Amended 7/15/24

Brief in support of appeal in the matters pled via docket #: A-001658-23T2

PHILIP HAHN Plaintiff vs. The University of Medicine and Dentistry, Marco Zarbin, John Doe Defendants	: Superior Court of New Jersey : Appellate Division : Docket No: A-001658-23T2 : : On Appeal from: : Superior Court of New Jersey : Law Division, Essex County : : Sat below: : Hon. L. Grace Spencer : Docket #: ESX-L-3267-07 :

BRIEF IN SUPPORT OF APPEAL

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Philip Hahn on the brief
Dated: June 7, 2024/July 15, 2024

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PRELIMINARY STATEMENT

I have personal knowledge of all matters contained herein.

Our entire legal system is geared toward a trial of the facts of a matter by jury. The facts of a matter usually consist of the law of the matter at the time of the cause of action and the facts giving rise to a cause of action.

Per a law of a congress of the United States - 73d CONGRESS. SESS. II . CHS. 651. JUNE 19, 1934. - there is a 7th amendment right to trial by jury. The size of the jury is 6 in the state of New Jersey per New Jersey statutory law.

Per the Supreme court rulings in *Insurance Company v. Folsom*, 85 US 237 and *Slocum v. New York Life Insurance Co.*, 228 US 364 there is a right to trial of all evidence presented by a pleading by a jury of 12.

Per the New Jersey Constitution, and New Jersey statutory law, the right to trial by a jury of 6 is to be held inviolate.

Per the Constitution, the 10th amendment and *Schick v. United States*, 195 US 65 all infractions of public laws are crimes that must be tried by a jury. The size of the jury is 6 in the state of New Jersey per New Jersey statutory law.

While a judge can act illegally and remain immune from action per a prior Supreme court opinion, the fact remains that the denial of the right to trial by jury is a crime per title 18 section 242 and that crime has to be tried by jury regardless of whether the presiding judge will remain immune from action none-the-less.

If a presiding judge were to deny the right to trial by jury, by more than just a judge-jury of one, in a matter brought to the bar, every judge in the country would be legally obligated to preserve the right to trial by jury, per *Slocum v. New York Life Insurance Co.*, 228 US 364, Article III and Article VI of the Constitution, by bringing the case to Washington, DC, where the offending judge would not be immune from action, for trial of the matter by the Supreme court of the United States. The Supreme court could then issue an order for the incarceration, or fine, of the offending judge, per title 18 section 242, in either the judge's state of residence, or Washington, DC.

With the above referenced in mind, the judges in the appellate court of New Jersey can properly attend to the matters that I seek to bring to the bar by directing that a jury trial commences with regard to the matters that I seek to bring to the bar.

Just because a judge was unaware of the law, does not mean it did not exist or bind the defendant.

PROCEDURAL HISTORY

Plaintiff, Philip Hahn, filed his first Complaint sounding in medical malpractice, on April 23, 2007, against defendants, University of Medicine and Dentistry of New Jersey ("UMDNJ") and Marco Zarbin, M.D. , docket number ESX-L-3267-07 (Appendix pages 0 (I) d - 0 (IV) d).

In the first complaint, docket number ESX-L-3267-07 , plaintiff alleges that on June 1, 2005, Dr. Zarbin, an employee of UMDNJ, treated plaintiff at the University Hospital and removed the lens in Mr. Hahn's right eye.

An Answer to plaintiff 's first complaint, docket number ESX-L-3267-07, was filed solely on behalf of defendant, UMDNJ on May 17, 2007 (Document not in appendix). An answer was not filed as to defendant Dr. Zarbin at this time because Dr. Zarbin had not yet been correctly served with the summons and complaint .

Defendant, UMDNJ filed a motion to dismiss the plaintiff , Philip Hahn' s, complaint for failure to file a Notice of Claim pursuant to the mandates of N.J. S.A § 59 : 8-1, et seq. , on June 18, 2007, originally returnable July 6, 2007 (Appendix pages 0 (V) d - 0 (X) d).

On June 28, 2007, in response to Defendant ' s,UMDNJ motion to dismiss, plaintiff filed a Notice of Claim (Appendix pages 0 (XI) d - 0 (XIII) d)

On August 17, 2007, the Honorable Garry J. Furnari, J. S.C. ,

granted Defendant, UMDNJ's motion to dismiss the plaintiff, Philip Hahn 's, complaint for failure to file a notice of claim pursuant to the mandates of N.J. S.A S 59 : 8-1, et seq.(1d-2d).

On November 15 , 2007 , an Answer to plaintiff ' s first Complaint , docket number ESX-L-3267-07, was filed on behalf of defendant , Marco Zarbin, M.D. (Appendix pages b3(I)d-3(VI)d)

Defendant, Marco Zarbin, M.D. filed a Motion to Dismiss the plaintiff, Philip Hahn's, Complaint for failure to file a Notice of Claim pursuant to the mandates of N.J. S.A S 59: 8-1, et seq. , returnable February 29, 2007 (Document not in appendix).

On February 29, 2008, the Honorable Paul J. Vichness, J. S.C. , granted Defendant, Mark Zarbin, M.D. ' s motion to dismiss the plaintiff, Philip Hahn 's, complaint for failure to file a notice of claim pursuant to the mandates of N.J. S.A S 59: 8-1, et seq. (3d-4d)

Subsequently, plaintiff filed an appeal from the February 29 , 2008 Court Order and oral argument in the Appellate Division was held on January 13, 2009, Docket No. A-3815-07T3(Document not in appendix).

On January 26, 2009 , the Appellate Division affirmed the dismissal of plaintiff' s complaint by the law division. (5d -6d).

On April 10, 2008, plaintiff filed a second Complaint sounding in medical malpractice against UMDNJ and Marco Zarbin, M.D. , docket number ESX-L-3063-08, arising out of exactly the same set of facts as the first complaint, received by Dr. Zarbin on June 5 , 2008 (Document not in appendix) .

In the second Complaint, docket number ESX-L-3063-08, plaintiff again alleges that on June 1, 2005, Dr. Marco Zarbin, an employee of UMDNJ, treated plaintiff at the University of Medicine and Dentistry of New Jersey and removed the lens in Mr . Hahn's right eye .

On or about June 23, 2008, plaintiff filed a motion for leave to amend his first complaint, docket number ESX-L-3267-07, to name new defendants, specifically the anesthesia staff present during plaintiffs ' operation on June 1, 2005 at UMDNJ, returnable July 18, 2008 (Document not in appendix).

In an Order entered on July 18, 2008 , the court denied plaintiff's motion on the grounds that he cannot amend his complaint to name a job title as a defendant (Document not in appendix).

On or about August 5, 2008, plaintiff again filed a motion for leave to amend his first complaint, docket number ESX-L-3267-07, to name new defendants, specifically Magdy Yacoub, Marianne Antoniello, and Abraham Berkowitz (Document not in appendix).

In an Order entered on August 11, 2008, the court denied plaintiff's motion on the grounds that he cannot amend a complaint that has been dismissed (Document not in appendix).

Amongst the confusion of pending motions and an appeal involving the same transaction and occurrence as the within Complaint, an answer was not filed on behalf of defendants , UMDNJ and Marco Zarbin, M.D., to plaintiff's second complaint, docket number ESX-L-3063-08.

Counsel for defendants was advised by the court that default in case docket number ESX-L-3063-08 had been entered against both UMDNJ and Marco Zarbin, M.D., on December 2, 2008 (Document not in appendix).

On February 3 , 2009, defendants, UMDNJ and Marco Zarbin, M.D. filed a motion to vacate default and to file a motion in lieu of answer to dismiss plaintiff's complaint with prejudice pursuant to N.J. S.A. § 2A: 14-2, N.J. S.A. § 59: 8-1, the doctrine of res judicata, the doctrine of collateral estoppel, and the law of the case doctrine, returnable February 20, 2009 (7d-8d). On February 20, 2009, the Honorable Paul J. Vichness, J. S.C., granted defendants , UMDNJ and Mark Zarbin, M.D. s motion to dismiss the plaintiff, Philip Hahn 's, complaint with prejudice(Document not in appendix).

Plaintiff filed a motion for reconsideration of the February 20, 2009 , Order dismissing plaintiff ' s second complaint , returnable April 17, 2009 .

On April 17, 2009, the Honorable Paul J. Vichness, J. S.C denied plaintiff 's motion for reconsideration. (9d) . The Order states:

> Motion to reconsider order of 2/20/09 is denied, by the plaintiffs brief this case is exactly the same as the previously dismissed L-3267-07 which was dismissed because of plaintiff's failure to comply with the Tort Claim Act , after the dismissal plaintiff filed a Tort Claim and started this action based on the same facts and legal theory, no grounds to reconsider exist .

Plaintiff filed an appeal of the dismissal of plaintiff 's second complaint, Orders dated February 20, 2009 and April 17 , 2009 . On March 9 2010, oral argument in took place before the Appellate Division in Trenton regarding plaintiff's second appeal , docket number A-4216-08T3. The Appellate Division affirmed on March 22, 2010. (10d - 12d).

Plaintiff filed a motion in the law division in the previously dismissed complaint, docket number ESX-L-3267-07 , for an evidentiary hearing . On November 11, 2009, the Honorable John C. Kennedy, J. S.C. , denied plaintiff ' s motion for an evidentiary hearing. (9d) . Plaintiff filed an appeal from the trial court's Order of November 11, 2009 . (See A-002010-09T1) (Document not in appendix).

On January 4, 2011, oral argument in took place before the Appellate Division in Trenton regarding plaintiff's third appeal, docket number A-002010-09T1 . The Appellate Division affirmed on January 12, 2011 . (29d -34d) .

On April 5, 2010, plaintiff filed the motion to amend his complaint to conform to evidence and award plaintiff a verdict against the previously dismissed defendants, UMDNJ and Marco Zarbin, M.D. On April 30, 2010, the Honorable John C. Kennedy, J . S . C . denied plaintiff ' s motion to amend complaint to conform to evidence and award plaintiff verdict (13d). Plaintiff filed appeal from the trial court's Order of April 30, 2010.(Document not in appendix).

On March 16, 2011, oral argument in took place before the Appellate Division in Trenton regarding plaintiff's third appeal , docket number A-4799-09T1. The Appellate Division affirmed on March 25, 2011 . (35d -37d).

After the outcome of plaintiff's second appeal, docket number A-4216-08T3. Plaintiff filed a new complaint in special civil, docket number DC-10832-10 against Frank Fascella, the Honorable Stephen Skillman, the Honorable William Gilroy, and the Honorable Paul J. Vichness, J. S. C, Michael Ricciardulli, Esq. Karin J . Ward, Esq. , and Ruprecht , Hart, & Weeks, LLP on April 5, 2010. (18d-21d).

On April 15, 2010, defendants Michael Ricciardulli, Esq., Karin J. Ward, Esq. , and Ruprecht, Hart, & Weeks, LLP filed a Notice and Demand pursuant to 1:4-8 . (22d - 24d) . An Answer was filed on behalf of defendants Michael Ricciardulli, Esq. , Karin J. Ward, Esq. , and Ruprecht, Hart, & Weeks, LLP on April 21, 2010. (25d -26d) . The matter was subsequently transferred from Essex

County (DC-10832-10) to Passaic County (DC-7635-10) (Document not in appendix).

At the trial call on June 25, 2010, defendants , Michael Ricciardulli, Esq. , Karin J. Ward, Esq. , and Ruprecht, Hart, & Weeks, LLP moved for an order dismissing plaintiff's complaint with prejudice for failure to state a claim upon which relief may be granted. After oral argument, the Honorable Bruno Mongiardo J. S.C. granted defendant's request and plaintiff's complaint was dismissed with prejudice as to defendants, Michael Ricciardulli, Esq. , Karin J. Ward, Esq. , and Ruprecht, Hart, & Weeks, LLP. (27d-28d) (Document not in appendix) .

Plaintiff filed appeal from the trial court's Order of June 25, 2010 (Document not in appendix).

On October 30, 2023 plaintiff filed via a civil rights claim in the Essex vicinage of the Superior court of New Jersey a motion for judgement against the University of Medicine and Dentistry, Doctor Marco Zarbin and John Doe (38da-79da)

On December 8, 2023 judge L. Grace Spencer denied motion for judgment (80da).

On January 18, 2024 plaintiff filed the current appeal, via docket #: A-001658-23T2

STATEMENT OF FACTS

No facts have been determined by a jury of more than just a judge-jury of one at this point.

At issue is whether there is avenue for recovery in spite of any previous court ruling.

Nothing can be done in the absence of a jury, of more than just a judge-jury of one, confirmation of a judge's finding of fact.

A jury can find Doctor Marco Zarbin liable via a breach of criminal statute theory of recovery.

A jury can find Doctor Marco Zarbin liable via a title 42 section 1983 action.

A jury can find Doctor Marco Zarbin liable via a malpractice action.

The UMDNJ can be held liable via respondeat superior theory.

Per the evidence of law in record, there is avenue for recovery via a jury determination of the facts of the matters at the bar.

POINT 1: Per New Jersey statutory law any change in the meaning of language is irrelevant (Not argued below)

N.J.S.A. 1:1-1. General rules of construction reads as follows:

'....In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning....'

The above referenced passage from the New Jersey statutes is self-authenticating.

As far as previously enacted law, and court decisions – both Supreme court and other courts – are concerned, the matter is irrelevant as to whether the meaning of language has changed.

In other words, while there is no way to really know what the original drafters of a law, or court opinion, had in mind at the time, the New Jersey statutes allows for the law to be interpreted according to the standards of the day that the law, or court interpretation, is read.

Clearly, to me, at-the-least, what matters in a charge to jury with regard to the facts of a matter is the present day meaning of the passage, regardless of the intent at the time of the drafting of the law, or court opinion.

POINT 2: The laws created by the past Congresses of the United States are still valid (Not argued below)

The Constitution reading in pertinent part as follows:

Article. I.

Section. 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 8.

The Congress shall have Power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article. IV.

Section. 3.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Section. 4.

The United States shall guarantee to every State in this Union a Republican Form of Government,

There is nothing at the bar stating that a law passed by a prior Congress becomes void upon a change in the composition of a Congress of the United States.

POINT 3: Supreme court opinions are facts that cannot be otherwise re-examined (Not argued below)

Insurance Company v. Folsom, 85 US 237 reading in pertinent part as follows:

'....By the terms of the Act of Congress permitting issues of fact in civil cases to be tried and determined by the court without the intervention of a jury, it is provided that the finding of the court upon the facts may be either general or special, and that the finding shall have the same effect as the verdict of a jury....'

My understanding of the matter is that juries decide facts. As a result, per the 7th amendment a decision of the Supreme court is a fact that cannot be otherwise re-examined as the Supreme court is a court of the United States.

The 7th amendment reading as follows:

'....In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law....'

The 7th amendment is clear where no fact decided by a jury shall be otherwise re-examined in a court of the United States.

POINT 4: Per the prior Supreme court opinions, a jury is to perform its office (Not argued below)

Slocum v. New York Life Insurance, Co., 228 US 364 reading in pertinent part as follows:

'....Coughran v. Bigelow recognizes that this is the true conception of trial by jury, for it is there said, "if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict."

Why instruct the jury in such a case if they have no office to perform? Why contemplate that they may not conform to the instruction if it be immaterial whether they do or not? And why take their verdict or have any concern about it if none is required? The answers are given in prior decisions, which hold, as before shown, that in such a case it is essential "that the jury make its verdict, albeit in conformity with the order of the

Page 228 U. S. 398 court," and that, if there be a verdict, "the action is ended, unless a new trial be granted, either upon motion or upon appeal...."

The court is in error for rendering an opinion without a jury confirmation of the judge's finding of fact.

POINT 5: New Jersey common laws are facts that cannot be otherwise re-examined (Not argued below)

Insurance Company v. Folsom, 85 US 237 reading in pertinent part as follows:

'....By the terms of the Act of Congress permitting issues of fact in civil cases to be tried and determined by the court without the intervention of a jury, it is provided that the finding of the court upon the facts may be either general or special, and that the finding shall have the same effect as the verdict of a jury....'

Clearly, *Folsom* applies to the creation of New Jersey common law by the New Jersey supreme court, and other courts of the state of New Jersey.

POINT 6: There is a right to trial by jury via the 7th amendment per the 73rd Congress
(Not argued below)

73d CONGRESS. SESS. II . CHS. 651 JUNE 19, 1934 reading in pertinent part as follows:

'....Provided, however, That (in such union of rules) the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate....'

Approved, June 19, 1934.

POINT 7: There is a right to trial by jury via *Slocum v. New York Life Insurance Co.*, 228 US 264. (Not argued below)

Slocum v. New York Life Insurance Co., 228 US 364 reading in pertinent part as follows:

*'....wherein it uniformly has been held (a) that we must look to the common law for a definition of the nature and extent of the right of trial by jury which the Constitution declares "shall be preserved;" (b) that the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court; (c) that the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury which is no less a part of the tribunal charged with the trial than is the court, and (d) that [****57] when the issues have been so tried and a verdict rendered they cannot be reexamined otherwise than on a new trial granted by the court in which the first trial was had or ordered by the appellate court for some error of law affecting the verdict....'*

As words are to be taken to have their plain meaning, one can only conclude that there is a right to trial by jury of 12 per the jury decision that the Supreme court opinion in *Slocum* represents.

Notably the Supreme court put to rest any possibility of a state court judge re-examining a Supreme court opinion via the language of *Slocum*, above referenced.

POINT 8: The right to trial by jury is to remain inviolate per the New Jersey constitution and New Jersey statutory law. (Not argued below)

The New Jersey constitution reading in pertinent part as follows:

'....Article I, section 9. The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury....'

N.J.S.A.2B:23-1. Number of jurors reading as follows:

a. Juries in criminal cases shall consist of 12 persons. Except in trials of crimes punishable by death, the parties in criminal cases may stipulate in writing, before the verdict and with court approval, that the jury shall consist of fewer than 12 persons.

b. Juries in civil cases shall consist of 6 persons unless the court shall order a jury of 12 persons for good cause shown.

POINT 9: All crimes are to be tried by jury (Not argued below)

The Constitution reading in pertinent part as follows:

Article. III, Section. 2.

'....The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed....'

Schick v. United States, 195 US 65 reading in pertinent part as follows:
'....In this treatise, vol. 4, p. 5. is given a definition of the word "crimes:"

"A crime or misdemeanor, is an act committed or omitted in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious Page 195 U. S. 70 dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only."

While the use of the word *'dye'* in the definition of the words *'crimes'* may be unknown, the fact remains that via the exclusive language of the word *'only'* with regard to *'misdemeanors'* - only one conclusion can be drawn in the matter of the Supreme court opinion delivered in *Schick*, - all misdemeanors are crimes and all crimes are misdemeanors.

Therefore, via Article III of the constitution, the appellate court judges are legally obligated to have the matter of the denial of my right to trial by jury, by a judge acting under the color of law, tried by a jury of 6 in the state of New Jersey.

POINT 10: The Supreme court can issue an order to incarcerate, or otherwise fine, a judge that is denying the right to trial by jury (Not argued below)

Article VI of the Constitution reading in pertinent part as follows:

'....This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding....'

Article III or the Constitution reading in pertinent part as follows:

Article. III, ***Section. 1.***

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases,....'

As a result, a judge operating in the District of Columbia is not bound by the Constitution, and any associated Supreme court opinion holding a judge immune from action. However, the judge can still take action via title 18 section 242, as it is the supreme law of the land, and find a judge guilty of denying the right to trial by jury.

Then, the Supreme court could issue a binding order directing that an offending judge is either fined, or incarcerated, for denying the right to trial by jury that would be binding via the provisions of Article III of the Constitution.

POINT 11: The laws of the United States, made by congress, are the supreme law of the land. (Not argued below)

Article VI of the Constitution reads in pertinent part as follows:

'....This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding....'

At first glance there appears to be two avenues that can be taken where the *'.... Laws of the United States....'* will not be the *'....supreme Law of the Land....'*

Note: *'....Laws of the United States which shall be made in Pursuance....' of '....This Constitution....'* are not part of the Constitution.

However, from *McCulloch v. Maryland*, 17 U.S. 316 we have:

*"....But this question is not left to mere reason: the people have, in express terms, decided it, by saying, *406 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states,*

shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'...."

As a result, either '*....this constitution,....' or '....the laws of the United States....'* could be the supreme law of the land.

Fortunately, from *Schick v. United States*, 195 US 65 we have in pertinent part:

*'....If there be any conflict between these two provisions, the one found in the Amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier [*69] one....'*

So, the above referenced part of Article VI starts with, *'....This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;....'*

Clearly, *'....the Laws of the United States....'* is written after *'....This Constitution....'*

As a result, *'....the Laws of the United States....'* is the *'....the last expression of the will of the lawmaker....'* on the matter.

It follows that *'....the laws of the United States....'* are the supreme law of the land rather than *'....This Constitution....'*

POINT 12: As a matter of law, the plaintiff is entitled to judgment versus the University of Medicine and Dentisty (UMDNJ) via a civil rights action

(Not argued below)

The evidence of law, and evidence of the cause of action via brief filed in support of award of judgment in the lower court - in record - merely need to be confirmed by a jury empaneled by the presiding judge at this point in order to find in Philip Hahn's favor.

The governing law reading in pertinent part as follows:

42 U.S. Code § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

New Jersey constitutuion, Article I, Rights and Privileges

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Clearly the law of the New Jersey constitution, and rights created thereby, are secured by the Constitution via the 10th amendment.

~~(See appendix pp. AB41 - AB59 for copy of brief in support of judgment filed in lower court via a federal civil rights claim)~~

As the federal law of title 42 section 1983 is the supreme law of the land, neither an Affidavit of Merit, nor expert testimony, nor Notice of Claim is needed in order to comply with the provisions of N.J.S.A. 59 et seq. in order to establish a civil rights claim via the denial of the right to obtain safety and happiness as established via the NJ constitution.

As there is sufficient law to sustain a recovery, and evidence in record that can prove Philip Hahn was denied his right to obtain safety and happiness by an

employee of the UMDNJ while the person was acting under the color of law, the December 8, 2023 dismissal order by the Hon. L. Grace Spencer was in error.

Further, title 42 section 1983 is part of the supreme law of the land. As a result, there are no state statutory, or common law, statutes of limitation with regard to an action versus ther UMDNJ now part of Rutgers, the state University.

POINT 13: Doctor Zarbin was acting under the color of law when he removed the lens from Philip Hahn's right eye on June 1, 2005. (Not argued below)

Performing an operation made possible via one's medical license is an action under the color of law.

Power was not granted to doctor Zarbin to needlessly remove the lens from Philip Hahn's right eye.

Removal of Philip Hahn's lens from his right eye was an action under the color of law, - performed with apparent power that doctor Zarbin did not in fact possess.

As a result Philip Hahn's lens was removed from his right eye by someone acting under the color of law.

POINT 14: As a matter of law a valid breach of statute negligence claim can be found to be true by a jury (Not argued below)

Under N.J.S.A. § 2C:12-1a(1), a person commits a simple assault if he or she attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another person.

There is evidence in record where doctor Zarbin removed the lens from Philip Hahn's right eye.

There is nothing at the bar to prove that removal of the lens from Philip Hahn's right eye was not a crime.

There is nothing at the bar, particularly expert testimony, to dispute the fact that there was a breach of statute the resulted in actionable negligence being established.

Per *Daniel v. Brunton*, 7 N.J. 102, 107, *Di Cosala v. Kay*, 91 NJ 159, and *Ochs v. Public Service Railway Company,* 81 N.J.L. 661 breach of statute negligence

claims versus the UMDNJ and doctor Zarbin can be proven merely by empanelling a jury to confirm the negligence.

POINT 15: The N.J.S.A. 59 et seq. provides no protection in connection to a crime being committed by an employee of a public entity (Not argued below)

N.J.S.A. 59:3-14. Public employee immunity; exception

a. Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

b. Nothing in this act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

POINT 16: The state of New Jersey, or the former UMDNJ can still be held liable via the provisions of the N.J.S.A. 59 et seq. in a malpractice claim

(Not argued below)

Causes of action may still accrue where the state of New Jersey, or the former UMDNJ, can be held liable via the provisions of title 59 et seq. where sovereign immunity is found to have been waived.

A malpractice claim does not accrue until there is expert testimony, proven to be true by a jury.

Once malpractice is proven as fact via expert testimony at a jury trial, a notice of claim can be given to Rutgers, - the state University, - as Rutgers has assumed liability for all liabilities of the former UMDNJ, thus complying with the provisions of title 59 et seq.

In the event that it is found that any part of the old University of Medicine and Dentistry (UMDNJ) was part of the state of New Jersey for legal purposes, notice

of claim could be given for any malpractice action established via a jury determination of fact, thus preventing the claim from being lost via the provisions of the N.J.S.A. 59 et seq.

Further, by virtue of the fact that the doctors at the UMDNJ were legally obligated to present themselves as employees of the UMNDJ, via the discovery rule it can be found that a cause of action versus the state of New Jersey can saved from being lost to a statute of limitations defense.

POINT 17: A jury can hear evidence and decide a malpractice claim in the absence of any allegation of malpractice. (Not argued below)

While the Affidavit of Merit Act is clear where any allegation of Malpractice or negligence in one's profession must be supported by an affidavit of merit attesting to the fact, there is nothing to stop a jury from hearing evidence and deciding that malpractice has occurred.

N.J.S.A. 2A:53A-27 Affidavit of lack of care in action for professional, medical malpractice or negligence; requirements, - reading as follows:

2. In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c.17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

L.1995,c.139,s.2; amended 2004, c.17, s.8.

So there is nothing to stop a jury from deciding malpractice in the absence of an affidavit of merit.

Further, the NJ constitution is clear where the right to trial by jury shall remain inviolate.

The New Jersey constitution reading in pertinent part as follows:

'....Article I, section 9. The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury....'

N.J.S.A.2B:23-1. Number of jurors reading as follows:

a. Juries in criminal cases shall consist of 12 persons. Except in trials of crimes punishable by death, the parties in criminal cases may stipulate in writing, before the verdict and with court approval, that the jury shall consist of fewer than 12 persons.

b. Juries in civil cases shall consist of 6 persons unless the court shall order a jury of 12 persons for good cause shown.

POINT 18: UMDNJ is a 'person' via the USCS 1:1-1 and the Supreme court opinion in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989)

(Not argued below).

The UMDNJ is a *'person'* via federal statutory law

The U.S.C.A. § 1. Words denoting number, gender, and so forth reading in pertinent part as follows:

'....In determining the meaning of any Act of Congress, unless the context indicates otherwise--

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;....'

WILL v. MICHIGAN DEPARTMENT OF STATE POLICE, 109 S.Ct. 2304 reading in pertinent part as follows:

'....Black's Law Dictionary 143 (1891) ("body politic" is "term applied to a corporation, which is usually designated as a 'body corporate and politic' " and "is particularly appropriate to a public corporation invested with powers and duties of government"); 1 A. Burrill, A Law Dictionary and Glossary 212 (2d ed. 1871) ("body politic" is "term applied to a corporation, which is usually designated as a body corporate and politic ")....'

When the statutory law of the state of New Jersey, at the time of the cause of action is considered, via the Supreme court decision in Will, when combined with the federal statutory law of U.S.C.A. Chapter 1, Section 1, the UMDNJ is a 'person' for the purposes of a title 42 section 1983 action.

From the N.J.S.A. 18A:64G-3. Establishment of University of Medicine and

Dentistry (circa June 1, 2005) we have in pertinent part:

*'....There is hereby established a **body corporate and politic** to be known as the "University of Medicine and Dentistry of New Jersey." The exercise by the university of the powers conferred by this act in the presentation and operation of programs of medical, dental, nursing and health related professions and health sciences education shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey....'*

Notably, the New Jersey legislature declined to write into law that the UMDNJ was a part of the state of New Jersey.

Per the USCS 1:1-1, *Will* and New Jersey statutory law, it follows that in some instances UMDNJ was a 'person' as far as the courts are concerned with regard to title 18 section 242 and title 42 section 1983.

CONCLUSION:

There is sufficient evidence in record to find in the plaintiff's favor.

The former University of Medicine and Dentistry of New Jersey (UMDNJ) is liable via title 42 section 1983.

Further, the UMDNJ is liable via a beach of statute negligence claim.

There is nothing at the bar to defend against any cause of action that is available for Philip Hahn to recover with.

Via a jury trial a malpractice claim can be still a valid cause of action.

Additionally, evidence supporting a claim for relief can be adduced at trial. Therefore, the court is in error for denying the opportunity to adduce evidence via a jury trial.

The court is in error for rendering an opinion without a jury confirmation of the judge's finding of fact

PHILIP HAHN

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Plaintiff(s), PHILIP E. HAHN, *Plaintiff-Appellant,* **vs.** UNIVERSITY OF MEDICINE AND DENTISTRY OF THE STATE OF NEW JERSEY; MARK ZARBIN *Defendants-Respondents.*	**CIVIL ACTION** ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO.: ESX-L-3267-07 APPELLATE DOCKET NO. A-001658-23-T2 Sat Below: HON. L. GRACE SPENCER, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS, UNIVERSITY OF MEDICINE AND DENTISTRY OF THE STATE OF NEW JERSEY AND DR. ZARBIN

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[1] "Pa" means "Plaintiff's Appendix" as filed with the Court on August 9, 2024.

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A. PRELIMINARY STATEMENT

This frivolous and rambling "appeal" is Plaintiff's umpteenth attempted bite of the apple to revive his cause of action. His case was properly dismissed when George W. Bush was the president and when the undersigned – a 2015 law school graduate – was a high school senior.

Plaintiff commenced an action sounding in medical malpractice against University of Medicine and Dentistry of the State of New Jersey ("UMDNJ") and Dr. Marco Zarbin ("Dr Zarbin") (collectively "Defendants") in 2007. The trial court granted UMDNJ's motion to dismiss for failure to provide a notice of claim on August 17, 2007 and subsequently granted Dr. Zarbin's motion to dismiss for failure to provide a notice of claim on February 29, 2008.

In the intervening timeframe, Plaintiff has filed numerous letters and other materials in this case as well as additional frivolous lawsuits and appeals. Most recently, Plaintiff filed a procedurally improper, untimely, and meritless "motion to enter judgment" in the trial court notwithstanding that this case has been dismissed since 2008. The trial court properly denied the "motion to enter judgment" and Plaintiff now appeals that denial. The Court should affirm the trial court's order denying Plaintiff's motion for judgment.

B. PROCEDURAL HISTORY

Plaintiff filed a complaint against Defendants in 2007 sounding in medical negligence as a result of treatment rendered in 2005. (Pa*i*-Pa*iv*).[1] UMDNJ moved for and obtained dismissal of the complaint with prejudice as against it for Plaintiff's failure to file a notice of claim. (Pa1da-Pa2da). Thereafter, Dr. Zarbin moved for and obtained dismissal of the complaint with prejudice as against him on the same ground. (Pa3da-Pa4da). The Appellate Division affirmed the dismissal as to Dr. Zarbin (Pa5da-Pa6da) as did the Supreme Court. Hahn v. Univ. of Med. & Dentistry of New Jersey, 199 N.J. 128 (2009).[2]

Plaintiff has engaged in an inchoate yet protracted campaign of court filings – ranging from letters to new lawsuits to additional appeals – to try undo the trial court's proper dismissal of his case. (Da1-Da3, Pa7da-Pa40da); N.J.R.E. 201. For instance, on March 22, 2010, the Appellate Division affirmed the dismissal of Plaintiff's re-filed lawsuit arising out of the same transaction or occurrence – the 2005 medical treatment rendered. (Pa10da-Pa12da). In so doing, the Appellate Division explained that "[a]lthough plaintiff relies upon a different legal theory in

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[1] "Pa" means "Plaintiff's Appendix" as filed on August 9, 2024. Plaintiff's Appendix contains Roman Numerals for some of the pages (*i – xii*) and then begins renumbering as [number]da. "Da" means Defendants' Appendix.

[2] See generally Hahn v. Frascella, No. A-0070-10T3, 2011 WL 2298178 (N.J. Super. Ct. App. Div. June 3, 2011) (providing an overview of Plaintiff's repeated advancement of meritless arguments over the course of multiple lawsuits).

this action than in his prior action, the present action relates to the same June 1, 2005 eye surgery as the prior action. Therefore, this action is barred by res judicata and the entire controversy doctrine." (Pa11da).

As another example, Plaintiff later tried to revive his 2007 case by filing a motion for an evidentiary hearing to try to develop a factual basis for his theory that Dr. Zarbin committed a crime against him, which the trial court denied. (Pa29da-Pa34da). On January 12, 2011, the Appellate Division affirmed this denial (Pa34da), explained that the 2007 case was properly disposed of despite Plaintiff's claims to the contrary (Pa31da), and reasoned that the statute of limitations had expired with respect to the claims that Plaintiff then sought to assert (Pa33da-Pa34da).

In late 2023, Plaintiff filed a procedurally defective and substantively meritless "motion to enter judgment" against the long-dismissed Defendants. (Pa41da-Pa67da). Defendants opposed the motion and appeared at oral argument, which Plaintiff failed to do. The trial court properly denied Plaintiff's motion at oral argument. (Pa80da).

C. STATEMENT OF FACTS

Defendants repeat the procedural history set forth under the previous heading as though set fully herein.

Plaintiff contends that he sustained physical injuries as a result of undergoing a procedure performed by Dr. Zarbin at UMDNJ in 2005. (Plaintiff's Br. at*12).

Dr. Zarbin rendered his treatment for Plaintiff in the scope of his employment with UMDNJ. (Plaintiff's Br. at*12) (Pa5da-Pa6da, Pa14da-Pa15da).

D. LEGAL STANDARD FOR SETTING ASIDE FINAL JUDGMENTS AND ENTERING SUMMARY JUDGMENT

A final judgment is a judgment that adjudicates all issues as to all parties. See Huny & BH Assocs. Inc. v. Silberberg, 447 N.J. Super. 606, 609 (App. Div. 2016) (citing Silviera–Francisco v. Bd. of Educ. of Elizabeth, 224 N.J. 126, 136 (2016)). Parties seeking to challenge a final order have three options – to file a motion to alter or amend judgment (also known as a motion to reconsider) pursuant to Rule 4:49-2 within 20 days of entry of the judgment, to file a motion for relief from judgment (also known as a motion to vacate) pursuant to Rule 4:50 within one year or within a reasonable time following entry of the judgment depending on the subsection relied upon, or to appeal the judgment pursuant to Rule 2:2 within 45 days of the entry of the judgment.

A plaintiff seeking summary judgment as to liability of a defendant must file an appropriate motion for such relief which

> [S]hall be served with a brief and a separate statement of material facts with or without supporting affidavits. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

Rule 4:46-2(a). The Court will then evaluate any opposition filed by the defendant pursuant to Rule 4:46-2(b). Under Rule 4:46-2(c), the Court will assess whether:

> [T]he pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

If there is no genuine issue of material fact and the plaintiff is entitled to judgment as a matter of law, only then the Court shall grant the motion. Rule 4:46-2; see generally Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

E. LAW AND ARGUMENT

1. PLAINTIFF'S "MOTION TO ENTER JUDGMENT" WAS PROCEDURALLY DEFECTIVE. (Raised below: Defendants' brief in opposition to Plaintiff's "motion to enter judgment" and 1T4-1T6) [3]

Plaintiff improperly sought to move to obtain a judgment in his favor without first vacating the judgments dismissing his claims under Rule 4:49-2, Rule 4:50, or Rule 2:2. C.f. Huny, supra, 447 N.J. Super. at 609 (citing Silviera–Francisco, supra, 224 N.J. at 136). Even if he had sought relief under one of these rules, Plaintiff

[3] Consistent with Rule 2:6-1(a)(2), Defendants are not including the trial court brief with the Appendix. Should the Court require same, Defendants can promptly submit it. In addition, the transcript of the trial court motion hearing was filed with entered on docket on April 11, 2024 as "MOTION (Vol. 001) (12/08/2023)".

could not rely on same due to the passage of time. The order or orders that Plaintiff is seemingly challenging under this docket were entered in in 2007 and/or 2008.[4] By seeking relief in 2023, Plaintiff did not act within 20 days or a year or within a reasonable amount of time. In this case, more than 15 years has passed since the time to move to reconsider and the time to appeal have expired.

In addition, Plaintiff had already appealed the dismissal of his claims in this case as to Dr. Zarbin to both the Appellate Division and the Supreme Court, which sustained the trial court's dismissal of the action. See Hahn v. Univ. of Med. & Dentistry of New Jersey, No. A-3815-07T3, 2009 WL 160427, at *1 (N.J. Super. Ct. App. Div. Jan. 26, 2009) (attached as Pa5da-Pa6da); Hahn v. Univ. of Med. & Dentistry of New Jersey, 199 N.J. 128 (2009); see generally Hahn v. Frascella, No. A-0070-10T3, 2011 WL 2298178 (N.J. Super. Ct. App. Div. June 3, 2011) (providing an overview of Plaintiff's repeated advancement of meritless arguments over the course of multiple lawsuits) (attached as Da4-Da6). The trial court was also not in a position to adjudicate an appeal or undo the determinations made by the Appellate Division and the Supreme Court. For these reasons, the trial court properly denied Plaintiff's "motion to enforce judgment."

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[4] Relief under Rule 4:49-2 would also have been inappropriate because Plaintiff did not provide the order(s) that he purportedly sought to have the trial court reconsider.

2. PLAINTIFFS SUBSTANTIVE ARGUMENTS ARE MERITLESS, FRIVOLOUS, AND REHASHED (Raised below: Defendants' brief in opposition to Plaintiff's "motion to enter judgment" and at the motion hearing 1T4-1T6)

In this case, when faced with the same arguments from Plaintiff over 15 years ago, the trial court correctly applied the law to the facts and dismissed Plaintiffs' claims with prejudice. Plaintiff filed appeals with the Appellate Division and the Supreme Court with respect to the dismissal of his claims against Dr. Zarbin. The trial court's decision was sustained by the Appellate Division and the Supreme Court. See Hahn, supra, 2009 WL 160427, at *1 (attached as Pa5da-Pa6da); Hahn, supra, 199 N.J. 128; Hahn, 2011 WL 2298178 at *1 (attached as Da4-Da6). None of the courts were palpably incorrect or irrational and none of the courts overlooked or failed to appreciate evidence. C.f. R. 4:49-2; Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (quoting Guido v. Duane Morris LLP, 202 N.J. 79, 87-88 (2010)). There is no reason justifying relief from the judgment(s). C.f. R. 4:50-1(f).

It is undisputed that UMDNJ was a public entity at the time Plaintiff's claims arose and that Dr. Zarbin was a public employee, entitling both to immunity under the Tort Claims Act. N.J.S.A. 59:2-1, 3-1, 8-3; Lowe v. Zarghami, 158 N.J. 606, 614-15 (1999). The allegations against the defendants sound in the tort of medical negligence where – per Plaintiff – "Phillip Hahn was operated on by Dr [ ] Zarbin on June 1, 2005 at [ ] UMDNJ". The claims do not sound in "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." C.f. 42

U.S.C. 1983; Harvey v. D.C., 798 F.3d 1042, 1050 (D.C. Cir. 2015) c.f. Fuchilla v. Layman, 109 N.J. 319, 320-21 (1988) (holding that UMDNJ and its employees were not entitled to assert immunities of the Tort Claims Act *in that case* because that case was properly a case arising under 42 USC 1983 and the New Jersey Law Against Discrimination, which are exceptions to the applicability of the Tort Claims Act). Plaintiff cannot state a claim under 42 U.S.C. 1983.

Plaintiff is also incorrect in his argument that the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26, et seq., does not apply. A plaintiff claiming medical malpractice must submit an affidavit against all defendants that are "licensed persons." N.J.S.A. 2A:53A-26 and -27. The definition of licensed persons includes "doctors" and "healthcare facilities." At the time the surgery was performed, it is undisputed that Dr. Zarbin was a doctor and UMDNJ was a healthcare facility. Non-compliance with N.J.S.A. 2A:53A-27 is deemed a failure to state a cause of action. N.J.S.A. 2A:53A-29; Meehan v. Antonellis, 226 N.J. 216, 228 (2016) (citing Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 146 (2003)).

Plaintiff's claims are meritless, frivolous, and rehashed. Under these circumstances, he is not entitled to a trial by jury. Hahn, supra, 2011 WL 2298178, at *2 (N.J. Super. Ct. App. Div. June 3, 2011) (attached as Da4-Da6) ("The gist of [Mr. Hahn's] argument on appeal . . . is that he requested and paid for a jury trial, a constitutional right, which trumped the firm defendants' right to make a motion to

dismiss his complaint and the judicial defendants' right to dismiss his case prior to an adjudication on the merits by a jury. [Mr. Hahn's] position is not founded in law"); see also Brill, supra, 142 N.J. at 537 (1995); Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.), certif. denied, 185 N.J. 297 (2005); County of Warren v. State, 409 N.J. Super. 495, 503 (App. Div. 2009), certif. denied, 201 N.J. 153 (2010). The Court should likewise disregard Plaintiff's unsubstantiated, defamatory, and inapposite accusations of criminal conduct on the part of Dr. Zarbin. Thus, the Court should affirm the trial court's denial of Plaintiff's motion to enter judgment.

In addition, Plaintiff's claims arising out of a 2005 medical procedure – whether sounding in medical negligence, assault and battery, violations of 42 U.S.C. 1983, or any other theory that Plaintiff may now or in the future try to assert – are barred by res judicata and the entire controversy doctrine by virtue of the final judgment in this 2007 case which has been affirmed by the Appellate Division (Pa5da-Pa6da) and the Supreme Court. Hahn, supra, 199 N.J. 128. The Appellate Division has also previously ruled that Plaintiff's claims arising out of the 2005 medical procedure are barred under the statute of limitations with respect to any new legal theories that Plaintiff has raised or will raise in the future. (Pa33da-Pa34da).

F. CONCLUSION

Plaintiff could not and did not perfect a claim against the Defendants when he had an opportunity to try to do so in the mid-2000s. He has not demonstrated any basis to undo the dismissals of his claims or to have a judgment entered in his favor. The Court should thus affirm the trial court's denial of Plaintiff's motion to enter judgment.

Respectfully Submitted,

Ruprecht Hart Ricciardulli & Sherman, LLP
Attorneys for Defendants, University of Medicine and Dentistry of the State of New Jersey and Dr. Zarbin

/s/ Richard M. Forzani
Richard M. Forzani (Attorney ID 182932016)

Dated: October 8, 2024

T2 JC

Reply brief in support of appeal in the matters pled via docket #: A-001658-23T2

	: Superior Court of New Jersey
PHILIP HAHN	: Appellate Division
	: Docket No: A-001658-23T2
Plaintiff	:
	: On Appeal from:
vs.	: Superior Court of New Jersey
	: Law Division, Essex County
The University of Medicine and Dentistry, Marco Zarbin, John Doe	:
	: Sat below:
	: Hon. L. Grace Spencer
Defendants	: Docket #: ESX-L-3267-07
	:

REPLY BRIEF IN SUPPORT OF APPEAL

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Philip Hahn on the brief
Dated: October 14, 2024

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Rules of the Court of the state of New Jersey

Entire Controversy Doctrine

PRELIMINARY STATEMENT

I have personal knowledge of all matters contained herein.

In order for me to prevail in my appeal I need the New Jersey Appellate court judges to find that the laws of the United States, created by a Congress, whether present or past, are the supreme law of the land, rather than *both* the laws created by a Congress and the Constitution being the supreme law of the land.

I believe that I have brought sufficient evidence to the bar to prove that a law created by a Congress of the United States is one of the supreme laws of the land, - rather than the Constitution of the United States also being the supreme law of the land.

The controlling Supreme court opinion in the matter is *Schick v. United States*, 195 US 65 reading in pertinent part as follows:

*'....If there be any conflict between these two provisions, the one found in the Amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier [*69] one....'*

Then I need that issue of fact to be confirmed by more than just a judge-jury of one, - i.e. by a jury of at least 6 per New Jersey statutory law, or 12 per the Supreme court ruling in *Slocum v. New York Life Insurance Co.,* 228 US 364.

Otherwise, a law created by the New Jersey legislature granting immunity in a matter at the bar could have equal precedence to a law created by a Congress of the United States. In which case the applicable law would ultimately have to be finally decided by the Supreme court of the United States.

In the absence of all issues of fact, - to include that there is sufficient evidence at the bar to sustain a recovery, being decided by more than just a judge-jury of one, chances are remote that I will ever be the beneficiary of the courts of this country.

In the alternative, defense counsel's defense hinges on all of the prior decisions of the courts of this country, and all laws made by Congress and the state of NJ, becoming irrelevant once the composition of the governing body that created the law changes. Then a judge, via power reserved to the people, via the 10th amendment, can just decide a case without regard to the laws previoulsy created in the past.

I can see no other way for defense counsel to endorse a court's finding of a matter res judicata when relation back law exists or to endorse a court's enforcement of the Entire Controversy Doctrine when the 7th amendment is clear where no fact decided by jury shall be otherwise re-examined.

Of note, in the event that the Entire Controversy Doctrine applies in the matters at the bar, - an issue of fact for jury, all may not have been lost for me. Whether I could recover via another action filed in another court of law would turn on relation back law and other res judicata law. Given the a zeal of

defense counsels in the past to have a matter brought to the bar decided in the absence of a trial by jury of more than just a judge-jury of one, I can imagine how that law can be conveniently overlooked. None-the-less I am due a jury trial in the matters of the bar. The finding of fact by the jury can be judicially noticed in another court.

Similarly, that is the only explanation that I can think of with regard to the courts just ignoring my right to trial by jury, of more than just a judge-jury of one, before a final decision can be made, - the members of the courts are of the position that none of the previously created laws apply once the composition of the body creating the law changes.

None-the-less I have brought evidence to the bar proving that the laws previously created, and court opinions previously made, still bind a judge that presides over an action at common law.

Note: In the event that none of the previously rendered opinons of a court, or laws created by legislative bodies, apply, defense counsel's brief in opposition to appeal is merely some white wash presented in an effort to confuse the matters at the bar.

It is a shame that 25 year old Robert M. Forzani is not receiving a little more support from his employer with regard to knowledge of the law. Robert M. Forzani knows about as much about the law as all of the other people associated with the matters at the bar did in the past. However, if he wishes to risk his law licence being revoked by lying to a panel of Appellate Court judges, that is his prerogative.

POINT 1: WE HAVE A COMMON LAW LEGAL SYSTEM

We have a common law legal system. In a common law legal system a judge decides a case. However, a judge is bound by the Constitution, the laws of the United States, NJ statutory law and NJ common law per Article VI of the Constitution and the 10th amendment.

Per the 7th amendment and the N.J.S.A.1:1-1 the right to trial by jury at common law is to be preserved and the amount in controversy is greater than $20. The size of the jury is to be at least 6 persons per NJ statutory law.

POINT 2: ALL PREVIOUS COURT ORDERS ARE INTERLOCULATORY IN NATURE

Notwithstanding that in the absence of a jury trial in the matters at the bar that all actions of a court are interlocularly in nature and therefore not binding, the fact of the matter is that I have sought to have the members so the Appellate Court straighten out the matters at the bar. Of importance is the fact that the judges of the Appellate Court of NJ are bound by the Supreme court opinion in *Slocum* requiring a jury of 12 confirmation of the judges' finding of fact.

While it may be perfectlty within a court's prerogative to try to convince a participant that a matter can be resolved in the absence of jury of more than just a judge-jury of one confirmation of the court's finding of fact, there must come a point where a delay in a trial by jury becomes a denial of the right to trial by jury actionable via title 42 section 1983, civilly, and title 18 section 242, criminally.

POINT 3: PLAINTIFF'S MOTION TO ENTER JUDGMENT WAS NOT PROCEDURALLY DEFECTIVE OR MERITLESS, FRIVOLOUS OR REHASHED

There are numerous theories of recovery that can be pursued in the matters at the bar. It is not in dispute that a court has, or courts have, rendered an opinion, or opinions, in the past. However, evidence of other theories of recovery can still be brought to the bar.

Chances are remote that new evdidence of law that existed at the time of the cause of action will not relate back to the original filing date of at least one matter that I have sought to bring to the bar.

Whether any new evidence brought to the bar with regard to a cause of action will be admitted to the court turns on whether the defendant has be prejudiced by the delay in bringing new evidence of a cause of action to the bar.

While it is undisputed that a presiding judge in a New Jersey Superior Court, and panel of judges in the Appellate court have rendered opinions in the past, the opinions none-the-less are not binding as there has never been a jury, of more than just a judge-jury of one, confirmation of the judge's finding of fact.

Further, as the matter at the bar is one of federal statutory law, - the supreme law of the land, something like the Rules of the Court of the State of New Jersey are irrellevant in the matter and cannot be used to defeat an otherwise meritorious action.

While I imagine that it is easy to get lost in the mixture of federal and state law governing the matters at the bar, my 18 years of research in the matters gives me a better understanding of the law with regard

to the matters at the bar than the typical attorney trying oppose the matters that I seek to bring to the bar.

POINT 4: NEW EVIDENCE OF LAW HAS BEEN BROUGHT TO THE BAR

At this point it seems as though defense counsel has chosen to ignore the briefs that I submitted in the lower court and appellate court.

Clearly, I am of the position that, in light of new evidence of law brought to the bar, that all of the prior proceedings of the courts associated with the matters at the bar have been in error, or are at the least interloculatory in nature.

Again, the action at the bar is via federal statutory law that is the supreme law of the land. As a result no state statutory, or common law, immunities apply.

Defense counsel's brief in opposition to appeal offers nothing to dispute that new evidence of law is being brought to the bar and a jury, of more than just a judge-jury of one, is required to confirm the judge's finding of fact in the matters at the bar.

POINT 5: FACTS OF MEDICAL MALPRACTICE CAN BE ESTABLISHED VIA A JURY DECISION

While a court may have made a decision regarding dismissal of a malpractice claim, in the absence of establishing any facts in the matter via a jury confirmation of the court's finding of fact, via other law established via the Tort Claims Act, the fact remains that per testimony adduced at trial from one of the doctors associated with the matters at the bar, malpractice can be established by the jury. In which case knowledge of injury sufficient to start the running of the statute of limitations would then begin to run.

In other words, if malpractice could have only been established via a jury decision, the statute of limitaions on that theory of recovery would not have begun until the jury gave its verdict. An injured party would then have 90 days to give proper notice to the public entity responsible for the loss.

If the previously created NJ common law regarding discovery did not apply, in the event that all previously law did not apply, then it would be up to the presiding judge to decide whether the statute of limitations began to run in a matter where an injury was unknown to a plaintiff.

The applicable law with regard to tolling the statutes of limitations in a matter is *Szczuvelekv v. Harborside Healthcare*, 182 N.J. 275.

The applicable law with regard to res judicata is *Culver v. Insurance Co. of North America,* 115 N.J. 451 reading as follows:

'....Hence, the doctrine of res judicata applies unless the causes of action and essential issues were not substantially the same....

....The test for the identity of a cause of action for claim preclusion purposes is not simple. The term " 'cause of action' cannot be precisely defined, nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes." Donegal Steel Foundry Co. v. Accurate Prods. Co., 516 F.2d 583, 588 n. 10 (3d Cir.1975). To decide if two causes of action are the same, the court must consider:

*(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions) Gissen v. Tackman, 401 F.Supp. 310, 312 (D.N.J.1975); (2) whether the theory *462 of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first) O'Shea v. Chrysler Corporation, 206 F.Supp. 601, 605 (D.N.J.1962); and (4) whether the material facts alleged are the same. [United States v. Athlone Industries, Inc., 746 F.2d 977, 984 (3d Cir.1984).]...'*

POINT 6: PER POINT 12 IN BRIEF IN SUPPORT OF APPEAL AN ACTION CAN BE ASSERTED VIA TITLE 42 SETION 1983

There is nothing exclusive with regard to the NJ supreme court opinion in *Fuchilla v. Layman*, 109 NJ 319.

While the opinion is evidence that the former University of Medicine and Dentistry of New Jersey did not enjoy 11th amendment immunity at the time, the fact of the matter is that a valid title 42 section 1983 legal action can be maintained via other law. In this case the law of the New Jersey constitution that created the right to safety and happiness for a citizen of the state of New Jersey.

POINT 7: THE SUPREME COURT OF NJ NEVER HEARD ORAL ARGUMENT IN THE MATTER AT THE BAR

Per the Rules of the Court of the state of New Jersey, all claims brought to the New Jersey Supreme court are to be argued orally.

As a result, any decision by the New Jersey Supreme court that served to deny me a right as established via the Constitution represents a violation of title 18 section 242 and title 42 section 1983, - to be tried by more than just a judge-jury of one.

POINT 8: THE PRINCIPAL OF STATE DECISIS IS AS FOLLOWS IN THE COURTS OF THE STATE OF NEW JERSEY

Lower courts are bound by the published opinions of a higher court. As a result, the appellate courts are bound by NJ supreme court opinions and a superior court is bound by appellate court and NJ supreme court opinions.

Therefore, the NJ appellate court is bound by a NJ supreme court opinion with regard to res judicata, as is a superior court of the state of NJ.

POINT 9: NO FACT DECIDED BY JURY SHALL BE OTHERWISE RE-EXAMINED

The Entire Controversy Doctrine would have no effect on a jury decision in the matters at the bar as the 7th amendment is clear where no fact decided by a jury shall be otherwise re-examined.

POINT 10: THERE IS NO STATUTE OF LIMITATION FOR A TITLE 42 SECTION 1983 ACTION

As title 42 section 1983 is part of the supreme law of the land, no New Jersey statutory or common law immunities apply in the matters at the bar.

POINT 11: THERE IS NJ RELATION BACK LAW WHEN THE STATUTE OF LIMITATIONS HAVE RUN

Harr v. Allstate Ins. Co., 54 *N.J.* 287, 299–300, 255 *A.*2d 208 (1969) reading in pertinent part as follows:

'....The rule should be liberally construed. Its thrust is directed not toward technical pleading niceties, but rather to the underlying conduct, transaction or occurrence giving rise to some right of action or defense. When a period of limitation has expired, it is only a distinctly new or different claim or defense that is barred. Where the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy remains the same, it should be readily allowed and the doctrine of relation back applied. It should make no difference whether the original pleading sounded in tort, contract or equity, or whether the proposed amendment related to the original or a different basis of action....'

POINT 12: THERE HAS NEVER BEEN A DECISION ON THE MERITS WITH REGARD TO MATTERS PLED VIA DOCKET NO.: 05-37749-NLW

There has never been a jury determination of facts in matters pled via Docket #: 05-37749-NLW.

A jury determination of facts is required in the matter per the law of title 42 section 1988 in spite of failing to demand a jury trial via the Federal Rules of Civil Procedure (FRCP).

As a result, no matters at the bar are res judicata via *Watkins v. Resorts Intern. Hotel and Casino, Inc.*, 124 N.J. 398

It would have been disappointing to find out that I could have been subjected to unnecessary medical procedures and malpractice at the UMDNJ, and then have no avenue for recovery via the failure of my counsel to properly demand a jury when I was forced into petitioning for bankruptcy in 2005, even after I had potentially been getting overdosed on phyciatric drugs by an incompetant doctor at another medical facility (See BER-L-1852-07).

Fortunately, I checked the law and found that I am due a jury trial in every matter that I ever sought to bring to the bar via *Schick v. United States*, 195 US 65, notwithdstanding that my right to trial by jury is to be preserved and held inviolate in state court, as opposed to federal court where the FRCP apply.

CONCLUSION

Ultimately all issues of fact are for jury, - to include defense counsel's assertion that the matters at the bar have previously been properly dismissed by the court in the absence of a jury confirmation of the court's find of fact.

As the matter is a matter of federal law – the supreme law of the land, all of defense counsel's state law defenses fail.

It appears as though defense counsel is hoping for an ignorant court to make a mistake with regard to the right to trial by a jury of more than just a judge-jury of one in the matters at the bar, thus defeating an otherwise meritorious action at the bar.

There are multiple theories of recovery with regard to the matters at the bar. Recovery via a federal civil rights action is but one theory of recovery.

As Richard M. Forzani must be sworn to uphold the Constitution via any oath the he must have taken to be admitted to the bar, he must be of the postion that the prior laws with regard to the right to trial by jury no longer apply, - or he is willing to risk sacrificing his law license for some reason.