N.J. at 491 (conflict evaluation is highly fact specific). And again, the Supreme Court in Opinion 552 already rejected Allstate's misunderstanding that joint or overlapping liability creates a conflict of interest. 102 N.J. at 205. As the trial court found here, Allstate's contentions about conflict are mere "speculation." Pa316.

Accordingly, the Mandelbaum Firm is not disqualified from representing the Sood Defendants under RPC 1.7(a)(2).

B. Dr. Sood and Dr. Shah waived any conflict under RPC 1.7(b).

Regardless, as the trial court explained, Dr. Sood and Dr. Shah exercised their right to waive any potential conflict under RPC 1.7(b) both when they retained the Mandelbaum Firm and again when they signed another conflict waiver in August 2023 in response to Allstate's motion. Pa316; SDa36-45; SDa47-52. This was their absolute right to do with informed consent and full

disclosure. See RPC 1.7(b)(1); State v. Hudson, 443 N.J. Super. 276, 289 (App. Div. 2015). They received full disclosure and waived any conflict both when they retained the Mandelbaum Firm and again in response to the motion. Pa319-20 ¶¶ 6, 14; Pa322-23 ¶¶ 6, 14; SDa47-52. Accordingly, the Mandelbaum Firm is not disqualified from representing the Sood Defendants under RPC 1.7(a)(2).

Allstate dedicates an entire section to arguing that the record was insufficient to assess whether the waiver was sufficient. See Pb29-33. Allstate does so on the false premise that the

> informed consent waivers purportedly signed by defendants are not part of the record; defendants refused to produce them claiming, without legal support, attorney-client privilege. Pa317-318. Although defendants offered the trial court an opportunity to review the written waivers in camera, it declined that invitation, and decided the waivers were sufficient without ever having seen them.
>
> [Pb29-30.]

Allstate's assertions are false as to the Sood Defendants.

The Sood Defendants' waivers are part of the record. When Allstate moved to disqualify, per the trial court's direction, the Mandelbaum Firm sent both Dr. Sood's and Dr. Shah's retainer agreements and their additional conflict waiver to the trial court via email to its law clerk for *in camera* review. SDa34.[5]

[5] Appendix page Pa317-18 that Allstate cites for these propositions, Pb29, is only the Bufano Affidavit and is both irrelevant to the Sood Defendants and

Indeed, the law clerk—the "unidentified speaker" on page 49 of the motion transcript—confirms to the trial court that he printed the conflict waivers and gave them to the court. T49:18-19[6]; see also T57:11-17. The trial court absolutely did not decline the Sood Defendants invitation to provide it the waivers *in camera*. Pb29. Indeed, in its decision denying Allstate's motion, the trial court expressly found that the Sood Defendants signed informed consent waivers of any potential conflict and were informed by counsel of the potential risks involved. Pa316.

The trial court **also** relied on Dr. Sood's and Dr. Shah's certification—in addition to the retainers and waivers. Pb30. Their certifications do not "speak in generalities," contrary to Allstate's argument. Ibid. For example, both doctors certify that, after Allstate filed its motion, the Mandelbaum Firm advised them of all of Allstate's arguments about a purported conflict. Pa320 ¶ 14; Pa323 ¶ 14. In any event, the conflict waiver that Dr. Sood and Dr. Shah signed comprehensively advised them of all of the requisite information to permit them

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does not support the proposition that the Sood Defendants waivers are not part of the trial court record.

[6] The transcript misidentifies the name of the Sood Defendants counsel as "Mr. Kanefsky" during this portion of the argument when it was clearly Mr. Kivowitz speaking who represented the Sood Defendants at the motion argument. See T49:17, 49:22-50:1; T6:12-14 (appearance of counsel for the Sood Defendants). Mr. Kanefsky represents a different defendant, Dr. Cho.

to again give their informed consent to joint representation, including with regard to the CNA's applicability to IFPA claims. SDa47-49. So, Allstate's argument that the certifications do not specifically mention that "the pending IFPA claims are subject to the CNA" and the implication of joint liability is irrelevant as to the Sood Defendants. Pb31.

On this waiver basis too, the Mandelbaum Firm is not disqualified. The Court should affirm.

IV. The Mandelbaum Firm is not disqualified under In re Grand Jury.

The Mandelbaum Firm is not disqualified based on a conflict under the decision in In re Grand Jury Investigation, 200 N.J. 481 (2009), contrary to Allstate's argument. Pb24-29. In re Grand Jury does not hold that a waiver of conflict cannot be valid "where concurrently represented defendants face joint liability" and one defendant agrees to pay legal fees for the attorney. Pb24.

It is important to understand the specific facts and context of In re Grand Jury. In that case, a company was under grand jury investigation, and the company hired lawyers for certain employees, including non-target employees and former employees of the company. In re Grand Jury, 200 N.J. at 486. The employees had no choice in selecting counsel and had to either accept the employer's choice of counsel and agreement to pay their legal fees or retain and pay for counsel of their own choosing. Ibid. Per each retainer, the company

agreed to pay the employees' legal fees. Ibid. The State moved to disqualify each counsel for the employees under RPCs 1.7, 1.8, and 1.10. Id. at 488.

Given that scenario, the Supreme Court held that "a lawyer may represent a client but accept payment, directly or indirectly, from a third party" if six conditions are met. Id. at 495. Those are: "(1) The informed consent of the client is secured," (2) "The third-party payer is prohibited from, in any way, directing, regulating or interfering with the lawyer's professional judgment in representing his client," "(3) There cannot be any current attorney-client relationship between the lawyer and the third-party payer," "(4) The lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation of his client," "(5) The third-party payer shall process and pay all such invoices within the regular course of its business, consistent with manner, speed and frequency it pays its own counsel," and (6) the third-party can only be relieved of its payment obligation by the court. Id. at 495-97.

The factual scenario present in In re Grand Jury is not present here. This civil case involves joint defendants who are being sued by Allstate and have determined to mount a joint defense by retaining the same counsel to represent them. Pa319-20 ¶¶ 3-4; Pa322 ¶¶ 3-4. Dr. Sood and Dr. Shah have each certified to their aligned interests and their desire to proceed with a unified defense. Pa319-21; Pa322-24. They each also certified to the requisite requirements and

understandings concerning a third-party payor situation. Pa319-20 ¶¶ 7-8, 14; Pa323 ¶¶ 7-8, 14. These requirements were also set forth in Dr. Shah's retainer executed by Dr. Sood. SDa42. As such, the principle that a third-party payor of fees cannot have an attorney-client relationship with the lawyer to whom the fees are paid does not extend to this case.

Allstate overlooks the facts that supported the Court's decision in In re Grand Jury about third-party payors not having an attorney-client relationship with the law firm. The Court was focused on whether the third-party payor's relationship with the law firm created a concurrent conflict of interest. In re Grand Jury, 200 N.J. at 496 (citing In re Garber, 95 N.J. 597, 607 (1984). Indeed, to support the third condition, the Supreme Court cited In re Garber, 95 N.J. 597, 607 (1984), and specifically, Garber's statement that "[i]t is patently unethical for a lawyer in a legal proceeding to represent an individual whose interests are adverse to another party whom the lawyer represents in other matters, even if the two representations are not related." In re Grand Jury, 200 N.J. at 496 (quoting Garber). Garber, like In re Grand Jury, is nothing like this civil case.

In Garber, a lawyer had a long-time relationship with a client who was accused of murder. 95 N.J. at 603-04. The lawyer also was retained to represent a key material witness to the murder at the same time. 95 N.J. at 608-09. Because

of that relationship, and nexus with the facts of both representations, the Court concluded that an actual conflict prevented the dual representation of the key witness in the murder prosecution and the defendant who was accused of committing the murder. Ibid.

Here, there is no actual conflict. Dr. Sood and Dr. Shah are mounting a joint defense. Allstate's allegations of conflict do not involve a defendant and a witness, like in In re Grand Jury and Garber. And Allstate has not cited to a single case to support its proposition that joint defendants facing liability cannot retain the same counsel with a third-party fee arrangement. Additionally, unlike In re Grand Jury, which was a criminal case that carried criminal penalties, including imprisonment, this is a civil case with possible civil damages. While the harm in a criminal case is not fully indemnifiable because a person cannot serve the prison sentence of another, the damages in a civil case can be addressed through indemnification, as the Supreme Court noted in Opinion 552.

The consequences of applying a strict reading of In re Grand Jury to this case make clear that the case's holding is limited. In re Grand Jury says that where a party other than the client is paying the client's legal fees, "(3) [t]here cannot be any current attorney-client relationship between the lawyer and the third-party payer." 200 N.J. at 495. If that was extended to this case, it would mean that Dr. Sood's co-defendant medical practice entities cannot pay for Dr.

Sood's counsel because the entities, too, have an attorney-client relationship with the Mandelbaum Firm.

Indeed, under Allstate's theory, in any case where an individual and his or her company are both either plaintiffs or defendants in a civil lawsuit, the company cannot pay the owner's bills and vice versa. And if the company did pay for the owner's legal fees, the owner would have to retain separate counsel. Allstate avoids confronting this absurd result by once again lumping together Dr. Sood and his medical practice entity defendants and speaking about Dr. Shah, only.

If Allstate's theory of the of the law were to be accepted, then ubiquitous, industry standard joint representations would be prohibited. For example, in the professional liability defense world, it is common for insurance carrier to appoint a single panel counsel to represent both the professional who is accused of professional negligence as well as his or her employer, where the carrier and panel counsel determine that the interests of such co-defendants are perfectly aligned, and provided that the co-defendants consent to such representation. Allstate's rationale could be applied to bar joint representation in many other areas of the law as well, such as LAD cases, whistleblower cases, RICO cases, False Claims Act cases, and the like. Thus, Allstate's theory, if adopted, would ban efficient joint representation across civil cases in many industries and not

just in IFPA cases. That would create a sea change in the defense bar and how cases are regularly defended.

Allstate further posits that the Mandelbaum Firm's representation of the Sood Defendants also violates the second and fourth conditions of In re Grand Jury that prohibit a third-party payor of fees from controlling or influencing the attorney's judgment in representing the client and prohibit the disclosure of attorney-client communications. Pb27-28. That is a serious accusation to make with no facts to support it. The only purported factual support that Allstate cites concerns only Bufano and other of the CMCC Defendants, which has nothing to do with the Mandelbaum Firm or the Sood Defendants. Pb27.

The Rules of Professional Conduct apply to lawyers. Allstate's theory requires believing, without any evidence, that the Mandelbaum Firm is violating its ethical obligations by allowing one client to control its representation of another client and that the firm is violating the attorney-client privilege by improperly sharing information. It is misleading, irresponsible, and inadequate to make allegations of ethical misconduct without a shred of proof.

Allstate's desperation reveals its motive. The RPCs governing conflicts of interest are a shield to protect clients and former clients from conflicts of interest. Allstate is trying to weaponize the RPCs and use them as a sword to sever a joint defense and otherwise harmonious attorney-client relationships.

Allstate's motion is not about vindicating the ethical rules or protecting clients from attorney malfeasance. Allstate's application is a litigation tactic designed to deprive Dr. Sood, his practices, and Dr. Shah of their freely chosen counsel, to splinter a unified, joint defense, and to undermine the fair administration of justice by driving up costs and leveraging defendants into settling. Put simply, Allstate is afraid of a fair fight.

What Allstate's disqualification motion is truly about is what the Supreme Court foresaw in Opinion 552 would happen: a plaintiff, like Allstate, would name multiple defendants to bludgeon defendants forced to pay for their own counsel into settling for reasons untethered to the merits of the plaintiff's claims. 102 N.J. at 207. Indeed, during the motion argument in the trial court, Allstate candidly acknowledged that Allstate's disqualification tactic here is motivated by its perceived difficulty in forcing certain defendants to settle: "I mean, and, you know, let's not bury our heads in the sand, you know, the opportunities for settlement negotiations is completely curtailed when the heavy, the main defendant, is paying for and sharing the same attorney as the subordinate defendants, the lower level defendants." T47:10-15; see also T49:23-9. Allstate echoes that same motive in its appellate briefing. Pb3, 23-24. The Court should not sanction Allstate's use of a disqualification motion to leverage settlement.

The Court should not disqualify the Mandelbaum Firm under In re Grand Jury and should affirm.

CONCLUSION

Allstate's disqualification gambit is not a noble attempt to try to advance the principles of the Rules of Professional Conduct. Rather, Allstate is engaged in a litigation tactic because it faces a unified defense by the defendants, who have made clear their intent to defend themselves. Afraid of that, Allstate wants to sever the joint defense to drive up the cost of litigation and leverage settlements in its favor. And so, it seeks to disqualify the Mandelbaum Firm (and the Randolph Firm) under RPC 1.7(a) and In re Grand Jury. For the multitude of reasons set forth above, there is no concurrent conflict or other ethical prohibition. Indeed, the extreme *per se* rule Allstate asks for is without legal basis and outside the authority of this Court.

The Sood Defendants respectfully request that the Court affirm the trial court's denial of Allstate's disqualification motion.

Respectfully submitted,

MANDELBAUM BARRETT PC

By: */s/ Andrew Gimigliano*
Andrew Gimigliano
Brian M. Block

Dated: May 28, 2024

ALLSTATE NEW JERSEY INSURANCE COMPANY, ALLSTATE NEW JERSEY PROPERTY and CASUALTY INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, ALLSTATE FIRE & CASUALTY INSURANCE COMPANY, ALLSTATE NORTHBROOK INDEMNITY COMPANY, and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

CARTERET COMPREHENSIVE MEDICAL CARE, P.C., d/b/a MONROE COMPREHENSIVE MEDICAL CARE, d/b/a COMPREHENSIVE MEDICAL CARE, d/b/a FASSST SPORT, d/b/a COMPREHENSIVE VEIN CARE, INIMEG MANAGEMENT COMPANY, INC., 311 SPOTSWOOD-ENGLISHTOWN ROAD REALTY, L.L.C., 72 ROUTE 27 REALTY, L.L.C., SAME DAYPROCEDURES, L.L.C., MID-STATE ANESTHESIA CONSULTANTS, L.L.C., NORTH JERSEY PERIOPERATIVE CONSULTANTS, P.A., INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY, L.L.C., d/b/a PAIN MANAGEMENT PHYSICIANS OF NEW JERSEY, d/b/a METRO PAIN CENTERS, d/b/a METRO PAIN and VEIN, SOOD MEDICAL PRACTICE, L.L.C., ONE OAK MEDICAL GROUP, L.L.C., d/b/a NEW JERSEY VEIN TREATMENT CLINIC, ONE OAK

SUPERIOR COURT OF THE STATE OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-001575-23

On Appeal From:
Superior Court of New Jersey
Law Division, Middlesex County

Sat Below:
Hon. Christopher D. Rafano J.S.C.

Trial Court Docket No.:
Docket No. MID-L-1469-23

ORTHOPAEDIC & SPINE GROUP, L.L.C., ONE OAK HOLDING, L.L.C., JOSEPH BUFANO, JR., D.C., CHRISTOPHER BUFANO, MICAH LIEBERMAN, D.C., RICHARD J. MILLS, M.D., JENNIFER M. O'BRIEN, ESQ., GERALD M. VERNON, D.O., D.C., ALVIN F. MICABALO, D.O., JOSE CAMPOS, M.D., JOHN S. CHO, M.D., MICHAEL C. DOBROW, D.O., RAHUL SOOD, D.O., SACHIN SHAH, M.D., FAISAL MAHMOOD, M.D., RAVI K. VENKATARAMAN, M.D., MANGLAM NARAYANAN, M.D., SHANTI EPPANAPALLY, M.D.,

Defendants-Respondents.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS
Submitted June 25, 2024

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PRELIMINARY STATEMENT

Plaintiffs' motion to disqualify is not, as defendants portray, a tactical maneuver designed to drive up defense costs or to fabricate conflicts. It stems from a genuine need to maintain efficient litigation, accurately allocate liability, facilitate meaningful settlement, and ensure a fair trial, not one marred by procedural delays, increased costs, and a potential mistrial or reversal that will result from the continued representation by conflicted counsel.

Defendants' challenge to Plaintiffs' standing lacks merit. Plaintiffs readily meet New Jersey's liberal standard allowing non-clients to seek disqualification when they have a stake and real adverseness in the matter. This is a significant litigation with high dollar damages at stake; it is likely to be protracted and discovery intensive. Withdrawal or disqualification of counsel later in the proceedings would detrimentally impact the progression of the case and needlessly burden valuable judicial time and resources.

The trial court's failure to adequately address the conflicts among defendants who are subject to statutory apportionment of fault ignores the reality that each defendant's interests are fundamentally at odds. Each party has a vested interest in minimizing liability at the expense of others, leading to unavoidable and non-waivable conflicts. That dynamic is exacerbated by the improper litigation funding arrangement that is expressly prohibited by In re Grand Jury.

Compounding those concerns are strong public policy considerations underlying this case, in which defendants are accused of intentionally perpetrating a complex insurance fraud scheme. Public policy would be thwarted if leaders of the conspiracy are permitted to finance and thereby control the defense of their co-conspirators through joint counsel to their likely detriment, or as some defendants suggest, resort to indemnifying fellow co-conspirators for their share of damages. The public interest in eradicating fraud and protecting the integrity of the proceedings necessitates addressing those conflicts now.

Also, although the conflicts here are inherent and unwaivable, Plaintiffs submit, in light of Grand Jury's prohibition on defendants' funding arrangement, should this Court deem the waivers relevant, it should consider the procedural deficiencies that have plagued this case. The trial court's failure to properly conduct an in camera review, beginning with the lack of formal order, to its informal, ex parte request that defendants produce documents, to its failure to give notice to Plaintiffs of such review has left Plaintiffs unable to adequately contest the validity of the waivers. The lack of transparency and opportunity to challenge the waivers underscores the unfairness of the process. Defendants now continue to conceal those documents while relying on their contents in this appeal. Should the Court consider the waivers, Plaintiffs must be afforded access to the documents and an opportunity for additional briefing on the waiver issue.

ARGUMENT

I. Plaintiffs have standing to seek disqualification.

A party has standing when it has a stake and real adverseness in the subject matter of the litigation, and a substantial likelihood that harm will fall upon it in case of an unfavorable decision. N.J. Citizen's Action v. Riviera Motel Corp., 296 N.J. Super. 402, 415-16 (App. Div. 1996). Where "the proceeding serves the public interest" and a party "is not simply an interloper," the court will likely find standing. Id. at 415 (quoting In re Quinlan, 70 N.J. 10, 34-35 (1976)).

Contrary to the Sood Defendants' argument,[1] standing to bring disqualification motions are not limited to current or former clients. See Van Horn v. Van Horn, 415 N.J. Super. 398, 412 (App. Div. 2010) ("Our jurisprudence has entertained disqualification motions filed by the attorney's adversary."); City of Atl. City v. Trupos, 201 N.J. 447, 450-52 (2010) (reviewing municipality's motion to disqualify law firm from representing plaintiffs); Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 204-05 (1988) (reviewing defendant's motion to disqualify law firm representing plaintiffs based on conflict); State v. Davis, 366 N.J. Super. 30, 37 (App. Div. 2004) (holding there was "no doubt" that the State possessed standing to seek

[1] The Sood Defendants' brief is referred to as "SDb." CCMC's brief is referred to as "CCDb." Capitalized terms and acronyms have the meanings set forth in Pra001.

disqualification of defendants' counsel). In Dewey, the Supreme Court observed that disqualification of an attorney "has an impact not only on the parties to the affected litigation but on the efficiency of the judicial system." Id. at 221.

Federal courts in this jurisdiction similarly have upheld an adversary's standing to seek disqualification. In re Congoleum Corp., 426 F.3d 675, 687 (3d Cir. 2005) (holding insurers' counsel had standing to disqualify debtors' counsel given "the long-standing role of lawyers practicing before federal courts in monitoring and reporting ethical violations"); Essex Cnty. Jail Annex Inmates v. Treffinger, 18 F. Supp.2d 418, 430 (D.N.J. 1998) (holding that defendants had standing to contest plaintiffs' attorney's conflicts); Cafaro v. HMC Int'l, LLC, No. 07-CV-2793 (KM) (JAD), 2012 WL 4857763, at *6 n.8 (D.N.J. Oct. 11, 2012) ("[A]n adversary and not only a client or former client affected by the actual or potential conflict may move for disqualification.") (Pra051); Delso v. Trs. for Ret. Plan for Hourly Emps. of Merck & Co., No. 04–3009 (AET), 2007 WL 766349, at *5 (D.N.J. Mar. 6, 2007) ("In addition to clients, adversaries have standing to raise conflict of interests issues") (Pra055); Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., No. 91-5433, 1994 WL 62124, *2 (D.N.J. Feb. 23, 1994) (disqualification motions not limited to current or former clients; "attorneys are required to come forward and report actual or

potential ethics violations") (Pra067); Tibbott v. N. Cambria Sch. Dist., No. 16-5, 2017 WL 2570904, at *3 (W.D. Pa. June 13, 2017) (Pra073).[2]

Standing is best characterized through the lens of Justice Scalia's reduction of the inquiry to the "rude question sometimes posed when one person challenges another's actions: 'What's it to you?'" Douglas R. Richmond, The Rude Question of Standing in Attorney Disqualification Disputes, 25 Am. J. Trial Advoc. 17, 22 (2001) (quoting Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 882 (1983)). So, "what's it to [Plaintiffs]?"

This is a high-stakes litigation seeking more than $1.7 million dollars in damages for fraudulently obtained insurance payments (before treble damages, counsel fees and other statutory remedies). The trial court recognized that "the CNA may create a conflict of interest if this matter proceeds to trial." Pa310, 316. Yet, defendants' attorneys are unable to appropriately advocate for, or against, their co-clients' proportionate fault, and tellingly, have identified no solution to that problem in their briefs. As the U.S. Supreme Court observed,

[2] The Sood Defendants' reliance on the single New Jersey case that denied standing to disqualify an attorney, In re Duke, 305 N.J. Super. 408 (Ch. Div. 1995)), is misplaced. SDb009-011. There, the objector lacked standing to contest anything, and suffered no harm, as she had no rights under the trust because New Jersey did not recognize adult adoption when the trust was formed. Id. at 440.

"[a] few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants." Wheat v. U.S., 486 U.S. 153, 163 (1988). Defendants' blasé attitude toward their conflicts harms Plaintiffs because it will inevitably lead to delays and attendant cost caused by substitution of new, conflict-free counsel, not to mention a potential mistrial or reversal.

Plaintiffs also have an interest in facilitating meaningful settlement and encouraging cooperation and testimony from multiple defendants, which the Sood Defendants wrongly portray as nefarious. Courts recognize settlements and cooperating testimony as a legitimate strategic approach, often used by prosecutors in criminal cases. See, e.g., United States v. Pacheco-Romero, 374 F. Supp. 3d 1326, 1329 (N.D. Ga. 2019) (observing that "the government may be willing to offer a favorable plea deal to one or more defendants in return for their cooperation and testimony against co-defendants" and counsel "could not fulfill their duty to effectively represent all of the defendants by advising one defendant to take a plea deal that would be detrimental to their other clients"); State v. Rodriguez, 466 N.J. Super. 71, 109 (App. Div. 2021) (noting plea bargaining can be an incentive for a defendant to . . . cooperate in the prosecution of codefendants or other more culpable offenders."). Just as prosecutors secure cooperation from lower-level participants to build cases against major

perpetrators, negotiating settlements with less culpable defendants to gather evidence and against those who orchestrate the fraud is a valid and important objective, particularly in light of this State's interest in eliminating insurance fraud. Plaintiffs have demonstrated a sufficient stake to confer standing.

II. The Law Firms have non-waivable conflicts.

Preliminarily, the Sood Defendants argue that because Plaintiffs sought disqualification before the trial court pursuant to RPC 1.7(a)(2), concerning a significant risk of material limitation and not RPC 1.7(a)(1), which prohibits representation when one client is directly adverse to the other, Plaintiffs cannot raise the latter on appeal. SDb17-18. That argument is unfounded.

The issue on appeal whether the Randolph and Mandelbaum firms should be disqualified was raised below; that Plaintiffs now raise additional reasons or theories for disqualification is not dispositive. As the Sood Defendants themselves point out, appeals are taken from judgments, not from opinions or reasons. SDb14 (citing Atl. Ambulance Corp. v. Cullum, 451 N.J. Super. 247, 254 (App. Div. 2017)). Whether a decision will be upheld depends on whether that decision is correct, irrespective of the court's reasoning. Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993).

Also meritless is the Sood Defendants' argument that this Court lacks authority to decide the issue. SDb18-19. Plaintiffs are not asking this Court to

"create a groundbreaking per se conflicts rule" (id. at 15), but rather to apply an established per se conflicts rule that prohibits joint representation of a driver and passenger whose liability is in dispute, to an analogous situation under the CNA where multiple defendants, each facing liability for intentional torts and concerted acts are jointly represented.

The argument also overlooks a critical issue. The Supreme Court established rules governing ethical third-party payer arrangements in Grand Jury, 200 N.J. 481 (2009), which defendants violated in having superior employers fund the defense of subordinate employees with divergent interests. That requires disqualification, and this Court has the power to resolve this issue.

Defendants' substantive arguments also miss the mark. First, the Sood Defendants' attempt to distinguish the driver/passenger analogy from joint tortfeasors subject to the CNA is unavailing. The core issue is not the type of case but the potential for irreconcilable conflicts. In automobile accident cases, joint representation is prohibited if there is any issue as to liability. In re Shaw, 88 N.J. 433, 440-41 (1982). That principle applies even if a passenger has not asserted a claim against a driver but may do so in the future. See Ethics Comm. Op. No.188, 93 N.J.L.J. 789, at *1 (Nov. 12, 1970) ("[T]he passenger (and owner) has a possible claim against the driver . . . even though the parties believe to the contrary"). The passenger's interest in maximizing compensation contravenes

the driver's interest in minimizing liability. The same logic applies here where joint tortfeasors accused of intentional acts, each subject to mandatory CNA apportionment, are undeniably motivated to minimize their own involvement to reduce liability while also disincentivized from shifting blame to jointly represented co-defendants (especially those funding their defense).

For that reason, liability insurers who defend multiple insureds appoint independent counsel to represent each insured where conflicts are foreseeable. Pb17-18 (collecting cases). Neither set of defendants address that line of cases and conveniently ignore this Court's decision in Wolpaw v. Gen. Accident Ins. Co., 272 N.J. Super. 41 (App. Div. 1994). In Wolpaw, an insurer assigned one law firm to represent a mother, her son, and her sister in a personal-injury action as a result of the child accidentally firing a BB gun that blinded his neighbor's eye. Although the three co-defendants shared a common interest in defending the lawsuitas the Sood Defendants claim here the court recognized that each defendant had an interest in minimizing their own fault and maximizing the percentage of fault attributable to their codefendants. Id. at 45. Based upon that conflict, the court found that the insurer breached its duty by assigning a single law firm to represent all defendants. Wolpaw's reasoning is directly on point.

The CCMC Defendants instead rely on a single unpublished federal case Dantinne v. Brown, No. 17-0486, 2017 WL 2766167 (D.N.J. June 3, 2017),[3] whose facts are inapposite. CCDb15. The asserted conflicts in Dantinne, a defamation case, depended on an unresolved issue of whether defendant acted in his official or individual capacity. Here, however, the conflict is inherent and ripe since multiple defendants face joint liability under the IFPA and RICO that must be apportioned under the CNA.

Nor does In re Opinion 552, 102 N.J. 194 (1986) foreclose Plaintiffs' argument and Plaintiffs' reading of the case is not "backwards" as the Sood Defendants claim. In declining to disqualify attorneys from jointly representing the government and its officials on a per se basis, the Supreme Court noted that conflicts may be mitigated through statutory indemnification. Id. at 201-02. This Court observed that "if the claims asserted against individuals could subject them to personal liability without a right of indemnification, the conflict is real, rather than potential." Hill v. New Jersey Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 309 (App. Div. 2001) (citation and internal quotation marks omitted).[4]

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[3] Ironically, Dantinne eviscerates defendants' standing argument as the court found that "a conflict may be raised by a party who is not a client or former client of the allegedly conflicted lawyer." Id. at *1, n.1.

[4] The Sood Defendants cited Hill to illustrate that Opinion 552 applies beyond § 1983 claims. Yet, this Court in Hill was "troubled" by the fact that defendants were all represented by the same attorney, was "concerned whether they made

Here, however, defendants cannot ameliorate the conflict through indemnification, as the Sood Defendants suggest. SDb42. Defendants personally liable for intentional torts are not entitled to common law and contractual indemnification. See, e.g., Cartel Capital Corp. v. Fireco of N.J., 81 N.J. 548, 566 (1980) ("It would be inequitable to permit an active wrongdoer . . . to obtain indemnity from another wrongdoer and thus escape any responsibility."); Malanga v. Mfrs. Cas. Ins. Co., 28 N.J. 220, 225 (1958) (stating it is "contrary to public policy to indemnify a person for a loss incurred as a result of his own willful wrongdoing"). Nor can defendants waive the CNA allocation so that their joint attorneys can elide the conflict caused by trying to minimize one client's liability at their co-clients' expense. Such allocation is non-waivable. N.J.S.A. 2A:15-5.2(a)(2) (The "trier of fact shall make . . . as findings of fact: [t]he extent, in the form of a percentage, of each party's negligence or fault." (emphasis added)); Liberty Ins. Corp. v. Techdan, 253 N.J. 87, 95-96, 100 (2023)[5] (holding that "trial court's failure to apply the CNA

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an informed decision to take that position which appears to be adverse to their best interest" and remanded to explore "whether there is an actual conflict of interests, or the realistic possibility of such a conflict" warranting separate representation. 342 N.J. Super. at 308-09 (emphasis added).

[5] The Sood Defendants glibly argue that Techdan undermines Plaintiffs' claim given that one attorney represented four defendants and the Supreme Court did not discuss the conflict issue. SDb31-32. But just three weeks after Techdan's publication, defense counsel recognized the obvious conflict imposed by the required CNA apportionment, and moved to withdraw, certifying that he could not simultaneously represent multiple defendants under RPC 1.7. Pra003-004

warrants a new trial," despite no crossclaims for indemnification or request for CNA allocation). The absence of indemnification and mandatory CNA allocation[6] creates an inherent conflict because each defendant will be personally liable for damages under the IFPA and RICO after an adverse judgment.

That conflict is exacerbated by defendants' improper litigation funding arrangement, that the Supreme Court expressly prohibited in Grand Jury. The Supreme Court acknowledged the long recognized and self-evident truth that an attorney should not jointly represent an employer and the employee "if the employee's interest may . . . be advanced by [his] disclosure of his employer's criminal conduct" nor should the attorney accept payment "from one whose criminal liability may turn on the employee's testimony." 200 N.J. at 492 (quoting In Re Abrams, 56 N.J. 271, 275 (1970)). Those concerns underpinned Grand Jury's second and third conditions, prohibiting the third-party payer from interfering with the lawyer's judgment and prohibiting an attorney-client relationship between the lawyer and the payer. Id. at 495-96.

(¶8). The Law Division Ordered that "each of the five Defendants . . . shall secure separate independent counsel." Pra007 (¶2). Those remand submissions can be judicially noticed as records of our state's courts. N.J.R.E. 201(4).

[6] Although fault would be apportioned amongst all defendants, both individuals and entities, Plaintiffs do not suggest that each alter-ego entity owned and operated by the same practitioner must obtain separate counsel, absent discovery of other facts.

The court should reject the Sood Defendants'[7] attempt to distinguish the "specific facts and context of In re Grand Jury" (SDb39), and unconvincing plea not to apply "a strict reading of In re Grand Jury to this case" (SDb42). The principles of Grand Jury apply "[r]egardless of the setting—whether administrative, criminal or civil, either as part of an investigation, during grand jury proceedings, or before, during and after trial," and are clear: "a lawyer may represent a client but accept payment, directly or indirectly, from a third party provided each of the six conditions is satisfied." Grand Jury, 200 N.J. at 485, 495 (emphasis added); see Maxlite, Inc. v. ATG Electronics, Inc., No. 23-1719, 2024 WL 1526749, at *4 (3d Cir. Apr. 9, 2024) (Pra078) (noting that a valid third-party arrangement must meet all six conjunctive conditions, "not only some of them," and holding a violation of any of Grand Jury's conditions precludes the third-party payer arrangement). Grand Jury's conditions are intended to curb the fertile ground for improper conflicts of interest.

Plaintiffs are entitled to a fair trial, not a trial where some defendants have the capacity to use economic coercion to control co-defendants' litigation strategy to their own benefit and the detriment of their co-defendants. See State v. Alexander, 403 N.J. Super. 250, 255-56 (App. Div. 2008) and In Re Garber, 95 N.J. 597, 608 (1984) (disqualifying counsel because he "created the opportunity, whether or not

[7] The CCMC Defendants surprisingly do not address Grand Jury at all in their briefs – a case that clearly forecloses those defendants' payment arrangement.

actually exploited, of influencing" one client's testimony in a manner favorable to another client). Because defendants breached Grand Jury's clear prerequisites to a valid third-party payer relationship, respective counsel cannot continue jointly representing the CCMC and Sood Defendants in the present manner.

III. Plaintiffs cannot respond to the sufficiency of the Sood and CCMC Defendants' waivers without access to those documents.

In their appeal brief, Plaintiffs argued that the trial court improperly determined that the Sood and CCMC Defendants waived conflicts without having seen the waivers, which Plaintiffs believed were not part of the record, and relied solely on defendants' certifications. Pb30. The Sood Defendants then filed a motion to seal a portion of their appendix containing their retainer agreement and conflict waivers. Pra13. As Plaintiffs only recently learned, those documents were subjected to an informal and undisclosed in camera review by the trial court, conducted without a formal order, without notice to Plaintiffs, and with no opportunity for Plaintiffs to challenge the waivers' adequacy. Pra042. Plaintiffs detailed the procedurally deficient manner that the in camera review was conducted in their opposition to the Sood Defendants' motion to seal and cross-motion to compel, currently pending before this Court. Pra013-043.

The Sood Defendants defend that clandestine process by blaming Plaintiffs for trusting that the trial court would uphold basic principles of due process and by deflecting responsibility for their own procedural failures. Such blame-shifting is

desperate and unfounded. Neither the fleeting remarks in the transcript nor the statements in the Sood Defendants' brief in this appeal were sufficient to notify Plaintiffs about the in camera review. Indeed, Plaintiffs expressly requested redacted copies of the waivers if such a review was conducted. Pra039-040. It certainly never occurred to Plaintiffs that the trial court would informally and covertly request such documents from defendants. Without the required notice, formal order, or even acknowledgment by the trial court in its decision that it reviewed documents in camera, Plaintiffs were unaware of this review until the Sood Defendants revealed the law clerk's email in their motion to seal. Pra041-043.

Plaintiffs are now unable to respond to arguments about the adequacy of the waivers that are predicated on documents they never saw and therefore requests leave to submit additional briefing to address defendants' waiver arguments depending on the outcome of the pending motions.

CONCLUSION

For the foregoing reasons, the trial court's decision should be reversed.

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